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## Notes

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## NOTES

### Constitutional Law—Debtor-Creditor Relations—*Fuentes v. Shevin*: Due Process for Debtors

In most states prior to June 12, 1972,<sup>1</sup> any person could avail himself of a statutory summary procedure known variously as “replevin,”<sup>2</sup> “claim and delivery,”<sup>3</sup> “detinue,”<sup>4</sup> and “sequestration”<sup>5</sup> to seize property in the hands of another by the simple expedient of alleging a right to possession and posting bond. A writ of possession would issue, usually conditioned upon the claimant’s initiating a later court action to determine the rights of the respective parties to the property.<sup>6</sup> A defendant’s bond provision was available in most states to enable the defendant to recover the disputed property pending the outcome of litigation on the issue of right to possession.<sup>7</sup> There was, however, no notice and no opportunity for the dispossessed party to challenge the claimant’s right to possession before seizure of the property.<sup>8</sup>

These summary prejudgment replevin statutes have had a long and curious history. One of their ancestors was the writ of replevin, developed in England over 700 years ago to correct abuses that accompanied the widespread use of “distress,” a self-help device by means of which a powerful creditor (usually a feudal baron) appropriated chattels of a debtor (usually his tenant) to compel payment of a debt of money or service.<sup>9</sup> Replevin permitted the alleged debtor to recover his property pending adjudication of the underlying dispute. The writ of replevin was thus, at early common law, a remedy for the debtor, rather than for the creditor.<sup>10</sup>

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<sup>1</sup>This was the date the Supreme Court’s decision in *Fuentes v. Shevin* was handed down. 92 S. Ct. 1983 (1972).

<sup>2</sup>See, e.g., ILL. ANN. STAT. ch. 119, §§ 1-27 (Smith-Hurd 1954).

<sup>3</sup>See, e.g., MINN. STAT. ANN. §§ 565.01-.11 (1947).

<sup>4</sup>See, e.g., VA. CODE ANN. §§ 8-586 to -595 (1957).

<sup>5</sup>See, e.g., TEX. REV. CIV. STAT. ANN. arts. 6840, 6844-48, 6858 (1960).

<sup>6</sup>See, e.g., CONN. GEN. STAT. ANN. § 52-518 (1960).

<sup>7</sup>See, e.g., CAL. CIV. PRO. CODE § 514 (West 1954).

<sup>8</sup>The National Legal Aid and Defender Association, in its Amicus Curiae Brief for *Fuentes v. Shevin*, 92 S. Ct. 1983 (1972), undertook a comprehensive survey of the prejudgment replevin statutes of all the states. The results are tabulated in Appendix A of the brief. Typical replevin procedures are described in greater detail in Comment, *Laprease and Fuentes: Replevin Reconsidered*, 71 COLUM. L. REV. 886, 888-90 (1971) [hereinafter cited as *Replevin Reconsidered*].

<sup>9</sup>J. COBBEY, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN 1, 22-23 (1890).

<sup>10</sup>*Replevin Reconsidered* 887; see Abbott & Peters, *Fuentes v. Shevin: A Narrative of Federal*

Another ancient ancestor of the modern statutes was the writ of detinue. This remedy differed from replevin in that detinue was used where chattels were wrongfully withheld, rather than wrongfully taken.<sup>11</sup> Further, there was no recovery of the property by the plaintiff until final adjudication. The defendant was rather commanded to appear and show why the property should not be delivered to the plaintiff.<sup>12</sup>

The modern replevin statutes were a merger of aspects of both writs, providing the prejudgment recovery of the property whether alleged to have been wrongfully taken in the first instance or only wrongfully withheld.<sup>13</sup> The modern statutes have become a creditor's remedy,<sup>14</sup> used typically by a secured seller of goods summarily to recover his merchandise upon default of payments by the purchaser.

Until recently, there had been notable absence of constitutional challenge to these time-honored procedures.<sup>15</sup> But in 1969, a landmark decision, *Sniadach v. Family Finance Corp.*,<sup>16</sup> cast considerable doubt on the constitutionality of summary prejudgment creditors' remedies. *Sniadach* involved a Wisconsin wage garnishment statute<sup>17</sup> which permitted a general creditor to garnish the wages of anyone he claimed was indebted to him by having summons issued pursuant to an action to adjudicate the debt and paying a token clerk's fee and suit tax. The Supreme Court held that in "extraordinary situations" such a procedure might be constitutional,<sup>18</sup> but absent such circumstances procedural due process was not met where one's wages were frozen without notice and an opportunity to be heard.<sup>19</sup> Mr. Justice Harlan, in a separate concur-

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*Test Litigation in the Legal Services Program*, 57 IOWA L. REV. 955, 963 (1972) [hereinafter cited as Abbott & Peters].

<sup>11</sup>*Replevin Reconsidered* 888.

<sup>12</sup>Brief for Appellant at 15, *Fuentes v. Shevin*, 92 S. Ct. 1983 (1972); Abbott & Peters 164.

<sup>13</sup>Brief for Appellant at 16, *Fuentes v. Shevin*, 92 S. Ct. 1983 (1972); *Replevin Reconsidered* 888.

<sup>14</sup>Abbott & Peters 963; *Replevin Reconsidered* 887.

<sup>15</sup>Recent Decisions, *Constitutional Law—Fourth and Fourteenth Amendments—New York Civil Practice Law and Rules, Article Seventy-One—Prejudgment Seizure Of Chattels in a Replevin Action Without an Order by a Judge Or of a Court of Competent Jurisdiction Is Unconstitutional*, 35 ALBANY L. REV. 370 (1971), suggests two possible reasons for this singular absence of challenge: the weight gathered from years of use and the fact that "most actions involving prejudgment seizures of chattels involved the poor who were not able to muster enough backing to fight such a procedure." *Id.* at 377.

<sup>16</sup>395 U.S. 337 (1969).

<sup>17</sup>WIS. STAT. ANN. §§ 267.01-.22 (1957).

<sup>18</sup>395 U.S. at 339.

<sup>19</sup>*Id.* at 339, 342.

ring opinion, questioned the constitutionality of even temporary deprivation of petitioner's wages without the kind of notice and hearing "aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use."<sup>20</sup> For Justice Harlan, even temporary seizure of a property interest that "cannot be characterized as *de minimis*" must be predicated on "the usual requisites of procedural due process."<sup>21</sup>

*Sniadach* stressed the importance of the subject matter of the suit—the fact that the petitioner's earnings were being subjected to summary seizure. "We deal here with wages—a specialized type of property presenting distinct problems in our economic system."<sup>22</sup> The decision was thus open to differing interpretation as to whether it applied only to wage garnishment actions (or at least actions subjecting the "necessities" of life to summary prejudgment seizure)<sup>23</sup> or whether it should be interpreted broadly to apply the requirements of procedural due process to "the entire domain of prejudgment remedies."<sup>24</sup> The Supreme Court's own reading of *Sniadach* was less than clear as to its intended sweep.<sup>25</sup>

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<sup>20</sup>*Id.* at 342-43 (emphasis by the Court).

<sup>21</sup>*Id.* at 342.

<sup>22</sup>*Id.* at 340.

<sup>23</sup>For a painstaking examination of this question see *Lebowitz v. Forbes Leasing & Fin. Corp.*, 326 F. Supp. 1335, 1341-48 (E.D. Pa. 1971). For cases limiting *Sniadach* narrowly to its facts see, e.g., *Reeves v. Motor Contract Co.*, 324 F. Supp. 1011 (N.D. Ga. 1971); *Termplan v. Superior Court*, 105 Ariz. 270, 463 P.2d 68 (1969).

<sup>24</sup>*Randone v. Appellate Dept.*, 5 Cal. 3d 536, 547, 488 P.2d 13, 19, 96 Cal. Rptr. 709, 715 (1971) (quoted with approval in *Fuentes*. For other cases construing *Sniadach* broadly see, e.g., *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970); *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

<sup>25</sup>Two cases seemed to invoke *Sniadach* only for its special treatment of wages as a uniquely important form of property interest: *Lines v. Frederick*, 400 U.S. 18 (1970) (bankrupt's accrued vacation pay a "specialized type of property," which did not pass to the trustee in bankruptcy); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (summary prejudgment termination of welfare benefits an unconstitutional denial of procedural due process). Other cases seemed to make the constitutional requirement of procedural due process turn on the importance of the property interest, although clearly extending *Sniadach* to interests less vital than wages. *Bell v. Burson*, 402 U.S. 535 (1971), cited *Sniadach* for the proposition that state action which adjudicated "important interests" of an individual require the safeguards of procedural due process and found that suspension of a driver's license was state action of this nature. *Id.* at 539-40. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), spoke of "the line" which divides protected and non-protected property interests and held that reputation interests affected by the Wisconsin procedure permitting "posting" to prohibit sale of liquor to any individual believed to be an excessive drinker fell on the protected side of the line. *Id.* at 436-37.

The scope of *Sniadach* was clarified, however, by the recent Supreme Court holding in *Fuentes v. Shevin*.<sup>26</sup> *Fuentes* and *Parham v. Cortese* (decided together) held the prejudgment replevin statutes of Florida and Pennsylvania unconstitutional as permitting repossession of goods under a conditional sales contract without prior notice and opportunity for a hearing. In *Fuentes*, petitioner-appellant Margarita Fuentes had purchased a gas stove and service policy and a stereo phonograph from Firestone Tire and Rubber Company. Alleging default under the provisions of the contract, Firestone instituted a small claims action, concurrently obtaining a writ of replevin through which the disputed goods were seized by the sheriff. Mrs. Fuentes then brought suit in federal district court, challenging the constitutionality of the Florida procedure under the due process clause of the fourteenth amendment.<sup>27</sup> The district court, in *Fuentes v. Faircloth*,<sup>28</sup> followed the minority of jurisdictions that had interpreted *Sniadach* as limited to its own facts. It specifically followed the interpretation of *Brunswick Corp. v. J & P, Inc.*,<sup>29</sup> which stated that *Sniadach* "was a unique case involving, [sic] 'a specialized type of property presenting distinct problems in our economic system.'"<sup>30</sup> It emphasized the recovery provision of the conditional sales contract as sufficient to authorize prejudgment replevin of a creditor's security interest without the necessity of a prior hearing.<sup>31</sup>

The Supreme Court in *Fuentes v. Shevin* rejected a narrow reading of *Sniadach* and instead approved the interpretation that had been given that case in *Randone v. Appellate Department*.<sup>32</sup> There the court stated, "*Sniadach* does not mark a radical departure in constitutional adjudication. It is not a rivulet of wage garnishment but part of the mainstream of the past procedural due process decisions of the United States Supreme Court."<sup>33</sup>

If the requirements of *Sniadach* were not limited to wage garnishment actions, neither were they confined to deprivations of other "specialized" forms of property. *Fuentes* made it clear that "[t]he Fourteenth Amendment speaks of 'property' generally. . . . It is not the

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<sup>26</sup>92 S. Ct. 1983 (1972).

<sup>27</sup>*Id.* at 1989.

<sup>28</sup>317 F. Supp. 954 (S.D. Fla. 1970), *rev'd sub nom.* *Fuentes v. Shevin*, 92 S. Ct. 1983 (1972).

<sup>29</sup>424 F.2d 100 (10th Cir. 1970).

<sup>30</sup>*Id.* at 105.

<sup>31</sup>317 F. Supp. at 958.

<sup>32</sup>5 Cal. 3d 536, 488 P. 2d 13, 96 Cal. Rptr. 709 (1971).

<sup>33</sup>*Id.* at 550, 488 P.2d at 22, 96 Cal. Rptr. at 718, *quoted*, 92 S. Ct. at 1998 n.22.

business of a court adjudicating due process rights to make its own critical evaluation of [property interests] and protect only the ones that, by its own lights, are 'necessary.'"<sup>34</sup> The Court adopted the broader view of Justice Harlan's concurring opinion in *Sniadach* requiring effective procedural due process before deprivation of any property interest that is not de minimis.<sup>35</sup> The "specialized type of property" language of *Sniadach*, which had formed the nucleus of controversy among the lower courts, was explained to be only an expression of emphasis not intended to limit the procedural due process requirement to deprivations of the necessities of life.<sup>36</sup>

In reversing the lower court and holding *Sniadach* controlling, the Supreme Court nevertheless restated its earlier pronouncements that "[t]here are 'extraordinary situations' that justify postponing notice and opportunity for a hearing."<sup>37</sup> At the same time, the Court was careful to exclude state goals of mere judicial economy or economic efficiency as justification for such delay.<sup>38</sup> The Court examined some "extraordinary situations" in which it had allowed seizure of property without opportunity for prior hearing "to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated foods."<sup>39</sup> In each instance it found crucial common elements:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.<sup>40</sup>

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<sup>34</sup>92 S. Ct. at 1999.

<sup>35</sup>395 U.S. at 342-44; see 92 S. Ct. at 1999 n.21, 2002-03.

<sup>36</sup>92 S. Ct. at 1998.

<sup>37</sup>*Id.* at 1999, citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). See *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339 (1969); *Phillips v. Commissioner*, 283 U.S. 589, 597 (1931).

<sup>38</sup>92 S. Ct. at 1999 n.22. The court in *Epps v. Cortese*, 326 F. Supp. 127 (E.D. Pa. 1971), *rev'd sub nom.* *Parham v. Cortese*, 92 S. Ct. 1983 (1972), had balanced these interests of the state in conserving its financial resources and administrative time together with the security interests of the creditor and had found them to outweigh the buyer's right not to be deprived temporarily of property before a hearing.

<sup>39</sup>92 S. Ct. at 2000 (citations omitted).

<sup>40</sup>*Id.*

The Court denounced summary seizure "when no more than private gain is directly at stake. The replevin of chattels, as in the present cases, may satisfy a debt or settle a score. But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health."<sup>41</sup>

In addition to outright seizures, however, the Court noted cases permitting *attachment* of property without prior notice and opportunity to be heard, and observed that these cases also required an important public interest.<sup>42</sup> Attachment was thus classed with seizure as requiring a "truly unusual" and "extraordinary" situation before the constitutional requirement of procedural due process could be dispensed with. The Court cited *Ownbey v. Morgan*,<sup>43</sup> and commented that "attachment necessary to secure jurisdiction in state court" was "clearly a most basic and important public interest."<sup>44</sup> The inclusion of *Ownbey* suggests, nonetheless, approval of attachment (and by analogy, seizure) prior to notice and hearing to serve interests that are not altogether public. The basis for permitting such seizure is the need for a state to protect the interests of its citizens in obligations owed them by non-residents.<sup>45</sup> It is readily apparent that the primary interest involved is not that of the state but that of its citizens—private individuals. This type of interest is easily distinguishable from the kinds of "governmental" and "general public" interests otherwise adverted to by the Court.

The Court implied that certain situations involving only private interests may fall within the category of "extraordinary circumstances" justifying summary prejudgment seizure of property: "There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods."<sup>46</sup> Since *Fuentes* did not present the issue, the Court did not say directly what would be the creditor's prerogative should the statute require a showing of such danger of destruction or concealment and should he be able to make such a showing. In the Court's observation of what was lacking in the statutes, however, there is the strong suggestion that if the missing elements were supplied, the law might be acceptable.<sup>47</sup>

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<sup>41</sup>*Id.*

<sup>42</sup>*Id.* at 1999 n.23.

<sup>43</sup>256 U.S. 94 (1921).

<sup>44</sup>92 S. Ct. at 1999 n.23.

<sup>45</sup>*Pennoyer v. Neff*, 95 U.S. 714, 723 (1878).

<sup>46</sup>92 S. Ct. at 2000-01.

<sup>47</sup>*Id.* at 2000. In *Sniadach*, too, the Court made a similar implication when it stated that

The case for the creditor in *Fuentes* was a strong one.<sup>48</sup> In addition to the weight of years of unchallenged use of summary prejudgment replevin, there were several specific factors that weighed in favor of permitting summary seizure: (1) The creditor had retained title and had, at the time of repossession, a substantial security interest in the merchandise; (2) the dispossession was only temporary, pending litigation, which the replevying party was required by law to initiate and prosecute promptly;<sup>49</sup> (3) Florida required the party invoking its replevin law to post bond of at least double the value of the goods;<sup>50</sup> (4) the statute provided for recovery of the property by the party replevied against upon posting of a counterbond;<sup>51</sup> and (5) the conditional sales contract under which the stove and stereo were purchased provided that the seller at his option could repossess the goods upon default of any payment. Each of these factors was noted and argued persuasively in the brief for the appellee,<sup>52</sup> but each was answered and disposed of by the Court.

The protection afforded by the fourteenth amendment is not reserved exclusively for interests of legal ownership, but extends as well to possessory interests.<sup>53</sup> The Court noted that Mrs. Fuentes had acquired the right to possession and use of the disputed goods, which was a property interest "sufficient to invoke the protection of the Due Process Clause."<sup>54</sup> Although this right to possession was conditioned upon continued payment of installments toward purchase, there might have been some defense to non-payment. But even if there were obvious default without apparent excuse, the right to prior notice and opportu-

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garnishment might be constitutional "in extraordinary situations [citing *Ownbey, inter alia*]. But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition." 395 U.S. at 339 (emphasis added). The Court seems to suggest, though, that the only creditor interest sufficient to remove the need for prior hearing is an interest in obtaining jurisdiction to adjudicate his claim. *Id.* Despite the vagueness of both *Snidach* and *Fuentes* on this point, it seems likely that a narrowly drawn provision limiting seizure without notice or opportunity for hearing to those "extraordinary situations" in which it could be demonstrated to the satisfaction of an appropriate state official that the creditor's security interests were indeed in danger of destruction or concealment would not be found unconstitutional.

<sup>48</sup>The following analysis refers only to the dispute between Mrs. Fuentes and Firestone.

<sup>49</sup>FLA. STAT. ANN. § 78.07 (1964).

<sup>50</sup>*Id.*

<sup>51</sup>*Id.* § 78.13 (1964). "Counterbond" is the Supreme Court's term. 92 S. Ct. at 1993.

<sup>52</sup>Brief for Appellee Firestone Tire & Rubber Co. at 44-51, *Fuentes v. Shevin*, 92 S. Ct. 1983 (1972).

<sup>53</sup>92 S. Ct. at 1997.

<sup>54</sup>*Id.*



ity for a hearing would not be obviated.<sup>55</sup> The dissent accused the majority of ignoring "the creditor's interest in preventing further use and deterioration of the property in which he has substantial interest."<sup>56</sup> It might be observed, however, that the creditor's security interest, like the continued possessory interest of the purchaser, was contingent. Both interests turned upon default of the purchaser without defense, which could only be determined at an evidentiary hearing.

The Court noted the temporary nature of the summary dispossession under the Florida statute, but refused to draw a distinction between permanent and "temporary, nonfinal" deprivations for purposes of procedural due process.<sup>57</sup> "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause."<sup>58</sup>

The Court quickly disposed of the appellee's argument that the bonding requirements of Florida's replevin law, together with available legal remedies for abuse of process, wrongful attachment, and malicious prosecution, served to protect the replevin defendant against frivolous dispossession<sup>59</sup> by noting simply that these "less effective" safeguards were "no substitute for an informed evaluation by a neutral official."<sup>60</sup> Not only are these deterrents uncertain,<sup>61</sup> but "as a matter of constitutional principle," they are no substitute for the affirmative constitutional right to a prior hearing, which is "the only truly effective safeguard against arbitrary deprivation of property."<sup>62</sup>

The counterbond provision suffers as a safeguard from the same deficiencies as the bond provision, with the additional defect that the typical replevin defendant will seldom be able to afford it.<sup>63</sup> The Court

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<sup>55</sup>*Id.*

<sup>56</sup>*Id.* at 2005.

<sup>57</sup>*Id.* at 1996.

<sup>58</sup>*Id.* at 1997.

<sup>59</sup>Brief for Appellee Firestone Tire & Rubber Co. at 46-47, *Fuentes v. Shevin*, 92 S. Ct. 1983 (1972).

<sup>60</sup>92 S. Ct. at 1996.

<sup>61</sup>The bad faith creditor can gamble that the alleged debtor will not know of the remedies available to him, or knowing of them, will not elect to pursue them. Another real problem is that the debtor, often impecunious, may not have the resources to pursue his remedies. Further, the replevin plaintiff knows he will recover his bond if the defendant fails to appear to litigate, or appearing, is unable effectively to present his defenses. *See id.* at 1995 n.13.

<sup>62</sup>*Id.* at 1996.

<sup>63</sup>For a discussion of the inequities of these bonding provisions in the context of attachment, see Alexander, *Wrongful Attachment Damages Must be Fixed in the Original Suit*, 4 U.S.F.L.

noted that the Wisconsin garnishment statute in *Sniadach* had a similar counterbond recovery provision,<sup>64</sup> and yet there Justice Harlan, in his concurring opinion, stated that the requirements of notice and hearing were not satisfied "by the fact that relief from the garnishment may have been available in the interim under less than clear circumstances."<sup>65</sup>

The last major issue dealt with by the Court was the issue of whether the replevin defendants waived their procedural due process rights by signing the conditional sales contract providing for repossession in the event of default of payments. While agreeing that this right could be contractually waived, the Court held that there was no such waiver under the facts of *Fuentes*.<sup>66</sup> The Court relied on its recent decision in *D.H. Overmyer Co. v. Frick Co.*,<sup>67</sup> which outlined the requirements for a valid contractual waiver of due process rights. In *Overmyer* the Court upheld such a waiver provision but stated that if it were part of an adhesion contract and no consideration were given for the waiver, "other legal consequences may ensue."<sup>68</sup> The suggestion by the Court is clear that the "purported waiver provision" in *Fuentes* was part of a contract of adhesion.<sup>69</sup> Aside from the adhesion contract problem, however, the Court found that the purported waiver was not in fact a waiver, since it provided only that the seller, upon default of payments by the buyer, could repossess. "The contracts included nothing about the waiver of a prior hearing."<sup>70</sup> Indeed, there was no clear statement of the process by which the goods would be repossessed.<sup>71</sup>

The Supreme Court gave the due process clause of the fourteenth

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REV. 38, 39-42 (1969). See Brief for Appellant at 22, *Fuentes v. Shevin*, 92 S. Ct. 1983 (1972).

<sup>64</sup>92 S. Ct. at 1996 n.15.

<sup>65</sup>395 U.S. at 343.

<sup>66</sup>92 S. Ct. at 2001-02.

<sup>67</sup>92 S. Ct. 775 (1972).

<sup>68</sup>*Id.* at 783. In *Overmyer*, two corporations, negotiating through their respective lawyers, executed a cognovit note. The Court found that *Overmyer* had "voluntarily, intelligently and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing." *Id.* In invoking the standard of waiver applicable to a criminal proceeding, the Court did not impose this standard upon cases involving only property rights but merely noted that *if* such standard applied, it was met in the *Overmyer* case. *Id.* at 782. It might not be too much to speculate in this era of concern for consumer rights, however, that the "voluntary, intelligent and knowing" standard for waiver of constitutional rights in a criminal proceeding may be adopted for protection of property rights. Cf. *Swarb v. Lennox*, 92 S. Ct. 767 (1972).

<sup>69</sup>92 S. Ct. at 2002.

<sup>70</sup>*Id.*

<sup>71</sup>*Id.*

amendment a broad reading in *Fuentes*. It held that except in "extraordinary situations" or where there has been a valid waiver, notice and an opportunity to be heard must precede the deprivation of any property interest that cannot be characterized as de minimis. Even a temporary, nonfinal deprivation of nonessential property to which the possessor has only possessory rights is not a de minimis property interest. Although this procedural due process right can be waived, it will admit of no substitute. Bond and counterbond provisions and civil remedies are "lesser safeguards" that will not suffice to replace the provisions of the fourteenth amendment.

Following *Sniadach*, but before *Fuentes*, it was suggested that general creditor attachment would be unconstitutional, except in situations involving purely commercial interests or where there is demonstrated danger of destruction or concealment of the object of attachment.<sup>72</sup> Since the general creditor, unlike the seller on conditional contract, has no specific property interest in the property to be attached, it would seem more clear after *Fuentes* that summary general creditor attachment will be unable to withstand constitutional attack, at least where the action is against a resident debtor and there is no demonstrated danger of destruction or concealment of the property.<sup>73</sup>

What recourse remains for the secured creditor after *Fuentes*? Claim and delivery as it has been practiced is clearly no longer possible.<sup>74</sup> Legislative change is required for the North Carolina claim and delivery statute.<sup>75</sup>

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<sup>72</sup>Comment, *The Constitutional Validity of Attachment in Light of Sniadach v. Family Finance Corp.*, 17 U.C.L.A.L. REV. 837, 845-49 (1970).

<sup>73</sup>Like the attachment laws of most states, the North Carolina law in this area appears to be drawn narrowly. See N.C. GEN. STAT. § 1-440.3(4), (5) (1969). If danger of concealment or destruction is within the "exceptional circumstance" exception of *Fuentes*, it would seem that this North Carolina law is constitutional. The continuing validity of *Ownbey* supports the use of attachment to secure quasi in rem jurisdiction over foreign debtors. Cf. N.C. GEN. STAT. § 1-440.3(1)-(3) (1969).

<sup>74</sup>Immediately after the *Fuentes* decision was handed down, a memorandum issued from the North Carolina Administrative Office of the Courts to the North Carolina judiciary, advising that the North Carolina claim and delivery provisions were unconstitutional. Memorandum from Taylor McMillan to Chief District Judges, June 15, 1972.

<sup>75</sup>The North Carolina claim and delivery statute is found in N.C. GEN. STAT. §§ 1-472 to -484 (1969). In advance of legislative change by the General Assembly, procedure has been judicially established for Mecklenburg County in *Campbell v. Wofford*, No. 72-CvD-8375 (Mecklenburg County Dist. Ct. Aug. 8, 1972), for the use of claim and delivery with appended *Fuentes* safeguards. This procedure includes provision for notice and hearing before the Clerk or Assistant Clerk of Superior Court, except where an "extraordinary situation" (defined as immediate danger to the security interests of the plaintiff) is found by the clerk to exist, or where the clerk finds a valid

A primary requisite for a constitutional claim and delivery statute is a provision for notice and opportunity for hearing prior to issuance of the claim and delivery order, except where there is a valid waiver, or where there are "exceptional circumstances." However, *Fuentes* emphasizes that the hearing for which opportunity must be given the defendant need not be a formal one. The scheduling, nature, and form of the hearing may depend upon "the simplicity of the issues,"<sup>76</sup> the relative importance of the property interest involved,<sup>77</sup> and even the apparent likelihood of the defendant's succeeding on the merits.<sup>78</sup> The Court stated that "the nature and form of such prior hearings . . . are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication."<sup>79</sup>

There may be room under *Fuentes* for a narrow provision permitting claim and delivery prior to notice and hearing where the plaintiff can present evidence that destruction or concealment by defendant is likely.<sup>80</sup> Presumably, the requirements for this provision are analogous to those for a temporary restraining order, another ex parte proceeding. If so, likelihood of irreparable harm to the plaintiff would justify the interposition of the court.<sup>81</sup>

It is emphasized by *Fuentes* that only an "opportunity" for hearing is required. A hearing need not be held if the defendant, having been given notice of his opportunity to be heard, elects not to appear to present his defenses.<sup>82</sup> Accordingly, for convenience of the parties and to conserve judicial time, provision could be made for a waiver<sup>83</sup> of this hearing, executed in writing before an officer of the court.<sup>84</sup>

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contractual waiver, together with a finding of probability that the defendant "voluntarily, intelligently and knowingly" made such a waiver.

<sup>76</sup>92 S. Ct. at 1998 n.18.

<sup>77</sup>*Id.* at 1999 n.21.

<sup>78</sup>*Id.* at 2002 n.33.

<sup>79</sup>*Id.* at 2002.

<sup>80</sup>Compare requirements for attachment in N.C. GEN. STAT. § 1-440.3(5) (1969).

<sup>81</sup>*Cf.* FED. R. CIV. P. 65; N.C.R. CIV. P. 65(b).

<sup>82</sup>92 S. Ct. at 2000 n.29.

<sup>83</sup>This waiver of the right to a hearing after notice has been provided should not be confused with a contractual waiver of the right to notice and hearing discussed below. The difficulties which attend the latter are much less troublesome where the waiver comes after notice when the replevin defendant is more likely to be aware of the significance of this act.

<sup>84</sup>A recent undated memorandum prepared by Roger Hendrix for Wachovia-American Credit Corp. outlined suggested legislative action for the 1973 North Carolina General Assembly to conform North Carolina law to the requirements of *Fuentes*. An appendix to this memorandum includes a suggested waiver form.

In addition to statutory remedy, it may be possible for a purchaser under a conditional sales contract to waive his procedural due process rights contractually within the bounds of *Fuentes*.<sup>85</sup> However, in view of the presumption against waiver of constitutional rights,<sup>86</sup> the strong tendency of courts to refuse enforcement of terms highly disadvantageous to the weaker party in contracts of adhesion,<sup>87</sup> and the fact that such a purported waiver will have been executed prior to the time when most consumer defenses arise (making it likely that the waiver was not made with full awareness of its consequences),<sup>88</sup> it seems unlikely that such a waiver could be enforced in the typical consumer context. At the very least, a contractual waiver would have to be clear and unequivocal, leaving no doubt that the purchaser or borrower is agreeing not only to return or collection per se, but also to return or collection without notice or an opportunity to present any defenses.<sup>89</sup>

Another creditor's remedy is self-help. However, where these acts expressly rely upon Uniform Commercial Code sections 9-503 and 9-504, their constitutionality is in dispute, as evidenced by recent conflicting U.S. District Court decisions in California.<sup>90</sup>

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<sup>85</sup>Cf. note 75 *supra*, describing the Mecklenburg County procedure.

<sup>86</sup>*Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 307 (1937). These two cases were cited in *Fuentes*, 92 S. Ct. at 2001 n.31.

<sup>87</sup>See Shuchman, *Consumer Credit by Adhesion Contracts*, 35 TEMPLE L.Q. 125, especially cases cited at 132-34 (1962). See also UNIFORM COMMERCIAL CODE § 2-302; N.C. GEN. STAT. § 25-2-302 (1971). In the context of secured sales agreements, see, e.g., *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970).

<sup>88</sup>Brief for Appellant at 28, *Parham v. Cortese*, 92 S. Ct. 1983 (1972).

<sup>89</sup>See 92 S. Ct. at 2002.

<sup>90</sup>Since *Fuentes* is a fourteenth amendment decision, 92 S. Ct. at 1996, "state action" must be present in any deprivation of property to which it is sought to be applied. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 169 (1970). *Adams v. Egle*, 338 F. Supp. 614 (S.D. Cal. 1972), found the necessary state action component in the implementation through private contractual agreements of state policy embodied in §§ 9503-04 of the California Commercial Code. *Id.* at 617. The court cited *Reitman v. Mulkey*, 387 U.S. 369 (1967), as authority for its determination that mere encouragement by state law of private acts inconsistent with constitutional mandate was sufficient to bring those acts within the control of the fourteenth amendment. 338 F. Supp. at 617. The Code provisions were therefore held unconstitutional, and the acts of repossession in reliance on the Code provisions were held illegal. *Id.* at 622. *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972), reached the opposite conclusion, however, by refusing to find state action in private contracts providing for self-help along the lines of the Uniform Commercial Code provisions. The *Oller* court felt that *Reitman*, dealing as it did with racial discrimination, was not controlling in a debtor-creditor context: "The historical, legal and moral considerations fundamental to extending federal jurisdiction to meet racial injustices are simply not present in the instant case." *Id.* at 23. It should be noted that California Commercial Code § 9503 adopts the Official Text of the Uniform Commercial Code without change. California Commercial Code § 9504 substantially adopts the Official

The economic impact of *Fuentes* has yet to be demonstrated. The dissent expressed concern that "the availability of credit may well be diminished or, in any event, the expense of securing it increased."<sup>91</sup> It seems probable, though, that the requirements of *Fuentes* will have minimal effect on consumer credit. Only where the debtor is willing to destroy or conceal the goods would the creditor's risk be appreciably increased by the requirement of notice before seizure. And if this is indeed an "extraordinary circumstance," then *Fuentes* does not preclude seizure without notice. Moreover, even where required, the expense of procedural due process need not be substantial, since informal hearings may suffice in many cases<sup>92</sup> and may probably be waived<sup>93</sup> in others. It seems probable that the prophecy of the dissent in *Fuentes* will not materialize.

KENT WASHBURN

### Constitutional Law—First Amendment—Shopping Centers and the "Quasi-Public" Forum

That "freedom of speech" involves something more than a federal and state<sup>1</sup> laissez-faire attitude toward expression is hardly a novel concept.<sup>2</sup> The Supreme Court has typically asserted that an affirmative "maintenance of the opportunity for free political discussion . . . is a

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Text, but makes the notice provisions more specific. CAL. COMM. CODE ANN. § 9503-04 (1964).

<sup>91</sup>92 S. Ct. at 2005. This same fear was expressed by the court in *Adams*, 338 F. Supp. at 622. The same argument was made in support of the California summary attachment procedure to the court in *Randone*—and was rejected. *Randone v. Appellate Dept.*, 5 Cal. 3d 536, 555-56, 488 P.2d 13, 24-26, 96 Cal. Rptr. 709, 721-22 (1971); see Comment, 17 U.C.L.A.L. REV., *supra* note 72, at 846. Collection agencies also had argued that wage garnishment was essential to the economy, but an empirical study has indicated that "the extension of consumer credit is unrelated to garnishment laws." Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1240 (1965).

<sup>92</sup>See text accompanying notes 76-79 *supra*.

<sup>93</sup>See text accompanying notes 83-84 *supra*.

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<sup>1</sup>The first amendment reaches the states through the fourteenth amendment. *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>2</sup>See, e.g., Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 559 (1941). Professor Barron maintains that "[a]s a Constitutional theory for the communication of ideas, laissez-faire is manifestly irrelevant." Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1656 (1967).

fundamental principle of our constitutional system.”<sup>3</sup> Yet behind the rhetoric lies the persistent problem of defining the contours of first amendment protection in particular situations.<sup>4</sup> Especially difficult is the resolution of those cases which reveal an asserted first amendment right posed in direct confrontation with other rights and interests no less traditional in our society.<sup>5</sup> It is thus interesting to note that in a recent case involving conflicting claims of free speech and private property interests, a majority of the Supreme Court found few obstacles in holding squarely on the side of the property owner.

*Lloyd Corp. v. Tanner*<sup>6</sup> involved the mall of a large privately owned shopping center as the stage for respondents’ short-lived attempts to circulate antiwar leaflets. The shopping center prohibited handbilling on the premises, and respondents were advised by security guards that a failure to cease their activity could result in trespass prosecutions. Respondents subsequently petitioned for relief in federal district court, alleging a violation of their first amendment right to distribute leaflets in Lloyd Center in a nondisruptive manner. In granting broad injunctive relief,<sup>7</sup> the district court cited *Marsh v. Alabama*<sup>8</sup> and *Food Employees Local 590 v. Logan Valley Plaza, Inc.*<sup>9</sup> as authority for the proposition that to the extent that private property is open to the public and resembles a “business district,” the owner loses the absolute right to prohibit first amendment activity on his premises.<sup>10</sup>

On appeal,<sup>11</sup> the Supreme Court reversed.<sup>12</sup> Writing for a five-to-four majority, Justice Powell reasoned that *Marsh* and *Logan Valley* were inapposite precedents for a case in which the asserted first amendment exercise was not related to the shopping center’s normal use and an adequate alternative forum was available. The consistent enforcement of a nondiscriminatory policy prohibiting all handbilling was enti-

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<sup>3</sup>*Stromberg v. California*, 283 U.S. 359, 369 (1931).

<sup>4</sup>T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT vii-viii (1963).

<sup>5</sup>See, e.g., *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (wearing of armbands threatens school discipline); *United States v. O’Brien*, 391 U.S. 367 (1968) (destruction of draft card).

<sup>6</sup>92 S. Ct. 2219 (1972).

<sup>7</sup>*Tanner v. Lloyd Corp.*, 308 F. Supp. 128 (D. Ore. 1970).

<sup>8</sup>326 U.S. 501 (1946).

<sup>9</sup>391 U.S. 308 (1968).

<sup>10</sup>308 F. Supp. at 132.

<sup>11</sup>The Court of Appeals for the Ninth Circuit affirmed the district court’s decision per curiam. *Tanner v. Lloyd Corp.*, 446 F.2d 545 (9th Cir. 1971).

<sup>12</sup>*Lloyd Corp. v. Tanner*, 92 S. Ct. 2219 (1972).

tled to protection under the due process clause of the fourteenth amendment.<sup>13</sup> Justice Marshall in dissent sharply attacked the majority's opinion as an arbitrary limitation of the rationale of *Logan Valley* and *Marsh*.<sup>14</sup> An understanding of the judicial conflicts present in this case is impossible at this point without a brief review of *Marsh* and *Logan Valley* and their place in first amendment theory.

One first amendment concept that runs consistently throughout cases and commentaries alike is that an open "marketplace of ideas" is essential to the health of a democratic society.<sup>15</sup> To maintain an informed electorate as a check on the powers of the state, it is held necessary that debate, "even of ideas we hate,"<sup>16</sup> be kept "uninhibited, robust, and wide open."<sup>17</sup> The rights protected by the first amendment are the rights of the public, and the special solicitude shown by the courts for the guarantees of free "speech"<sup>18</sup> attests to judicial recognition of this public interest.<sup>19</sup> This concept has received dramatic support in the Supreme Court's development of special protection of the "public forum." The town square, the streets, the parks, and the sidewalks of a community have been accorded special status as the proper and traditional locale for public discussion and assembly. Although the privilege of their use may be regulated in the public interest, "it must not, in the guise of regulation, be abridged or denied."<sup>20</sup> Of central importance is

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<sup>13</sup>*Id.* at 2228.

<sup>14</sup>*Id.* at 2230 (Marshall, J., dissenting).

<sup>15</sup>*See, e.g.,* *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See generally* T. EMERSON, *supra* note 4; A. MEIKLEJOHN, *POLITICAL FREEDOM* (1948).

<sup>16</sup>"Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions." *Dennis v. United States*, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting).

<sup>17</sup>*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>18</sup>"Speech" in the first amendment sense includes more than verbal expression. *See, e.g.,* *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (wearing of armband); *Edwards v. South Carolina*, 372 U.S. 229 (1963) ("freedom march"); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (picketing). But even "pure speech" is not absolutely protected, *Schenck v. United States*, 249 U.S. 47, 52 (1919), and first amendment exercise may be regulated to the extent that it conflicts with other important interests, *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Professor Kalven suggests that the pure speech-speech plus dichotomy is misleading. He proposes instead the notion that regulation of speech should be deemed constitutionally permissible only insofar as it controls conduct and not content. Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 25-27. *See also* A. MEIKLEJOHN, *supra* note 15, at 24-28.

<sup>19</sup>*Cf.* *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969): "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."

<sup>20</sup>*Hague v. CIO*, 307 U.S. 496, 515-16 (1939).



the assumption that the public's access to all sides of an issue can best be protected by providing a readily available forum for the "poor man's press": the leaflets, placards, and soapbox oratory of those who have no access to more expensive or exclusive media, but whose ideas deserve to be heard nevertheless.<sup>21</sup>

*Marsh v. Alabama*<sup>22</sup> represented another step in the genesis of the public forum doctrine, but with a new twist. When Gracie Marsh sought to distribute religious literature in the downtown business district of Chickasaw, Alabama, she was treading on private, not public property. Her chosen forum for spreading the Word chanced to be in the midst of a company town owned lock, stock, and sidewalk by a private corporation. Simply posed, the issue was whether a "private" town could impose restrictions that would not pass constitutional scrutiny if they emanated from a municipality. The Court held that it could not. In reversing the trespass conviction, Justice Black stressed the interests of the community's citizens in free access to uncensored information.<sup>23</sup> The fact that title to the property was privately held was of little consequence; a corporation, carrying on what properly were state functions of municipal government, could not restrict the residents' rights any more than could the state. Property rights were not to be taken as absolute: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, *the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.*"<sup>24</sup>

*Marsh* was more than just an interesting "state action" case.<sup>25</sup> Of no small import to Justice Black were the interests of the *public*, not merely the rights of the individual defendant, in the maintenance of an open channel of communication. *Logan Valley* found this theme no less relevant to the modern shopping center. The case involved a labor union's peaceful picketing of a supermarket located in a private shop-

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<sup>21</sup>*Cf. Martin v. City of Struthers*, 319 U.S. 141, 146 (1942), wherein Justice Black spoke of the "poorly financed causes of little people."

<sup>22</sup>326 U.S. 501 (1946).

<sup>23</sup>Chickasaw residents "must make decisions which affect the welfare of the community and nation. To act as good citizens they must be informed . . . [t]heir information must be uncensored." 326 U.S. at 508.

<sup>24</sup>326 U.S. at 506 (emphasis added).

<sup>25</sup>In *Marsh*, "state action" for fourteenth amendment purposes was found in the delegation of normal state functions to a private concern. See the further discussion of "state action" problems *infra*.

ping center. A five-to-four majority held that state trespass law could not be the basis of an antipicket injunction. Characterizing *Marsh* as representative of the principle that "under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held,"<sup>26</sup> Justice Marshall found no significant distinction between Chickasaw's business district and Logan Valley Plaza. In support of the holding that the center was "clearly the functional equivalent of the business district . . . involved in *Marsh*," he noted the substantial size of the shopping center involved, the public's unrestricted access to Plaza property, the presence of two large enterprises, and the elaborate system of streets and sidewalks traversing the complex.<sup>27</sup>

It is true that Justice Black, the father of *Marsh*, refused to acknowledge the legitimacy of *Marsh's* offspring in *Logan Valley*. It is further true that Justice Marshall's shopping center-business district comparison glossed over some factual dissimilarities between the two cases that the dissenting opinions found important.<sup>28</sup> One must examine the reason *why* Justice Marshall found the analogy so compelling. A clue may be found in the closing passages of his opinion in which he examined the sociological impact of the "advent of the suburban shopping center."<sup>29</sup> Here he made it clear that the shopping center had become such an important phenomenon in suburban life that any decision restricting the exercise of first amendment freedoms in such areas would adversely affect "workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring practices."<sup>30</sup> Such a result would be "at variance with the goal of free expression and communication that is at the heart of the First Amendment."<sup>31</sup> Measured in this context, the owner's property rights were not so strong as to negate the public interests involved.

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<sup>26</sup>*Id.* at 316.

<sup>27</sup>*Id.* at 317-18.

<sup>28</sup>Justice Black insisted in *Logan Valley* that *Marsh* allowed private property to be treated as public only when it had taken on *all* the attributes of a municipality and not merely a few. *Id.* at 327 (Black, J., dissenting). Justice White added the fear that the rationale of *Logan Valley* would compel all businesses to open up to unwanted first amendment activity. *Id.* at 338-40 (White, J., dissenting).

<sup>29</sup>391 U.S. at 324.

<sup>30</sup>*Id.*

<sup>31</sup>*Id.* at 325.

Two points central to the reasoning in *Logan Valley* merit special attention. First, the view of the shopping center as an increasingly significant forum for suburban activity led to the "business district" analogy. Justice Marshall reasserted this point in *Lloyd*: "For many . . . citizens, Lloyd Center will so completely satisfy their wants that they will have no reason to go elsewhere . . . *If speech is to reach these people, it must reach them in Lloyd Center.*"<sup>32</sup> The suburban shopping center does not merely resemble the urban business district; it replaces it. Secondly, although the public's interest in the maintenance of an open forum was found to outweigh the owner's property interests in *Logan Valley*, the owner was said to retain the power to make "reasonable regulations" as to the location and manner of the first amendment exercise on his property.<sup>33</sup> The Court's holding was the result of a balancing process that weighed the various interests of each party.

In spite of the inventiveness of *Logan Valley's* extension of the *Marsh* "principle," the opinion unfortunately contained one major ambiguity. The holding was limited to a situation in which the "message sought to be conveyed" concerned the employment practices of a store on the premises; expressly not considered was "whether . . . property rights could . . . justify a bar on [first amendment activity] not thus directly related in its purpose to the use to which the shopping center was being put."<sup>34</sup> The intended meaning of this language is not clear.<sup>35</sup> Typical of the confusion that resulted was the disparate treatment given on two levels of appeal to a post-*Logan Valley* case involving "unrelated-to" first amendment activity. In *Diamond v. Bland*,<sup>36</sup> plaintiffs sought to confirm their alleged right to enter a private shopping center and solicit signatures for an anti-pollution petition. The California Court of Appeals refused relief. Relying on *Logan Valley's* "related-to" language, the court fashioned a twofold requirement: the asserted first amendment exercise must be both relevant to shopping center busi-

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<sup>32</sup>*Lloyd Corp. v. Tanner*, 92 S. Ct. 2219, 2234 (1972) (Marshall, J., dissenting) (emphasis added).

<sup>33</sup>391 U.S. at 320-21. Thus the owner may reasonably regulate conduct but not content. *Cf.* note 18 *supra*.

<sup>34</sup>391 U.S. at 320 n.9.

<sup>35</sup>It has been suggested that the limitation was an attempt to calm the fears of dissenting Justice White. Comment, *The Shopping Center: Quasi-Public Forum for Suburbia*, 6 U.S.F.L. REV. 103, 108 (1971).

<sup>36</sup>8 Cal. App. 3d 58, 87 Cal. Rptr. 97 (1970), *rev'd*, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501, *cert. denied*, 402 U.S. 988 (1971).

ness and without any effective alternative channel of communication before it may demand a forum on private property.<sup>37</sup> On appeal the California Supreme Court reversed. Conceding that the question of "relatedness" merited some consideration, the majority nevertheless concluded that plaintiffs' interests outweighed the owner's right to impose a complete ban on nonrelated communicatory activity. Regardless of the possibility of alternative forums available to the plaintiffs, the court stressed that access to the center provided a particularly appropriate vehicle for the obtaining of signatures on a petition.<sup>38</sup> A completely different "balance" was struck than that obtained in the lower court.

The two *Diamond* cases prove that *Logan Valley's* "related-to" language could be conveniently seized upon or as easily bypassed, depending upon the result desired. The *Lloyd* decision has now at least identified the authoritative (five-to-four) interpretation. Justice Powell, writing for the majority, emphasized the lack of any relation, direct or indirect, between antiwar leafletting and shopping center operations. He further noted that respondents had been free to pursue their handbilling in the public areas outside Lloyd Center.<sup>39</sup> These two factors were deemed sufficient to distinguish the *Lloyd* situation from that in *Logan Valley*:

*Logan Valley* extended *Marsh* . . . only in a context where the First Amendment activity was related to the shopping center's operations. . . . The holding in *Logan Valley* was not dependent upon the suggestion that the privately owned streets and sidewalks of a business district or a shopping center are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks.<sup>40</sup>

Thus, a footnote in *Logan Valley* indicating what was not being decided<sup>41</sup> was elevated to the status of expressing the "rationale" of that case. The *Lloyd* court adopted substantially the same formula as that engendered in the California intermediate court's treatment of *Diamond*. Once this judicial plastic surgery was performed, the respondents' theories were quickly dismissed. Their argument that Lloyd Center was open to the public and resembled in function the public forum

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<sup>37</sup>8 Cal. App. 3d at 73-74, 87 Cal. Rptr. at 107-08.

<sup>38</sup>3 Cal. 3d at 662, 477 P.2d at 738, 91 Cal. Rptr. at 506; *accord*, *Sutherland v. Southcenter Shopping Center, Inc.*, 3 Wash. App. 833, 478 P.2d 792 (1971).

<sup>39</sup>*Lloyd Corp. v. Tanner*, 92 S. Ct. 2219, 2226-27 (1972).

<sup>40</sup>*Id.* at 225-26 (emphasis added).

<sup>41</sup>See text accompanying note 34 *supra*.

of a municipal business district could now be rejected as "considerably broader than the rationale in *Logan Valley*."<sup>42</sup> In short, "[t]he Constitution by no means requires such an attenuated doctrine of dedication of private property to public use."<sup>43</sup>

Dissenting in *Lloyd*, Justice Marshall observed that the majority was "obviously troubled" by the decision in *Logan Valley*. Certainly it is significant that Justice Powell's analysis of *Logan Valley* quoted extensively and with approval from the dissenting opinions in that case.<sup>44</sup> The *Lloyd* majority apparently felt that *Logan Valley* represented the maximum in imposing constitutionally tolerable burdens on the property owner's interests. First amendment interests were deemed sufficiently protected by requiring a forum to be provided on private property only where both (a) the speech is "directly related" to the normal use of the locale, and (b) no "adequate" alternative forum exists.<sup>45</sup> Forcing an owner to yield in other situations "would diminish property rights without significantly enhancing the asserted right of free speech."<sup>46</sup>

The "related to" and "no adequate alternative" criteria may be seen as an attempt to formulate workable guidelines for the complex process of accomodating conflicting rights. If this is so, the question is whether it is a successful attempt. An examination of a number of problems implicit in the *Lloyd* holding is therefore appropriate.

#### A. THE UNEASY MARRIAGE OF "RELATED TO" AND "ADEQUATE ALTERNATIVE FORUM"

Justice Marshall indicated in his *Lloyd* dissent that the shopping center management in the past had found it a good business practice to allow the use of its facilities by certain political candidates and service organizations. Thus, he reasoned, having already opened its premises to

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<sup>42</sup>92 S. Ct. at 2226.

<sup>43</sup>*Id.* at 2229.

<sup>44</sup>*Id.* at 2226-27.

<sup>45</sup>*Logan Valley* was characterized as representing just such a situation and no more:

The [*Logan Valley*] opinion was carefully phrased to limit its holding to the picketing involved, where the picketing was "directly related in its purpose to the use to which the shopping center property was being put" . . . and where . . . no other reasonable opportunities for the pickets to convey their message . . . were available.

Neither of these elements is present in the case now before the Court.

*Id.* at 2226.

<sup>46</sup>*Id.* at 2228.

first amendment activities, Lloyd Center should not be heard to claim that respondents' handbilling was not related to the normal use of the mall.<sup>47</sup> This interpretation was rejected. Instead, Justice Powell apparently would require that the *subject* of the message touch more directly on some aspect of the center's retail enterprise. But how substantial should the connection be? What of the situation in which the ultimate objective of a protest relates only indirectly to a part of the shopping center, as where a union pickets a store because that store buys advertising space from an antiunion newspaper?<sup>48</sup> To go one step further, could the respondents in *Lloyd* have transformed their handbilling into "related" activity simply by amending their leaflets to include a protest against the sale of Dow Chemical products by a shopping center store? It is doubtful that such a transparent maneuver would succeed,<sup>49</sup> but the contours of the "related to" requirement remain unclear nevertheless.

When considered in light of the amount of traffic involved and the convenience of the public, a shopping center may be the most effective and appropriate place to gather signatures for a petition. On the other hand, any public sidewalk might be deemed an "adequate alternative" to the shopping center forum when no more than the assurance of *some* opportunity for the message to get to *some* of the public is examined. It is not clear to what degree the *Lloyd* concept of "adequate" encompasses the idea of "equally effective." At the very least, an adequate alternative forum should be one that reaches substantially the same audience, whether or not the message had been directed specifically to them or generally to the public. Any lesser measure would ignore the "public forum" basis of the first amendment. Thus the *Lloyd* criteria are ambiguous. Justice Powell noted at one point in his opinion that respondents could have moved to "any public street" (access to *some*

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<sup>47</sup>If a "quasi-public" enterprise has offered a neutral forum for *some* "speech" of a certain medium, it cannot logically claim that it is hurt by having to accept other "speech" of the same medium and on the same basis, without regard to content. This "equal protection" approach to the first amendment has gained some limited acceptance in recent mass media cases. See, e.g., *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), *cert. granted*, 92 S. Ct. 1174 (1972) (broadcasting station must accept antiwar editorials); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969) (school newspaper must publish antiwar editorial); *Wirta v. Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967) (transit company that accepts commercial ads must accept political ads). See also Barron, *Access-The Only Choice for the Media?*, 48 TEXAS L. REV. 766 (1970).

<sup>48</sup>*In re Lane*, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969). The *Lane* court held that the shopping center must provide a forum.

<sup>49</sup>*Cf. Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942).

of the public);<sup>50</sup> elsewhere, however, he emphasized that access to the patrons of Lloyd Center (the same audience) was readily available on the sidewalks surrounding the complex.<sup>51</sup>

It is obvious that the more the message is related to the normal use of the shopping center, the less likely it is that a suitable alternative forum exists, since the message propagated in any other place would prove largely irrelevant. "Related to" and "adequate alternative forum" are thus interrelated criteria. But one is not always the function of the other. Consider the assertion of "nonrelated to" first amendment activity in the context of a private shopping center located at the crossroads of a private industrial complex but otherwise proximate to no streets or sidewalks on which the "speech" could safely be exercised. Areas such as this are not uncommon today; presumably it was this kind of phenomenon, less the physical copy of the town square than its functional replacement, upon which Justice Marshall was meditating when he wrote *Logan Valley*. As applied here, the dual requirement test of *Lloyd* would apparently deny use of the center to those without consent. Yet with no forum available, "adequate" or otherwise, the public right to an open "marketplace of ideas" would be abridged.<sup>52</sup> Insofar as it is intended to preserve a proper balance between first amendment interests and private property rights, the *Lloyd* formula breaks down at this point.

#### B. THE UNEASY DIVORCE OF *Lloyd* FROM *Logan Valley*

Justice Powell's argument in *Lloyd* stressed the protection of property accorded by the due process clause and found that free speech would not be "significantly enhanced" by allowing respondents to prevail. Justice Marshall stressed in dissent the "preferred place" of freedom of speech "in our hierarchy of values"<sup>53</sup> and found that the prop-

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<sup>50</sup>92 S. Ct. at 2227.

<sup>51</sup>*Id.* at 2228.

<sup>52</sup>There is room for the contention that such a result is not necessarily compelled by *Lloyd*, since affording a forum in this case would "significantly enhance" the right of free speech. However, with *Logan Valley* specifically restricted to the fact situation in which both the elements of "related to" and "no adequate alternative" are present, *see* note 45 and accompanying text *supra*, such an argument would have to be forged anew from a general theory that the first amendment requires affirmative state action in the providing of public forums. But *Lloyd* indicates that the present majority of the Court is something less than receptive to this concept. *See* text accompanying notes 54-55 *infra*.

<sup>53</sup>92 S. Ct. at 2234 (Marshall, J., dissenting).

erty rights asserted in *Lloyd* paled in comparison. The two opinions simply approached the same problem from opposite ends of the spectrum.

But *Lloyd* represents more than a limitation of the holding in *Logan Valley*. If *Lloyd* did not expressly overrule the holding in *Logan Valley*, it effectively mutilated its rationale. This discussion thus far has been confined to the subject of shopping centers because, after *Lloyd*, it is doubtful whether *Logan Valley* has precedential value in any other context. The key to this problem lies in the concept of "state action." Before first amendment rights may be asserted in a nonfederal context, some involvement of the state in the alleged abridgement of free speech must be found to invoke the fourteenth amendment. *Marsh* was based on the fiction that municipal government carried on by a private concern constituted a delegation of state authority. However, if the state is primarily responsible for the maintenance of its municipalities, it is not so affirmatively charged with regard to shopping centers. Thus, Justice Marshall's reliance on *Marsh* to extend first amendment protection within the confines of Logan Valley Plaza represented a rather dramatic extension of notions of state action. His treatment of *Marsh* implied that as private property takes on the attributes of a citizens' forum, the first amendment compels the state to guarantee free speech no less than on the public streets.

By undercutting Justice Marshall's "business district" analogy, the *Lloyd* majority effectively sterilizes *Logan Valley* as authority for this concept of the "quasi-public forum." The validity of various applications of the *Logan Valley* rationale<sup>54</sup> to non-shopping center situations is thus put in doubt. More importantly, the *Lloyd* majority's distinguishing away of *Logan Valley* connotes a conservative reluctance to embrace the concept of the "quasi-public" forum. At least where private property interests are concerned, the Court does not seem very sympathetic to the argument that social regulation should assume a more affirmative role in the maintenance of the open forum.<sup>55</sup>

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<sup>54</sup>*E.g.*, *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (bus terminal); *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967) (railway terminal).

<sup>55</sup>*Cf.* T. EMERSON, *supra* note 4, at 38: "The complexities of modern society have introduced into the free marketplace of ideas blockages and distortions that can only be removed by affirmative social controls."



## CONCLUSION

*Lloyd Corporation v. Tanner* is an unfortunate decision. The *Lloyd* test of "related to" and "adequate alternative forum" conceals more problems than it resolves. The *Lloyd* rationale cripples *Logan Valley* without attempting to refute its logic. And the *Lloyd* result, although perhaps acceptable on the particular facts of the case,<sup>56</sup> represents a rather inflexible approach to the delicate process of accommodating conflicting rights. Taken together, *Logan Valley* and *Lloyd* pose such a sharp contrast that one is tempted to sympathize with Justice Marshall: "I am aware," he said, "that the composition of this Court has radically changed. . . ."<sup>57</sup>

FRANK M. PARKER, JR.

### Constitutional Law—Jury Unanimity No Longer Required in State Criminal Trials

For more than six centuries the common law tradition has required a unanimous vote of a twelve-man jury to convict an accused in a criminal proceeding.<sup>1</sup> The Burger Court, in a pair of sharply divided opinions, has radically altered that traditional formula. Two years ago, in *Williams v. Florida*,<sup>2</sup> the Court held that the twelve-man jury panel is not an indispensable element of the sixth amendment jury trial guarantee. A panel of six was found adequate in that case, and the Court left open the possibility of an even smaller jury in some cases. More recently, in *Apodaca v. Oregon*<sup>3</sup> and a companion case from Louisiana,

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<sup>56</sup>If, as Justice Powell maintained, respondents could have moved to the sidewalks surrounding Lloyd Center and reached virtually the same audience as was inside the mall, *Lloyd's* reversal of the lower court's decision did not compromise first amendment interests. An inquiry into whether or not an *equally effective* forum existed would have been relevant to the balancing of rights involved. However, the "related to" criterion is immaterial to the balancing process. Furthermore, its use allows the property owner an unjustified measure of control over the content of the asserted "speech."

<sup>57</sup>92 S. Ct. at 2237 (Marshall, J., dissenting).

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<sup>1</sup>1. W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 318 (7th ed. 1956); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 88-90 (1898).

<sup>2</sup>399 U.S. 78 (1970).

<sup>3</sup>92 S. Ct. 1628 (1972). The companion case, *Johnson v. Louisiana*, 92 S. Ct. 1620 (1972), was originally tried several months before the Court's decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968), which held the sixth amendment jury trial right applicable to the states under the due

the Supreme Court decided that the unanimity requirement was not an essential element of trial by jury in state criminal proceedings. The majority, composed of the four Nixon appointees and Justice White (who announced the decision), upheld convictions by jury votes of ten to two and nine to three.

The right to trial by jury in criminal cases in the federal courts is provided by article III, section three and the sixth amendment to the Constitution. The Court has said that this includes the right to

a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted . . . Those elements were— (1) that the jury should consist of twelve men, neither more nor less; (2) that the jury be in the presence or under the superintendence of a judge . . . and (3) that the verdict should be unanimous.<sup>4</sup>

The sixth amendment jury trial guarantee was held applicable to the states under the due process clause of the fourteenth amendment four years ago in *Duncan v. Louisiana*.<sup>5</sup> Justice White, writing for the Court, held that a defendant had the right to a jury trial in state court in any case in which he would be entitled to a jury trial in federal court. At that time the Court was unwilling to express itself as to the future impact of the *Duncan* decision on the details of state jury trials, or as to the applicability to state proceedings of older decisions construing the sixth amendment:

It seems very unlikely that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration . . . In addition, most of the States have provisions for jury trials equal in breadth to the Sixth Amendment . . .<sup>6</sup>

The Court could have been suggesting that it would not be too burdensome for the few non-conforming states to put their procedures

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process clause. Because the Court held in *DeStefano v. Woods*, 392 U.S. 631 (1968), that *Duncan* was not to be applied retroactively, the *Johnson* case was not a suitable vehicle for a full expression of the constitutional status of the unanimity requirement under the sixth amendment. Robert Apodaca was tried and convicted of assault with a deadly weapon in an Oregon court after *Duncan* was decided. The *Apodaca* case, therefore, squarely presented the question whether the right to trial by jury in a state court also includes the right to a unanimous verdict.

<sup>4</sup>Patton v. United States, 281 U.S. 276, 288 (1930).

<sup>5</sup>391 U.S. 145 (1968).

<sup>6</sup>*Id.* at 158.

in line with the federal standard. Or it may have been suggesting that the sixth amendment would be re-interpreted not to require all the common law features.

The latter possibility was realized in *Williams v. Florida*<sup>7</sup> when the Court stripped away as unnecessary one of the standard features of the common law jury—the twelve-man panel. Mr. Justice White, again speaking for the majority, articulated a new test to aid in determining which features of the common law jury are preserved in the sixth amendment: “The relevant inquiry, as we see it, must be the function which the particular feature performs and its relation to the purposes of a jury trial.”<sup>8</sup> Again the Court left open the question of whether the Constitution required unanimity in state criminal jury verdicts.

In the *Apodaca* decision the Court finally has faced the issue squarely and held that jury unanimity is not constitutionally required for non-capital proceedings in state courts. Although the four Nixon appointees concurred in the judgment of Justice White’s plurality opinion,<sup>9</sup> the newcomers did not vote as a cohesive bloc. Justice Powell took his position between two groups to create shifting majorities.<sup>10</sup> He agreed with Justices White, Burger, Blackmun, and Rehnquist that unanimity is not constitutionally required in state proceedings,<sup>11</sup> so that the petitioners’ convictions were affirmed; but he sided with the dissenting Justices Douglas, Brennan, Stewart, and Marshall in his belief that the sixth amendment requires a unanimous verdict in federal criminal trials.<sup>12</sup> Powell in effect created a bridge between the two groups by rejecting the doctrine of selective incorporation.<sup>13</sup> This doctrine has resulted in the *ad hoc* absorption of the individual guarantees of the Bill of Rights into the fourteenth amendment, making them applicable to the states to the same extent they apply to the federal government.<sup>14</sup>

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<sup>7</sup>399 U.S. 78 (1970).

<sup>8</sup>*Id.* at 99.

<sup>9</sup>This concurrence led the news media to describe the decision as another victory for the President’s “peace forces.” N.Y. Times, May 23, 1972, § 1, at 1, col. 1; TIME, June 5, 1972, at 65.

<sup>10</sup>92 S. Ct. at 1635 (concurring & dissenting opinion).

<sup>11</sup>*Id.* at 1641.

<sup>12</sup>*Id.* at 1638.

<sup>13</sup>*Id.* at 1637, 1640.

<sup>14</sup>See generally *Benton v. Maryland*, 395 U.S. 784, 795 (1969); *Griffin v. California*, 380 U.S. 609, 615 (1965); *Malloy v. Hogan*, 378 U.S. 1, 11 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Henkin, “Selective Incorporation” in the Fourteenth Amendment, 73 YALE L.J. 74 (1963).

Had Justice White been able to win one additional Justice to his position, unanimous jury verdicts would not be required in federal criminal trials either. His plurality decision in *Apodaca* concluded that unanimity—like the twelve-man jury requirement—“was not of constitutional stature.”<sup>15</sup> It is not, therefore, a necessary aspect of the sixth amendment jury.<sup>16</sup> Justice Powell refused to go that far. His reading of the Court’s chain of sixth amendment decisions convinced him that in enacting the amendment the framers desired to preserve the common law jury, including the unanimity requirement.<sup>17</sup> Therefore, “the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial.”<sup>18</sup> That requirement is not “so fundamental to the essentials of jury trial,” however, as to be binding on the states under the fourteenth amendment due process clause.<sup>19</sup>

In holding that conviction by a less-than-unanimous jury does not violate the sixth amendment jury trial guarantee, Justice White found the historical evidence inconclusive as to the intent of the framers and thus turned to other considerations.<sup>20</sup> As in his *Williams* opinion, Justice White focused upon “the function served by the jury in contemporary society”:

As we said in *Duncan*, the purpose of trial by jury is to prevent oppression by the Government by providing a “safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” “Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . .”<sup>21</sup>

Unanimity, concluded Justice White, “does not materially contribute to the exercise of this commonsense judgment.”<sup>22</sup>

Justice White’s one-page analysis of the function of the jury and the unanimity requirement in the modern American legal system seems very cursory in light of the widespread acceptance of that requirement. Certainly, the jury has played an important role as a buffer between the state and individual citizens, particularly in England and the English

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<sup>15</sup>92 S. Ct. at 1630.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.* at 1638.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 1639.

<sup>20</sup>*Id.* at 1632.

<sup>21</sup>*Id.* at 1632-33 (citations omitted).

<sup>22</sup>*Id.*

colonies during the eighteenth and nineteenth centuries.<sup>23</sup> While that role is still occasionally applauded today, some observers have suggested that the need for this original virtue of the jury trial has largely disappeared.<sup>24</sup> The Court did not even consider an equally important function of the jury as protector of unpopular minorities from the bias of the majority.

When members of minority groups—be they racial, religious, or political—face trial in periods of violent social conflict, the unanimity requirement is an indispensable check against mob rule. The dissenting vote of only one or two men can prevent a hasty and unwarranted conviction. In such a situation, the unpersuaded jurors on a panel may have been less susceptible to passion and prejudice than the majority; the true facts may be evident to those few men with cooler heads, while emotion blinds their fellow jurors. It was to this point that Justice Story referred when he added the following comment to his discussion of the jury trial in his famous *Commentaries on the Constitution*:

The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former

. . . .<sup>25</sup>

Because it requires the concurrence of the unbiased and impartial, the rule requiring unanimous jury verdicts increases the likelihood that the guilt or innocence of an accused will be fairly established. As Judge Brown recently said in condemnation of the *Allen* charge:<sup>26</sup> "I think a

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<sup>23</sup>For centuries after the institution of the jury originated toward the end of the thirteenth century, the right of trial itself was at the King's grace. W. FORSYTH, HISTORY OF TRIAL BY JURY 200 (1852). The jury was essentially a body of witnesses, selected from the local citizenry because they had personal knowledge of the case, until the time of Henry VI (1422-61). *Id.* at 159. Thus the jury was originated to serve the Crown. The accused was not allowed to introduce witnesses in his own behalf until 1606. The assistance of counsel was allowed defendants accused of treason only after the Glorious Revolution (1688), and it was not until 1836 that the same privilege was extended to those accused of other felonies. F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 9-10 (1951). The jury and other sixth amendment rights, therefore, began to serve and protect the criminal defendant fairly late in the development of the common law system.

<sup>24</sup>*E.g.*, *Duncan v. Louisiana*, 391 U.S. at 188 (Harlan, J., dissenting).

<sup>25</sup>2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1780 (5th ed. (1891)).

<sup>26</sup>The *Allen* charge is the traditional formula used by many trial judges in an attempt to urge an apparently deadlocked jury toward unanimity. It was approved by the Supreme Court in *Allen v. United States*, 164 U.S. 492 (1896).

mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise."<sup>27</sup> Now that less than unanimous jury verdicts have been approved for state courts, this protection is virtually eliminated. If a majority of nine or ten jurors can be formed, the majority need not even consider the arguments of any dissenters. Debate and deliberation time will almost certainly be reduced.

As Justice Douglas observed in dissent to *Apodaca*, the result is a diminution in the reliability of jury verdicts.<sup>28</sup> At the close of *Apodaca*'s trial, for example, the jury deliberated only forty-one minutes before bringing in a ten-to-two guilty verdict. It seems unlikely that forty-one minutes was enough time to "piece together the puzzle of historical truth"<sup>29</sup> that was the evidence given these jurors during the trial. One scholar has explained in the following terms his belief that the unanimity requirement is essential to the proper performance of the jury's function:

As writers for years have pointed out, the necessity for unanimity lies in the fact that it is a blending of the ideal and the real, a compromise of the abstract and the mundanely true. Unanimity requires full and frank discussion in the jury room. It requires a defense of each juror's individual viewpoint and a challenging inquiry to those of opposing view . . . . Weakness or insecurity of the position of a majority of the jurors is, in some cases, overcome by the logic and justice of a stronger position which might have been grasped only by a minority.<sup>30</sup>

Kalven and Zeisel, foremost scholars of the American jury, report that examples of a well-reasoned dissident viewpoint being accepted by the early majority are not uncommon: "In roughly one case in ten, the minority eventually succeeds in reversing an initial majority, and these may be cases of special importance."<sup>31</sup> But if non-unanimous verdicts are allowed and deliberation time is thereby shortened, the initial vote will almost always become the final verdict.

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<sup>27</sup>*Huffman v. United States*, 297 F.2d 754, 759 (5th Cir.) (dissenting opinion), *cert. denied*, 370 U.S. 955 (1962).

<sup>28</sup>92 S. Ct. at 1647.

<sup>29</sup>*Id.*

<sup>30</sup>Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120, 139 (1962).

<sup>31</sup>H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 490 (1966).

Justice White rejected the petitioners' claim that a less-than-unanimous verdict undercuts the standard of reasonable doubt, which was recently incorporated into the fourteenth amendment due process guarantee.<sup>32</sup> The fact that two or three jurors vote to acquit does not impeach the verdict reached by the majority who voted to convict.<sup>33</sup> The Court concluded that the "disagreement of three jurors does not alone establish reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenters' views, remains convinced of guilt."<sup>34</sup>

The Court seems to have overlooked the essence of the interrelation that has developed between reasonable doubt and unanimity: the decision to grant the defendant in a criminal trial the benefit of the minority view of reasonable doubt assures the highest possible degree of certainty. This is not solely a concession to the accused; it is also a conscious sacrifice of efficiency to secure widespread public support for the judicial process. Western society has judged that it is worse for an innocent man to be found guilty than for a guilty man to go free. This social judgment may be, as Kalven and Zeisel suggest, "an almost heroic commitment to decency,"<sup>35</sup> but it is a commitment that flows from an understanding of the terrible consequences of an erroneous conviction. The Supreme Court, in holding that due process requires the reasonable-doubt standard in *In re Winship*, clearly recognized the public demand for near certainty:

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.<sup>36</sup>

Unanimity is so ingrained in the common-law procedure that its elimination would seem to take from the verdict a virtue needed by the criminal law. The criminal verdict is based on the absence of reasonable doubt. A dissenting minority of two, three, or more in itself suggests to the popular mind the existence of a reasonable doubt and impairs public confidence in the criminal justice system.

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<sup>32</sup>*In re Winship*, 397 U.S. 358, 363-64 (1970).

<sup>33</sup>92 S. Ct. at 1623-24, 1633.

<sup>34</sup>*Id.* at 1625.

<sup>35</sup>H. KALVEN & H. ZEISEL, *supra* note 31, at 189.

<sup>36</sup>397 U.S. at 364.

One of the factors that persuaded the Court to drop the twelve-man jury panel in *Williams v. Florida* was the lack of evidence suggesting that the traditional panel was "necessarily more advantageous to the defendant" than a six-man jury.<sup>37</sup> This phrase implies that the Court will consider whether a given modification of the common law jury will tip the scales against the accused as it weighs the constitutionality of the change. Evidence compiled during Kalven and Zeisel's Chicago Jury Project<sup>38</sup> clearly indicates that the elimination of the unanimity requirement is not a neutral step but a significant detriment to the criminal defendant.

The Chicago study of 3,576 jury trial cases revealed that the jury brought in roughly two convictions for every acquittal, so that a defendant normally has a thirty percent chance of acquittal. Almost six percent of all juries, or some three thousand trials per year nationwide, end in a mistrial following jury deadlock.<sup>39</sup> The study revealed that roughly half of the hung jury cases produce the same practical consequences for a defendant as an acquittal, either because the prosecution drops his case or because he is acquitted in a subsequent retrial.<sup>40</sup> A table indicating the last votes of hung juries under the then-prevailing unanimity standard reveals that had a non-unanimous verdict of nine-three been permitted, almost 500 additional defendants, an increase of thirty-three percent, might have been convicted every year.<sup>41</sup> Furthermore, the evi-

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<sup>37</sup>399 U.S. at 101-02.

<sup>38</sup>This pioneering empirical study provided the basic material for Kalven and Zeisel's book, *supra* note 31.

<sup>39</sup>H. KALVEN & H. ZEISEL, *supra* note 31, at 56.

<sup>40</sup>*Id.* at 57 n.4. Kalven and Zeisel caution that this statistic is based on the estimate of an "experienced prosecutor" rather than a survey of the outcome of actual cases. *Id.*

<sup>41</sup>*Id.* at 460 n.3:

Last Vote of Deadlocked Juries

Vote for Conviction	Per Cent
11:1 .....	24
10:2 .....	10
9:3 .....	10
8:4 .....	6
7:5 .....	13
6:6 .....	13
5:7 .....	8
4:8 .....	4
3:9 .....	4
2:10 .....	8
1:11 .....	-

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100%



dence does not support the claim made by some supporters of the majority verdict that the accused is just as likely to be acquitted by a majority verdict as he is to be convicted. As noted above, the normal conviction-acquittal ratio for all jury trials is two to one, whereas had nine-three verdicts been accepted, the conviction ratio, in the cases of hung juries studied, would have been almost four to one. Thus, in instances of divided juries defendants would have a twenty percent chance of acquittal, compared to a thirty percent chance in trials generally. This increased conviction rate is particularly disturbing because defendants should have a *more* favorable chance for acquittal in trials resulting in a non-unanimous verdict. Presumably these are the closest, most difficult cases, when neither the prosecution nor the jury majority can convince the dissenting jury members to vote for conviction.

The writer does not mean to imply that these figures provide a completely accurate forecast of the actual effect of allowing less than unanimous verdicts in every state. These statistics do indicate, however, that a shift to non-unanimous verdicts would under no circumstances aid an accused more than it imperiled him. The converse is equally clear; the unanimity requirement "is necessarily more advantageous to the defendant" than a mere majority verdict and thus meets the *Williams* test.<sup>42</sup>

When a man's liberty is in the balance, the reliability of the decision-making process is very important. Therefore it is significant that probability theory also underscores the value of the unanimous jury verdict. Speaking in support of the unanimity requirement over fifty years ago, James Clark asserted: "It is unquestionably true that the greater the number of persons entertaining a conclusion the greater the

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Number of Juries in Sample—48.

The estimates in the text (and they must be understood as being no more than estimates) were derived from an analysis of the 3000 cases which end in a divided jury annually. *See* text accompanying note 39 *supra*. Under the unanimity standard, 1500 of these defendants may be convicted at a subsequent retrial. *See* text accompanying note 40 *supra*. If a 9-3 verdict is allowed, 1320 defendants (44% times 3000) may be convicted at their first trials. *See* table *supra*. Approximately 360 defendants (12% times 3000) may be acquitted. *See* table *supra*. The remaining 1320 cases would still end in a mistrial because the jury was not able to meet the new 9-3 minimum standard of agreement. An additional 660 of these remaining defendants might be convicted at a subsequent retrial. *See* text accompanying note 40 *supra*. Therefore, from the 3000 cases a total of 1980 defendants may be convicted under a 9-3 standard, an increase of 480 from the results under the unanimity standard.

<sup>42</sup>399 U.S. at 101-02.

probability of that conclusion being sound and true.”<sup>43</sup> Professor Forsyth has confirmed this axiom mathematically. The probability of a unanimous verdict being right in a hypothetical case is 167776220:1, that of a majority of eight to four being right, about 256:1, and that of a majority of seven to five, about 17:1.<sup>44</sup> That these figures are not without meaning is evident from the Louisiana and Oregon constitutional provisions requiring a unanimous jury verdict only to convict a defendant of a capital crime.<sup>45</sup> Apparently the people of those two states want to be as certain as possible of guilt before convicting a defendant of first degree murder, but do not feel it is necessary to be quite so certain before convicting him of lesser crimes.

Although the unanimity rule has been a feature of Anglo-American law for six hundred years, the United States is not the only country to question its continued application under modern conditions. At present many foreign legal systems, among them former British territories, allow majority verdicts.<sup>46</sup> Scottish juries are composed of fifteen members and for centuries have been able to bring in a simple majority verdict of eight to seven.<sup>47</sup> Most striking of all, however, is the abandonment of the unanimity requirement in England. The Criminal Justice Act of 1967<sup>48</sup> provides that the verdict of a jury in criminal cases need not be unanimous if in a case where there are twelve or eleven jurors, ten agree on the verdict, or in a case where there are only ten jurors, nine agree. The court may not accept a majority verdict of guilty unless the jury has deliberated for at least two hours.

As far-reaching as the unanimity decision is, the Court has left open a number of important questions. Probably foremost among these unresolved issues is the acceptable minimum jury vote. The Court approved a nine-three verdict, and Justice White emphasized the fact that a “heavy majority” had voted for conviction.<sup>49</sup> Concurring, Justice Blackmun implied that he would draw the line at eight-four; anything below that would be unacceptable.<sup>50</sup> But in dissent, Justice Stewart suggested that nothing in the majority’s reasoning would prevent states

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<sup>43</sup>Clark, *Should Verdicts Be Unanimous in Criminal Cases?*, 46 A.B.A. REP. 591, 593 (1921).

<sup>44</sup>W. FORSYTH, *supra* note 23, at 210-11 n.1.

<sup>45</sup>LA. CONST. art. 7, § 41; ORE. CONST. art. I, § 11.

<sup>46</sup>Samuels, *Criminal Justice Act*, 31 MODERN L. REV. 16, 25 (1968).

<sup>47</sup>J. McDONALD, *CRIMINAL LAW OF SCOTLAND* 559 (4th ed. 1929).

<sup>48</sup>Criminal Justice Act 1967, c. 80, § 13.

<sup>49</sup>92 S. Ct. at 1625.

<sup>50</sup>*Id.* at 1635.

allowing simple majority (seven-five) verdicts.<sup>51</sup> There is no clue in the majority decision as to whether juries of less than twelve (allowed under *Williams*) must be unanimous. Nor is it clear whether unanimity will be required in capital cases; all of the defendants whose convictions were affirmed in *Apodaca* and the companion cases faced non-capital sentences. Finally, how will the Court justify invalidating convictions brought in by votes of "three to two, or even two to one," as Justice Douglas put it?<sup>52</sup>

The full impact of the decisions will not be evident until the states respond to the new opportunities opened to them. It should be emphasized that the old rule of unanimity still stands in the federal courts. Although they handle only a tiny fraction of all criminal trials, the federal courts are the fora for some of the nation's most dramatic and difficult cases—particularly the federal conspiracy charges,<sup>53</sup> so popular of late with the Justice Department. Most criminal trials take place in the state courts,<sup>54</sup> and it is there that changes will be felt. Most observers believe that many states will alter their criminal procedures to take advantage of the less than unanimous jury verdict.<sup>55</sup> As indicated above, a slightly higher conviction rate may be expected.<sup>56</sup> Concomitantly, state prosecutors may enjoy whatever benefits accrue from a few more guilty pleas and a greater willingness to plea-bargain on the part of criminal defendants. Despite the anguished cries of the dissenters that the majority has "cut the heart out of" the jury trial,<sup>57</sup> the decision can affect at most only five or six percent of all criminal trials. Over ninety-four percent result in clearcut conviction or acquittal—without jury disagreement—under the old unanimity rule.<sup>58</sup> Furthermore, only a tiny fraction of all criminal defendants ask for trial—no more than fifteen

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<sup>51</sup>*Id.* at 1627.

<sup>52</sup>92 S. Ct. at 1649.

<sup>53</sup>18 U.S.C. § 371 (1970).

<sup>54</sup>See Friendly, *supra* note 14, at 936 n.40, pointing out that in 1963 the Supreme Court and County Courts of New York handled the cases of 19,888 criminal defendants, and the state's lowest courts handled an additional 452,271 felonies and misdemeanors. During approximately the same period, the federal district courts in New York disposed of 1,816 criminal cases.

<sup>55</sup>See sources cited note 9 *supra*.

<sup>56</sup>See text accompanying notes 38-42 *supra*.

<sup>57</sup>92 S. Ct. at 1651 (Marshall, J., dissenting).

<sup>58</sup>H. KALVEN & H. ZEISEL, *supra* note 31, at 453. Of this 6% of deadlocked juries, just over half contain one, two, or three dissenting jurors. If the Court does draw the line at 9-3 verdicts (see text accompanying notes 49-51 *supra*), the unanimity decisions will affect some 3% of all criminal trials annually.

percent.<sup>59</sup> Unlike the rulings on the right to counsel,<sup>60</sup> search and seizure,<sup>61</sup> or coerced confession,<sup>62</sup> for example, which affected most criminal defendants, the *Apodaca* decision will directly touch only one of every one or two hundred defendants. Its psychic impact on the American system of justice may be more difficult to measure.

THOMAS A. LEMLY

### Environmental Law-Substantive Judicial Review Under The National Environmental Policy Act of 1969

The National Environmental Policy Act of 1969 (NEPA)<sup>1</sup> sets forth a declaration of national environmental policy (section 101)<sup>2</sup> and establishes procedural requirements for governmental agencies whenever a major Federal activity which will have a major impact on the environment is undertaken (section 102).<sup>3</sup> These procedural requirements include the compilation of information and submission of an environmental impact statement to the Council on Environmental Quality before any work on a major federal project is begun. Section 102

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<sup>59</sup>*Id.* at 17-18.

<sup>60</sup>*Argersinger v. Hamlin*, 92 S. Ct. 2006 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>61</sup>*Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>62</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

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<sup>1</sup>42 U.S.C. §§ 4321-47 (1970).

<sup>2</sup>42 U.S.C. § 4331 (1970):

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

has consistently been held to be a ground on which to base judicial review of an administrative agency's action.<sup>4</sup> Environmentalists have been quick to utilize the courts to enforce as stringently as possible the procedural requirements of NEPA in cases involving agency actions which have ranged from nuclear warhead tests<sup>5</sup> to the attempted abandonment of a railroad line.<sup>6</sup> As a result of this active social concern on the part of groups and individuals, most agencies have realized that compliance with section 102 is necessary. However, many agencies now seem to be reluctantly seeking to comply with the letter, but not the spirit of NEPA. In these cases environmentalists have turned to section 101 in their efforts to enforce the policy of NEPA. This note will deal with the controversy over judicial review of administrative actions under section 101,<sup>7</sup> specifically focusing on the case of *Conservation Council of North Carolina v. Froehlke*.<sup>8</sup>

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(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

<sup>3</sup>42 U.S.C. § 4332 (1970).

<sup>4</sup>See, e.g., *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971); *Natural Resources Defense Council v. Morton*, 337 F. Supp. 165 (D.D.C. 1971), *aff'd*, 3 Env. Rep. Cas. 1558 (4th Cir. Jan. 13, 1972).

<sup>5</sup>*Committee for Nuclear Responsibility v. Seaborg*, 3 Env. Rep. Cas. 1126 (D.C. Cir. 1971).

<sup>6</sup>*City of New York v. United States*, 337 F. Supp. 150 (E.D.N.Y. 1972).

<sup>7</sup>For a clear recognition of the distinctions between procedural and substantive judicial review see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). There the court stated that an agency's action is to be set aside if it fails to meet statutory, procedural, or constitutional requirements (procedural review), or if the action was not supported by "substantial evidence" or was "unwarranted by the facts" (substantive review). The latter involves a "searching and careful" inquiry into the facts, but the court is not empowered to substitute its judgment for that of the agency. *Id.* at 414, 416. In addition, see Cohen & Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. IND. & COM. L. REV. 685 (1972).

<sup>8</sup>340 F. Supp. 222 (M.D.N.C.), *aff'd mem.*, 4 Env. Rep. Cas. 1044 (4th Cir. May 2, 1972).

On December 30, 1963, Congress authorized a "project for the comprehensive development of the Cape Fear River Basin,"<sup>9</sup> North Carolina's largest river basin. This development, designated New Hope Lake, was to be created by an earthen dam to be built upstream from the point where the Deep River and the Haw River join to form the Cape Fear River. The lake to be formed by the dam would cover a total of 14,300 acres.<sup>10</sup> The land within this projected pool is primarily woodland and farms. The woodland is made up of hardwoods mixed with pine, and the chief crops produced are corn, cotton, tobacco, and pasture grasses.<sup>11</sup>

The purposes of the dam include flood control, water supply, water quality control, general recreation, and fish and wildlife enhancement. The original cost of the New Hope project was to be 44.5 million dollars but was later revised to fifty-three million dollars. Ground breaking occurred on December 7, 1970, and as of September, 1971, fifty-four percent of the land had been acquired and twenty-two percent of the work completed with total cost as of that date of 16.9 million dollars.<sup>12</sup>

On August 10, 1971, the Conservation Council of North Carolina brought an action in United States District Court for the Middle District of North Carolina seeking injunctive and declaratory relief against the construction of the New Hope Dam by the United States Army Corps of Engineers. This action, *Conservation Council of North Carolina v. Froehlke*,<sup>13</sup> came before Chief Judge Eugene A. Gordon who on February 14, 1972, issued a memorandum order denying plaintiffs' motion for a preliminary injunction.<sup>14</sup>

The heart of the New Hope case involved the court's denial of substantive review under section 101.<sup>15</sup> NEPA, in the opinion of the

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<sup>9</sup>Act of Dec. 30, 1963, Pub. L. No. 88-253, 77 Stat. 841.

<sup>10</sup>1 U.S. ARMY CORPS OF ENGINEERS, ENVIRONMENTAL IMPACT STATEMENT FOR THE NEW HOPE LAKE, NORTH CAROLINA PROJECT 1 (1970).

<sup>11</sup>*Id.* at 6.

<sup>12</sup>*Conservation Council of North Carolina v. Froehlke*, 340 F. Supp. 222, 224 (M.D.N.C.), *aff'd mem.*, 4 Env. Rep. Cas. 1044 (4th Cir. May 2, 1972).

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 228.

<sup>15</sup>Specifically, plaintiffs contended, *inter alia*, that:

(1) the defendants had given insufficient consideration to alternatives to the project in that the environmental impact statement merely listed certain alternatives without sufficiently discussing them;

(2) the environmental impact statement failed to meet the requirements of section 102(2)(c) because it omitted consideration of two future nuclear power plants to be constructed downstream

court, does not provide such review, but only establishes procedures with which government agencies must comply: "[T]hese requirements provide only procedural remedies instead of substantive rights, and the function of the court is to insure that the requirements are met."<sup>16</sup> The court relied on several cases in support of its conclusion that the judiciary is powerless to substitute its own opinion as to whether or not a project should be undertaken.

Probably the clearest support for the court's decision in *Froehlke* is found in *Environmental Defense Fund v. Corps of Engineers*.<sup>17</sup> There the plaintiffs sought to enjoin the damming of the Cossatot River in Arkansas by the Corps of Engineers, basing their action on both section 101 and section 102 of NEPA. The court refused the injunction and expressly denied the existence of substantive review under section 101:

[NEPA] appears to reflect a compromise which, in the opinion of the Court, falls short of creating the type of "substantive rights" claimed by the plaintiffs. . . . If the Congress had intended to leave it to the courts to determine such matters [prohibition of the dam]; if, indeed, it had intended to give up its own prerogative and those of the executive agencies in this respect, it certainly would have used explicit language to accomplish such a far-reaching objective.<sup>18</sup>

In *Environmental Defense Fund v. Hardin*<sup>19</sup> plaintiffs sought to enjoin the Secretary of Agriculture from undertaking a cooperative federal-state program to control the fire ant population in the southeastern United States by spraying insecticides. Plaintiffs based their action on allegations that the defendant failed to satisfy the substantive and procedural requirements of NEPA. In denying the preliminary injunction the court limited its review to the procedural aspects of NEPA, saying: "Thus in reviewing the Department of Agriculture program under consideration here, the Court will not substitute its judgment for

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from the dam and the effect of a proposed extension of Interstate Highway 40 which will transect one of the wildlife sub-impoundments planned for the project;

(3) the ratio of the costs of the project to its benefits had been exaggerated in the following areas: interest rate and project life, nutrient removal costs, flood control benefits, water quality benefits, water supply and recreational benefits.

See Brief for Plaintiffs, *Conservation Council of North Carolina v. Froehlke*, 340 F. Supp. 222 (M.D.N.C. 1972).

<sup>16</sup>340 F. Supp. at 225.

<sup>17</sup>325 F. Supp. 749 (E.D. Ark. 1971).

<sup>18</sup>*Id.* at 755.

<sup>19</sup>325 F. Supp. 1401 (D.D.C. 1971).

that of the Secretary on the merits of the proposed program but will require that the Secretary comply with the procedural requirements of [NEPA]."<sup>20</sup>

*Froehlke* also held that the purpose of judicial review under NEPA is to insure that the procedural requirements are met, that is, that the environmental impact statement is complete, thus allowing Congress and the President to consider the evidence presented and decide on the desirability and feasibility of the project.

It is clear that NEPA was not intended to be a means for the Courts to second guess congressional appropriations, but was intended to be a means of disclosing to Congress and other decisionmakers all environmental factors in order that decisions and appropriations could be made with as little adverse effect on the environment as possible.<sup>21</sup>

The immediate result of the *Froehlke* decision was denial of the plaintiffs' motion for preliminary injunction. This order was affirmed by the United States Court of Appeals for the Fourth Circuit.<sup>22</sup> At present the case is before Judge Gordon on cross-motions for summary judgment.

The principle in *Froehlke* has been followed in at least two cases: *Pizitz v. Volpe*<sup>23</sup> and *Environmental Defense Fund v. Corps of Engineers*.<sup>24</sup> In the latter case plaintiffs challenged construction of Alabama's Tennessee-Tombigbee Waterway, basing some of their allegations on section 101 in much the same manner as the plaintiffs in

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<sup>20</sup>*Id.* at 1404.

<sup>21</sup>340 F. Supp. at 228. Support for this is found in *Committee for Nuclear Responsibility v. Seaborg*, 3 Env. Rep. Cas. 1126 (D.C. Cir. 1971). There the United States Court of Appeals for the District of Columbia Circuit refused to enjoin, under NEPA, nuclear tests on Amchitka Island, saying the court's "function is only to assure that the statement sets forth the opposing scientific views, and does not take the arbitrary and impermissible approach of completely omitting . . . any responsible scientific opinions concerning possible adverse environmental effects." *Id.* at 1128-29. Other cases concurring in the basic holding include: *Bradford Township v. Highway Authority*, 4 Env. Rep. Cas. 1301 (7th Cir. June 22, 1972); *McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1971) (limited to cases involving national security); *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971). The latter case presents an interesting quirk in that the provisions of NEPA are invoked, not by an environmental group but by several large oil companies, to prevent the federal government from discontinuing the purchase of helium from them. In the district court's words, it was "passing strange" to see the giants of the oil and gas industry representing the public interest. *Id.* at 654.

<sup>22</sup>4 Env. Rep. Cas. 1044 (4th Cir. May 2, 1972) (mem.).

<sup>23</sup>4 Env. Rep. Cas. 1195 (M.D. Ala. May 1, 1972).

<sup>24</sup>4 Env. Rep. Cas. 1408 (N.D. Miss. Aug. 4, 1972).



*Froehlke*. The Mississippi court cited *Froehlke* in support of its holding that:

Courts do not sit to decide the substantive merits or demerits of a federal undertaking under NEPA, but only to make certain that the responsible federal agency, in this case the Corps of Engineers, makes full disclosure of environmental consequences to the decisionmakers. While the exact scope of § 101 has not been defined by the Supreme Court, the prevailing view of the federal courts is that neither this section nor other provisions of NEPA create substantive rights that are enforceable in the courts.<sup>25</sup>

Notwithstanding these decisions, several courts have engaged in substantive judicial review under section 101 and to that extent are in disagreement with the ruling of the *Froehlke* court. In one such case, the Court of Appeals for the District of Columbia Circuit concluded that "reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."<sup>26</sup>

Furthermore, in *Scenic Hudson Preservation Conference v. Federal Power Commission*,<sup>27</sup> one of the two<sup>28</sup> most recent recent developments in the litigation over Consolidated Edison's plan to construct a pumped storage hydro-electric project at Storm King Mountain on the Hudson River, the Court of Appeals for the Second Circuit construed section 101 as requiring the detailed and exhaustive consideration of environmental factors required by that court when it remanded the same case to the Federal Power Commission five years prior.<sup>29</sup> These requirements included detailed substantive review by the court of alternate plans to the project and of the project's impact on "the conservation of natural resources, the maintenance of natural beauty, and the preserva-

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<sup>25</sup>*Id.* at 1413.

<sup>26</sup>*Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

<sup>27</sup>453 F.2d 463 (2d Cir. 1971), *cert. denied*, 92 S. Ct. 2453 (1972).

<sup>28</sup>The other being *deRham v. Diamond*, 69 Misc. 2d 1, 330 N.Y.S.2d 71 (Sup. Ct. 1972), a case not involving NEPA but a clear example of substantive judicial review in that the New York Supreme Court held that the New York Commissioner of Environmental Conservation acted "in excess of his authority and in violation of law" in certifying that the Storm King project complied with state water quality standards. *Id.* at \_\_\_\_, 330 N.Y.S.2d at 75.

<sup>29</sup>*Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

tion of historic sites.”<sup>30</sup> The court said that “the policy statement in Section 101 envisions the very type of full consideration and balancing of various factors which we, by our remand order, required the Commission to undertake.”<sup>31</sup>

Similarly, in *National Resources Defense Council v. Morton*<sup>32</sup> an injunction was granted banning the sale of oil and gas leases on the outer continental shelf off eastern Louisiana. The court reviewed the substance of the environmental impact statement and found that “the defendants only superficially discussed the alternatives listed in the Final Impact Statement, and they failed to discuss in detail the environmental impacts of the alternatives they listed in the statement.”<sup>33</sup>

In *Hanly v. Mitchell*<sup>34</sup> the Second Circuit again recognized NEPA’s substantive review provision. The General Services Administration (GSA) was required to submit an environmental impact statement covering the proposed construction of a federal jail in a neighborhood of New York City containing several government buildings and two apartment complexes which housed fifty thousand people. The court found the GSA’s action “arbitrary and capricious”<sup>35</sup> in not considering all relevant factors in making its determination that an environmental impact statement was not necessary. The statement should include a “hard look at the particular environmental impact of squeezing a jail into a narrow area directly across the street from two large apartment houses.”<sup>36</sup> The court issued a preliminary injunction and remanded the case to GSA for a “proper determination, . . . taking account of all relevant factors, of whether the proposed jail significantly affects the quality of the human environment.”<sup>37</sup>

In *Students Challenging Regulatory Agency Procedures v. United States*<sup>38</sup> the plaintiffs sought injunctive relief against the Interstate

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<sup>30</sup>Scenic Hudson Preservation Conference v. Federal Power Comm’n, 453 F.2d 463, 469 (2d Cir. 1971), cert. denied, 92 S. Ct. 2453 (1972).

<sup>31</sup>Id. at 481.

<sup>32</sup>3 Envir. Rep. Cas. 1558 (D.C. Cir. Jan. 13, 1972).

<sup>33</sup>Id. at 1560.

<sup>34</sup>4 Envir. Rep. Cas. 1152 (2d Cir. May 17, 1972). This case originally involved only procedural review under section 102(2)(c) since GSA contended that an impact statement was not necessary. However a short impact statement was ultimately submitted. The court discussed the procedural aspects in ruling that an impact statement was required and discussed the substantive aspects in finding the impact statement insufficient.

<sup>35</sup>Id. at 1157.

<sup>36</sup>Id. at 1156.

<sup>37</sup>Id. at 1158.

<sup>38</sup>4 Envir. Rep. Cas. 1312 (D.D.C. July 10, 1972), stay denied sub nom. Aberdeen R.R. v.

Commerce Commission, which had ordered a 2.5 percent surcharge to the normal tariff on all rail freight. The challenge was based on the theory that this surcharge increased the cost of shipping recyclable materials, thus discouraging the environmentally desirable use of recyclable goods to the extent that an environmental impact statement was required under NEPA. The ICC had stated that the environmental impact of this surcharge was "unclear."<sup>39</sup> Its statement had also examined alternatives to the increase "in extremely cursory fashion."<sup>40</sup> The court agreed with the plaintiffs that improper consideration was given to the environmental impact and issued relief.

There is obviously a great difference of opinion over the availability of review under section 101. Several courts have engaged in substantive review under NEPA, but none have specifically and comprehensively discussed it in their opinions. However, a closer look at the facts of the New Hope case reveal that it was an ideal vehicle for such an undertaking.

It has been decided that in reviewing an agency action under NEPA, the reviewing court cannot substitute its own judgment for that of the agency.<sup>41</sup> However, the court can reverse a substantive agency decision which has been based on an arbitrary balance of costs and benefits or insufficient consideration of environmental factors.<sup>42</sup> The facts of the New Hope case presented a clear case for finding an arbitrary cost-benefit balance and a lack of consideration of environmental factors.

Three areas will be considered here to show that the cost-benefit ratio was improper and therefore, should have been subject to judicial review. The first factor to be considered is the cost of nutrient removal. The environmental impact statement submitted by the Corps of Engineers expressed concern over nutrient enrichment of the lake and possible algae blooms which may occur.<sup>43</sup> Yet the analysis of the project by the Corps of Engineers included no costs for the necessary removal of

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Students Challenging Regulatory Agency Procedures, 41 U.S.L.W. 2068 (Burger, Circuit Justice, July 19, 1972).

<sup>39</sup>*Id.* at 1315.

<sup>40</sup>*Id.*

<sup>41</sup>Calvert Cliffs' Coordinating Comm., v. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

<sup>42</sup>*Id.*

<sup>43</sup>U.S. ARMY CORPS OF ENGINEERS, *supra* note 10, at 21-22.

these nutrients.<sup>44</sup> Thus the entire cost of the project had not been shown.

Secondly, in determining the amount of benefit from flood control, the Corps of Engineers determined flood frequency by using flood data for the region in which the project is located.<sup>45</sup> The method of calculating flood frequency used here by the Corps of Engineers<sup>46</sup> requires that local data be used if available; otherwise regional data is acceptable.<sup>47</sup> Local data was available in this case<sup>48</sup> but was not used. Plaintiffs' expert witness, Dr. Edward H. Wiser, in his deposition, stated that use of local rather than regional data would reduce the estimate of flood control benefits from 2,094,000 dollars (as estimated by the Corps of Engineers) to 938,800 dollars annually<sup>49</sup> and cause a corresponding drop in the cost-benefit ratio.

A final consideration is the potential recreational benefits of the project. In determining the dollar value of recreational benefits, the environmental impact statement used an admission price of fifty-five cents per person and placed the average number of man-days of recreation per year at 2,760,000.<sup>50</sup> This latter figure is probably derived from an estimation of the total possible number of man-hours of recreation that the lake could provide.<sup>51</sup> It is very unlikely that the lake will be filled to recreational capacity every day of its existence.

*Froehlke* not only failed to utilize the opportunity to interpret NEPA as allowing substantive judicial review but virtually emasculated NEPA, leaving only the shell of the statute which was designed to establish and enforce a national environmental policy. For example, *Froehlke* held that the project in question need not be more environmentally desirable than those alternatives to the project which are required to be listed in the environmental impact statement.<sup>52</sup> After *Froehlke* the

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<sup>44</sup>*See id.*

<sup>45</sup>*Id.* at 81.

<sup>46</sup>The log-Pearson Type III Method. For a discussion of this calculation *see 3 id.* at 321-64.

<sup>47</sup>*Id.* at 343.

<sup>48</sup>*Id.* The preliminary impact statements included no mention of local data. There the flood control frequency was based on regional data. However, Dr. Wiser's deposition, in which the local data was discussed, was included in the final impact statement even though the determination of flood frequency was not changed to reflect the local data.

<sup>49</sup>*Id.* at 341-42.

<sup>50</sup>*Id.* at 18, 28.

<sup>51</sup>The Corps of Engineers gave no explanation of the source of this figure. However, plaintiffs understood it to be based on this estimation. Interview with Thomas Schoenbaum, counsel for plaintiffs, in Chapel Hill, N.C., Aug. 1, 1972.

<sup>52</sup>340 F. Supp. at 228.

reviewing court would be powerless to act where the agency had gone through the formality of listing the alternatives, thus complying with the procedural requirements of section 102(2)(c). This leaves NEPA with no muscle to halt an undesirable project after the agency has "filled in the blanks" by simply listing the alternatives.

Finally, the facts of *Froehlke* indicate that the inadequacies and inaccuracies of the environmental impact statement were so great as to constitute a breach of the procedural as well as the substantive requirements of NEPA. The court did not insist upon the detailed consideration of the project that is required by NEPA. Instead it accepted the self-serving description of the project presented by the Corps of Engineers which casually dismissed many of New Hope's costs and adverse effects while relying on exaggerated benefits. The inadequate consideration of the alternatives to the project also amounted to noncompliance with section 102. Section 102 implicitly requires that the reports of alternatives be complete and accurate. NEPA does not contemplate the submission of misleading reports. When inaccurate reports are submitted the agency has not even met the procedural requirements of NEPA.

This case could have become the cornerstone of substantive judicial review under NEPA without breaching the traditional limits on judicial power. Without doubt, substantive judicial review conjures up visions of the court completely disregarding a reasonable and well-supported administrative decision by substituting its own subjective beliefs and preferences. Agencies on occasion fail to fully consider the environmental impact of their programs and projects. Section 101 should be interpreted as providing a judicial solution to such situations without unduly restricting agency discretion.

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### Income Taxation—Deductibility of Employment Agency Fees

Within the last few years executive level employees have been seeking new employment as frequently as blue-collar workers.<sup>1</sup> In a highly specialized technological or administrative field, employment opportunities are rare, and it is frequently necessary for the job seeker to engage

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<sup>1</sup>Tucker, *An Individual's Employment-Seeking Expenses: Analyzing the New Judicial Climate*, 34 J. TAX. 352 (1971).

the services of an executive employment agency. Is the fee which is paid to an employment agency or referral service a deductible business expense<sup>2</sup> when the agency is unsuccessful in its efforts to locate a new employment? The Tax Court, in *Leonard F. Cremona*,<sup>3</sup> a decision by the full court, recently held that the deduction no longer depends upon whether a new job was actually obtained by the employment agency. Now the only determination<sup>4</sup> is whether the new job is, or would have been, in the same trade or business in which the employee was working at the time of the expense.<sup>5</sup>

Leonard F. Cremona contracted with Harvard Executive Research Center, Inc., to pay a fee of \$1,500 for job counseling and referral services concerning available corporate administrative employment opportunities. No new job was obtained<sup>6</sup> and Cremona continued to be employed by the same corporation in the same administrative capacity as when he first contracted the employment agency. Cremona believed that there was still a possibility of future job offers although the employment agency's service had terminated.

The Tax Court held that the employment agency fee was a deductible expense since it was a good faith effort to improve the job opportunities in the trade or business in which the employee was engaged prior

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<sup>2</sup>INT. REV. CODE OF 1954, § 162(a) states:

"(a) IN GENERAL—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."

*Id.* § 212, states:

"In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

(1) for the production or collection of income . . . ."

In *Leonard F. Cremona*, 58 T.C. 219, P-H TAX CT. REP. & MEM. DEC. (58 P-H TAX CT. REP.) ¶ 58.20 (May 4, 1972), and *David J. Primuth*, 54 T.C. 374 (1970), the Tax Court found the expense to be deductible under § 162 and refrained from discussing the possibility that a deduction might also be allowed under § 212.

<sup>3</sup>58 T.C. 219, P-H TAX CT. REP. & MEM. DEC. (58 P-H TAX CT. REP.) ¶ 58.20 (May 4, 1972).

<sup>4</sup>*Id.* Although the court discusses only the requirement that the expense must be for seeking employment in the same trade or business, the discussion of *United States v. Geneser*, 92 S. Ct. 827 (1972), in this note indicates that an additional determination may be required in the future. See note 39 & accompanying text *infra*.

<sup>5</sup>*Id.* at 222, P-H TAX CT. REP. & MEM. DEC. at 153. See also *Gale C. Huber*, 39 P-H TAX CT. MEM. 1047 (1970), which held that expenses incurred by unemployed persons are business expenses since those persons are still in the same trade or business of being a particular type of employee.

<sup>6</sup>The \$1,500 fee was nevertheless paid because it was not contingent on securing a new job.

to the expenditure.<sup>7</sup> The court stated that outside factors, such as economic conditions in the field in which Cremona sought to obtain a new job, should not determine deductibility.<sup>8</sup>

After *David J. Primuth*,<sup>9</sup> in 1970, there was a two-part test to determine the deductibility of employment agency fees. First, the new employment had to be within the same trade or business in which the person had been previously employed; secondly, the expenses had to be for securing a job rather than for merely seeking one.

The requirement that the new job had to be in the same trade or business as the old job relates to section 162<sup>10</sup> of the Internal Revenue Code. Because a deduction under section 162 is not allowed for expenses incurred prior to going into a business,<sup>11</sup> the business had to have existed at the time the expense was incurred. Thus, an employment fee for changing from one trade or business to another would not have been deductible since it did not involve carrying on the old trade or business, and the new trade or business had not yet begun.

For many years, the courts have recognized that a person may be in the trade of being in a particular profession.<sup>12</sup> Teachers,<sup>13</sup> engineers,<sup>14</sup> and even corporate executives<sup>15</sup> have been recognized as persons engaging in a trade or business. This concept has been expanded to the point that expenses incurred by persons who were unemployed have been allowed as deductible business expenses because they were still in the

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<sup>7</sup>58 T.C. at 222, P-H TAX CT. REP. & MEM. DEC. at 153. The Tax Court was willing to accept the taxpayer's contention that he was in the trade or business of being an "administrator." If such broad categories are considered a trade or business in the future, the possible difficulties in obtaining a business expense deduction for employment agency fees which are discussed in this note will be substantially reduced.

<sup>8</sup>*Id.*

<sup>9</sup>54 T.C. 374 (1970). The taxpayer in *Primuth* was secretary-treasurer of one corporation and paid a noncontingent fee to an employment agency. As a result of the efforts of the agency, the taxpayer accepted employment with another corporation as controller and assistant to the vice president of finance. The new employment was held to be in the same trade or business and the business expense deduction was allowed under § 162(a).

<sup>10</sup>See note 2 *supra*.

<sup>11</sup>*Richmond Television Corp. v. United States*, 345 F.2d 901 (4th Cir. 1965). In this case expenses of a television corporation to train personnel several years before receiving an operation license were denied. These expenses were not incurred in "carrying on a trade or business" as required by § 162.

<sup>12</sup>*E.g.*, *Furner v. Commissioner*, 393 F.2d 292 (7th Cir. 1968); *Harold A. Christensen*, 17 T.C. 1456 (1952).

<sup>13</sup>*Furner v. Commissioner*, 393 F.2d 292, 294 (7th Cir. 1968).

<sup>14</sup>*Kenneth R. Kenfield*, 54 T.C. 1197, 1199 (1970).

<sup>15</sup>*David J. Primuth*, 54 T.C. 374, 379 (1970).

trade or business of being a particular type of employee.<sup>16</sup> However, some judges have expressed a desire to limit this concept severely by restricting the taxpayer's business to being an employee for the particular employer for whom he is working.<sup>17</sup> Consequently, expenses in seeking a job with a new employer would not be deductible because the new employment would be another trade or business and nearly all employment agency fee deductions would be destroyed. Fortunately, this conception has yielded to a broad trade or business test such as that utilized in *Cremona*.<sup>18</sup>

The second requirement for the deductibility of employment agency fees prior to *Cremona* was that the expense had to be for securing rather than seeking a job.<sup>19</sup> The job-seeking and job-securing distinction was initially evoked in Office Decision 579 in 1920,<sup>20</sup> which stated that fees paid to secure employment would be allowed as a deduction. Revenue Ruling 60-158,<sup>21</sup> however, specifically stated that all fees paid to employment agencies were not deductible. In the same year, Revenue Ruling 60-223<sup>22</sup> revoked Revenue Ruling 60-158 and stated that "the Internal Revenue Service will continue to allow deductions for fees paid to employment agencies for securing employment." Although the Service, through a series of Revenue Rulings, stated that it would only allow employment agency fees paid for securing a job to be deducted as a business expense, it made no attempt to develop guidelines to determine whether a fee was paid for seeking or for securing a job.

In *Thomas W. Ryan*,<sup>23</sup> an employment agency fee was disallowed as a business expense deduction even though evidence was presented that the final part of the fee was contingent upon the acquisition of a new job and that a new job was obtained. Ryan was required to pay a \$250 retainer to the employment agency and a \$250 final fee contingent upon the acquisition of a new job. The Tax Court disallowed the retainer as being an expense for seeking a new job and then disallowed the contingent fee because of lack of proof of payment. This different reason for denying the final fee was an early indication that the tax court would

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<sup>16</sup>Gale C. Huber, 39 P-H Tax Ct. Mem. 1047 (1970).

<sup>17</sup>David J. Primuth, 54 T.C. 374, 384 (1970) (Tietjens, J., dissenting).

<sup>18</sup>See note 7 *supra*.

<sup>19</sup>David J. Primuth, 54 T.C. 374, 380 (1970).

<sup>20</sup>3 CUM. BULL. 130 (1920).

<sup>21</sup>1960-1 CUM. BULL. 140.

<sup>22</sup>1960-1 CUM. BULL. 57.

<sup>23</sup>28 P-H Tax Ct. Mem. 506 (1959).



distinguish contingent employment agency fees from those which were paid regardless of whether new employment was obtained.

After *Ryan*, the Service had argued that deductions for contingent fees were allowable if the job were actually obtained as a result of the efforts of the employment agency,<sup>24</sup> but fees paid whether or not the agency was successful in obtaining employment were for job-seeking, not job-securing, and were not deductible even if employment was obtained.<sup>25</sup> In *Primuth* this argument was again made, but the Tax Court found this a "distinction without a difference."<sup>26</sup> The purpose and results of the payments were said by the court to be the same in either event. The employment agency had practically guaranteed Primuth that they would find a new job for him.<sup>27</sup> Therefore the existence of noncontingent fee did not preclude deductibility so long as the taxpayer was successful in obtaining a new job in the same trade or business.

The requirement that employment be secured was expanded still further by *Kenneth R. Kenfield*.<sup>28</sup> In *Kenfield*, the taxpayer paid a noncontingent employment agency fee and accepted a new job in the same trade or business found for him by the employment agency. However, the taxpayer reconsidered, declined the new job offer, and decided to remain at this old job because he was given a raise and a promotion. The Tax Court found that the promotion and raise given by his old employer was a direct consequence of the new job offer and allowed the employment fee as a business expense deduction.<sup>29</sup> This case moved the Tax Court one step closer to completely abandoning the requirement that the employee must be successful in his attempt to find a new job.

The job-securing half of the two-part test for deductibility has now been removed by *Cremona*. The job sought still must be in the same trade or business, but it does not actually have to be secured before the

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<sup>24</sup>In *Carson J. Morris*, 36 P-H Tax Ct. Mem. 1424 (1967), *aff'd*, 423 F.2d 611 (9th Cir. 1970), an employment agency fee was denied as a business expense deduction because the new job resulted from the efforts of the taxpayer rather than from those of the employment agency. The court felt that this was an indication that the fee was for seeking rather than for securing new employment.

<sup>25</sup>*Francois Louis*, 35 P-H Tax Ct. Mem. 1174, 1177-1178 (1966): "While the effect of such rulings and instructions is not entirely clear, it seems that they would allow as deductions payments (to employment agencies and perhaps others) for having secured employment for the taxpayer, but would disallow as deductions amounts paid for seeking employment which are payable irrespective of whether employment is secured."

<sup>26</sup>54 T.C. at 380.

<sup>27</sup>*Id.*

<sup>28</sup>54 T.C. 1197 (1970).

<sup>29</sup>*Id.* at 1200.

business deduction is allowed. Does the new test allow a deduction if the title or description of the new job is the same as that of the old job, or must the basic skills which are to be used in the new job also be the same as those used in the old one? Although the requirement that the new employment must be in the same trade or business existed prior to *Cremona*,<sup>30</sup> its coexistence with the job-securing requirement prevented any thorough development of this test because the deduction could be denied solely on the basis of failure to secure new employment.

The Commissioner sought to distinguish *Cremona* from prior<sup>31</sup> cases which had allowed an employment agency fee as a deduction by citing *Eugene A. Carter*<sup>32</sup> in which the taxpayer was not successful in obtaining a new job and the deduction was disallowed. *Carter* was held not applicable by the court because the taxpayer in *Carter* sought to obtain a job in a different trade or business.<sup>33</sup> Prior to *Cremona*, there seem to be no significant cases which denied the deductibility of employment agency fees solely on the basis that the new job was not in the same trade or business. It would seem that the uncertainty which has developed in applying the same trade or business test to business deductions for educational expenses has now been injected into the area of employment agency fee deductions.<sup>34</sup>

The post-*Cremona* taxpayer who incurs expenses in obtaining a new job which carries a slightly different job title or requires somewhat different skills or a higher degree of the same skills<sup>35</sup> cannot be certain that he will be allowed a business expense deduction. It is possible that such a person, due to the prior lack of emphasis which was placed on the requirement that the new job be in the same trade or business, would

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<sup>30</sup>*E.g.*, *Eugene A. Carter*, 51 T.C. 932 (1969).

<sup>31</sup>*E.g.*, *Kenneth R. Kenfield*, 54 T.C. 1197 (1970); *Guy R. Motto*, 54 T.C. 558 (1970); *David J. Primuth*, 54 T.C. 374 (1970).

<sup>32</sup>51 T.C. 932 (1969).

<sup>33</sup>58 T.C. at 221, P-H TAX CT. REP. & MEM. DEC. at 152.

<sup>34</sup>The test which is used to determine the deductibility of education costs as a business expense is whether the expense was incurred to maintain employment or proficiency in the same trade or business. The same trade-or-business test, as used in the education expense business deduction cases, has been characterized by uncertainty. *Compare, e.g.*, *Welsh v. United States*, 210 F. Supp. 597 (N.D. Ohio 1962), *aff'd per curiam*, 329 F.2d 145 (6th Cir. 1964), which held that an Internal Revenue agent could have a business deduction for his expenses in going to law school even though he quit his job shortly after graduating, *with James J. Engel*, 31 P-H Tax Ct. Mem. 1441 (1962), which held that a law degree qualified an Internal Revenue agent for a new profession and that a business deduction would not be allowed for the costs of going to school.

<sup>35</sup>*See* 58 T.C. at 224, P-H TAX CT. REP. & MEM. DEC. at 154 (Sterrett, J., concurring).

have been allowed a business expense deduction prior to *Cremona* but may not be allowed such a deduction in the future. Since there is now only one criterion for the deductibility of employment agency fees, judges may feel compelled to apply it more strictly. Consequently, the new job may be required to involve exactly the same duties, rather than merely the same basic skills, as the old job. The Tax Court may no longer consider an unemployed person to be engaged in a particular trade or business.<sup>36</sup> There are many ways in which the same trade or business test could be modified by judicial interpretation so as to disallow deductions which had previously been allowed in situations in which the taxpayer was successful in obtaining new employment.

Another problem may be presented when the taxpayer has paid an employment agency fee but has been unsuccessful in obtaining new employment. A determination of the type of new employment which the taxpayer was seeking would have to be made before there could be any determination whether the job sought would constitute a new trade or business. If the taxpayer was seeking new employment which was not the same as his present trade or business, the deduction seemingly would be disallowed. Even though the requirement that a new job must be secured no longer exists, the business expense deduction apparently would be allowed only for a good faith effort to secure employment in the *same*<sup>37</sup> trade or business.

An even more difficult situation would be the one in which the taxpayer not only would be willing to accept new employment in the same trade or business in which he is presently employed but also would be willing to accept employment in a different trade or business. Such a consideration would seem to call for a determination of the dominant desires in seeking new employment. It would be impossible to determine, with any degree of exactness, whether the taxpayer wanted employment in a new trade or business more than he wanted new employment in the same trade or business. Faced with the difficulty of this determination, the Tax Court might restrict deductions in this area by disallowing the employment agency fee when the taxpayer is willing to accept employment in a field other than his present trade or business but is unsuccessful in obtaining either. If the taxpayer was willing to accept employment in a field other than his trade or business and was

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<sup>36</sup>See note 16 *supra*.

<sup>37</sup>58 T.C. at 222, P-H TAX CT. REP. & MEM. DEC. at 153.

unsuccessful in getting a new job, then, under the rigid interpretation suggested above, he would be in the same position as he would have been before *Cremona* since the deduction would have been denied because no new job was obtained. Furthermore, the taxpayer might be in a less desirable position after *Cremona* if he had expressed a willingness to accept employment either in his present trade or business or in some other field and then acquired new employment in his present trade or business. The deduction would have been allowed prior to *Cremona* since he obtained new employment in the same trade or business. But the expense might now be disallowed because the taxpayer was willing to accept employment in some other trade or business when he incurred the expense. At present there is no way to determine the manner in which the Tax Court will treat a willingness to accept employment in some other trade or business. Although the same trade or business test was frequently mentioned prior to *Cremona*, the decisions had been made largely on the basis of a failure to secure a new job.<sup>38</sup>

The general area of business purpose was discussed in *United States v. Generes*,<sup>39</sup> a recent Supreme Court decision which held that a business expense will be allowed only if the trier of fact determines that the dominant motive for the claimed business expenditure was a business purpose. *Cremona* requires that the expense must be for attempting to find a new job in the same trade or business. The determination in both *Generes* and *Cremona* concerns business purpose. *Generes* involves the entire area of business purpose while *Cremona* requires that a specific business purpose, to find a job in the same trade or business, must be present. *Generes* could affect the outcome of future cases in which employment agency fee deductions are sought since the specific business purpose required by *Cremona* could be present while the dominant motive, which *Generes* requires must be a business purpose, might be lacking. References to *Generes* and its possible impact upon *Cremona* were made in two of the concurring opinions in *Cremona*.<sup>40</sup> Judge Tannenwald, with whom two judges agreed, and Judge Sterrett indicated that *Generes* may have a restrictive influence on employment agency fee deductions. They stated that the majority's same trade or business determination, combined with the dominant motive require-

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<sup>38</sup>E.g., *Eugene v. Carter*, 51 T.C. 932 (1969).

<sup>39</sup>92 S. Ct. 827 (1972).

<sup>40</sup>58 T.C. at 223-24, P-H TAX CT. REP. & MEM. DEC. at 154 (Tannenwald & Sterrett, JJ., concurring).

ment in *Generes*, was sufficient to prevent an unduly broad allowance of deductions in this area. An example of the effect which the *Generes* opinion could have upon *Cremona* would be if a taxpayer paid an employment agency fee to locate a new job in exactly the same trade or business and his dominant motive for changing jobs was a nonbusiness motive, such as a change of climate. If the *Cremona* criterion were used alone, the deduction would be allowed since this was an attempt to get a new job in the same trade or business. However, because the dominant motive for the expense was a nonbusiness purpose, the deduction would not be allowed under *Generes*.

When the Tax Court ceased to use the job-securing requirement for determining the deductibility of employment agency fees, it repudiated a test which was both unfair to the taxpayer and illogical in relation to section 162<sup>41</sup> of the Internal Revenue Code. But the job-securing distinction did have one appealing advantage—it was definite and consequently easy to apply. The same trade or business test, applied alone, is both fair and logical in that it allows a deduction for an expense which is related to the taxpayer's trade or business. Unfortunately, it is presently undeveloped and offers no definite guidelines for the taxpayer. Additionally, it may be difficult to develop clear and definite guidelines due to the difficulty in determining a subjective factor such as the dominant motive and the room for interpretation in determining whether the new employment is within the same trade or business. In the area of educational expense deductions, where the same trade or business criterion has been used for years,<sup>42</sup> the persisting uncertainty as to whether specific deductions will be allowed portends equal future uncertainty in predicting the deductibility of employment agency fees.

WILLIAM S. PATTERSON

### **Landlord and Tenant—Retaliatory Eviction and the Absolute Right to Choose Not to Have Any Tenants**

When a landlord is unwilling to bring his rental units into compliance with housing code provisions, does his ownership of the property include the absolute right to discontinue rental of all such units? If so,

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<sup>41</sup>See note 2 *supra*.

<sup>42</sup>See note 34 *supra*.

does the same absolute right exist when the landlord elects to discontinue rental of some but not all of his units? The court in *Robinson v. Diamond Housing Corp.*<sup>1</sup> attempted to answer these questions for the District of Columbia.

Under common law principles, the tenant only had the right to possession of the leased premises.<sup>2</sup> Thus, the landlord was under no duty to make repairs or to keep the premises in a habitable condition.<sup>3</sup> In an agrarian society where the tenant rented the land primarily for the production of crops and the buildings located thereon were merely incidental,<sup>4</sup> it may have been equitable to place the burden of repair on the tenant. However, the plight of the low-income urban resident has forced several jurisdictions to make a thorough reassessment of landlord-tenant law as it is applied to the modern residential leasehold.<sup>5</sup>

Much of this judicial activism has been the result of legislative failures. Congress attempted to remedy this situation, and, in promulgating a national housing policy of a "decent home" for every American,<sup>6</sup> expressly recognized the importance of local housing codes by conditioning monetary aid to municipalities on their adoption of such codes.<sup>7</sup> In order to meet the objectives of this federal policy and to qualify for federal funds, thousands of municipalities have promulgated housing codes and regulations.<sup>8</sup> However, local agencies responsible for enforcement of the codes have not been able to significantly halt or reverse the deterioration of urban buildings.<sup>9</sup>

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<sup>1</sup>No. 24,508 (D.C. Cir., Apr. 3, 1972).

<sup>2</sup>1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952).

<sup>3</sup>For an extremely harsh application of this principle see *Fowler v. Bott*, 6 Mass. 63 (1809). In addition, see Comment, *Landlord and Tenant—Implied Warranty of Habitability—Demise of the Traditional Doctrine of Caveat Emptor*, 20 DE PAUL L. REV. 955, 971 n.83 (1971) and citations there listed.

<sup>4</sup>2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 106-17 (2d ed. 1923).

<sup>5</sup>For general discussion on the plight of low-income tenants see Feldman, *Effective Remedies for Tenants*, 93 N.J.L.J. 481 (1970); Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 HASTINGS L.J. 287 (1970); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966).

<sup>6</sup>42 U.S.C. § 1441 (1970).

<sup>7</sup>42 U.S.C. § 1451(c) (1970).

<sup>8</sup>For an example see D.C. Housing Regs. (1955), cited in Daniels, *Judicial and Legislative Remedies For Substandard Housing: Landlord-Tenant Law Reform In The District of Columbia*, 59 GEO. L.J. 909, 913 (1971).

<sup>9</sup>The ineffectiveness of housing codes is discussed in F. GRAD, *LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS* 113 (1968); Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1255-56 (1966); Levi, *Focal Leverage Points in Problems Relating*

Due to these legislative shortcomings, several jurisdictions have adopted the view that a lease is essentially a contractual relationship with an implied warranty of habitability and fitness.<sup>10</sup> In order to protect tenants who elected to exercise these new rights, a few jurisdictions have also prohibited the landlord from terminating a tenancy where he had a legal right to do so, but where he was motivated by a desire to retaliate against the tenant.<sup>11</sup>

The District of Columbia (especially the United States Court of Appeals) has led the way with its innovative judicial response to the plight of low-income tenants. In *Edwards v. Habib*<sup>12</sup> it was held that a landlord could not oust his tenant with a suit for possession in order to punish the tenant for reporting housing code violations to governmental authorities. This decision was followed by *Brown v. Southall Realty Co.*<sup>13</sup> where the court held that a lease purporting to convey property burdened with substantial housing code violations was illegal and void. Thus, under *Brown*, the landlord is not entitled to gain possession for rent due under the invalid lease. *Javins v. First National Realty Corp.*<sup>14</sup> further expanded the rights of tenants by holding that the warranty of habitability was to be measured by the standards set out in the housing regulations and incorporated by implication into all leases, whether oral or written. *Javins* also conditioned the tenant's obligation to pay rent upon the landlord's performance of his obligations, including the im-

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to Real Property, 66 COLUM. L. REV. 275, 280 (1966); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 824 (1965).

<sup>10</sup>For recent decisions implying the warranty of habitability see *Buckner v. Azulai*, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (1967); *Gable v. Silver*, 258 So. 2d 11 (Fla. Dist. Ct. App. 1972); *Lund v. MacArthur*, 51 Hawaii 473, 462 P.2d 482 (1969); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

<sup>11</sup>The leading case is *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). Other jurisdictions have recognized the defense in the following cases: *McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971); *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501 (S.D.N.Y. 1969); *Schweiger v. Superior Court*, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970); *Dickhut v. Norton*, 45 Wis. 2d 389, 173 N.W.2d 297 (1970). On retaliatory evictions generally see *Moskovitz, Retaliatory Evictions—The Law and the Facts*, 3 CLEARINGHOUSE REV. 4 (1969); *Schoshinski, supra* note 5, at 541-52; Editorial Note, *Retaliatory Evictions and the Reporting of Housing Code Violations in the District of Columbia*, 36 GEO. WASH. L. REV. 190 (1967); Note, *Landlord and Tenant—Retaliatory Evictions*, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 193 (1967); Note, *Retaliatory Evictions—Is California Lagging Behind?*, 18 HASTINGS L.J. 700 (1967).

<sup>12</sup>397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

<sup>13</sup>237 A.2d 834 (D.C. App. 1968), *cert. denied*, 393 U.S. 1018 (1969).

<sup>14</sup>428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

plied warranty to maintain the premises in a habitable condition.

Although *Javins*, *Brown*, and *Edwards* were all landmark cases in landlord-tenant law, *Robinson v. Diamond Housing Corp.*<sup>15</sup> may well be the most significant of all. The events of the case began on May 2, 1968, when Mrs. Lena Robinson and her four children moved into a row house owned by Diamond Housing. Prior to executing the month-to-month rental agreement, Mrs. Robinson allegedly received assurance from the landlord that major repairs would shortly be made.<sup>16</sup> However, the landlord subsequently reneged on his alleged promise, and Mrs. Robinson began withholding rent. Suit was then instituted for possession. Mrs. Robinson successfully defended this action on grounds that the lease was unenforceable and void due to the existence of substantial housing code violations at the time the lease was signed.<sup>17</sup>

Undaunted by this initial set-back, Diamond instituted a second suit based on the theory that Mrs. Robinson was a trespasser since the first action had declared the lease void. The trial court dismissed the suit and the District of Columbia Court of Appeals affirmed.<sup>18</sup> The court held that Mrs. Robinson was not a trespasser, but that "having entered possession under a void and unenforceable lease [she] became a tenant at sufferance."<sup>19</sup> However, the Court added that the tenancy, "like any other tenancy at sufferance, may be terminated on thirty days' notice."<sup>20</sup> In interpreting the housing code it was further stated:

The Housing Regulations do not compel an owner of housing property to rent his property . . . . [I]f the landlord is unwilling or unable to put the property in a habitable condition, he may and should promptly terminate the tenancy and withdraw the property from the rental market. . . .<sup>21</sup>

Diamond, relying on the above dicta, instituted a third action for possession based on the statutory thirty-day notice to quit.<sup>22</sup> In support of its action, an affidavit was filed stating that Diamond was unwilling

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<sup>15</sup>No. 24,508 (D.C. Cir., Apr. 3, 1972).

<sup>16</sup>*Id.* at 4; *see id.* at 5 for a listing of the housing code violations existing at the inception of the lease.

<sup>17</sup>*Id.* at 5. Mrs. Robinson's defense was based on *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. App. 1968), *cert. denied*, 393 U.S. 1018 (1969).

<sup>18</sup>*Diamond Housing Corp. v. Robinson*, 257 A.2d 492 (D.C. App. 1969).

<sup>19</sup>*Id.* at 495.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>D.C. CODE ANN. §§ 45-902, -904 (1967).



to make the repairs necessary to comply with the housing code and furthermore that it intended to take the unit off the rental market. Mrs. Robinson based her defense on the alleged retaliatory motive of the landlord in seeking to oust her from possession of the premises.<sup>23</sup>

The trial court granted Diamond's motion for summary judgment. On appeal, the District of Columbia Court of Appeals affirmed, holding that the "retaliatory defense" of *Edwards v. Habib* was unavailable as a matter of law in such situations.<sup>24</sup>

On further appeal, the United States Court of Appeals for the District of Columbia was presented with the primary question: Would the landlord be permitted to evade the *Edwards* prohibition of retaliatory evictions?<sup>25</sup> Diamond argued that to permit the defense of retaliatory eviction at such a protracted point may mean that it would never be able to recover possession of its property. Equally important, Diamond contended that all landlords, regardless of any limitations imposed by law concerning the choice of tenants, had an absolute right to choose not to have any tenants.<sup>26</sup>

In response to these contentions, the court found that the attempted partial closing could have a "chilling effect" on the assertion of protected rights by other tenants. In brief, the court feared that such discriminatory closings would intimidate the remaining tenants into non-action.<sup>27</sup> Accordingly, due to the "inherently destructive" effect such closings may have, the court held that the jury should have been free to presume that the landlord was motivated by the desire to retaliate.<sup>28</sup> "Once [this] presumption is established, it is then up to the landlord to rebut it by demonstrating that he is motivated by some legitimate business purpose rather than by the illicit motive which would otherwise be presumed."<sup>29</sup>

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<sup>23</sup>See *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

<sup>24</sup>*Robinson v. Diamond Housing Corp.*, 267 A.2d 833, 835 (D.C. App. 1970).

<sup>25</sup>In *Cooks v. Fowler*, 437 F.2d 669, 673 (D.C. Cir. 1971), the same court had taken judicial notice of the apparently rising incidents of possessory actions based on notices to quit following closely on the heels of possessory actions based on nonpayment of rent.

<sup>26</sup>No. 24,508, at 17-18; *cf. Whetzel v. Jess Fisher Management Co.*, 282 F.2d 943, 950 (D.C. Cir. 1960) (suggesting that landlord take unit off market if unwilling or unable to repair the premises).

<sup>27</sup>No. 24,508, at 10. "There is thus a real danger that landlords may find it in their interest to sacrifice the profits derived from operation of a few units in order to intimidate the rest of their tenants." *Id.*

<sup>28</sup>*Id.* at 19.

<sup>29</sup>*Id.*; *cf. NLRB v. Brown*, 380 U.S. 278, 287 (1965); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228, 231 (1963).

In rejecting Diamond's contention that it had an absolute right to go out of business, the court relied on a passage from the labor law case of *Textile Workers Union v. Darlington Manufacturing Co.*:<sup>30</sup>

The closing of an entire business, even though discriminatory, ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place. On the other hand, a discriminatory partial closing may have repercussions on what remains of the business, affording the employer leverage for discouraging the free exercise of § 7 rights among the remaining employees . . . .<sup>31</sup>

In the *Darlington* case, Deering Milliken Corporation, which operated seventeen textile manufacturing plants in the South, decided to cease operations at its Darlington, South Carolina, plant after the union won a representation election. Following the closing of the plant, the union filed unfair labor practice charges alleging that the closure was based on an anti-union motivation.

The Labor Board, by a divided vote, upheld the charges against Deering Milliken,<sup>32</sup> but the court of appeals refused to enforce the Board's decision.<sup>33</sup> On appeal, the United States Supreme Court reversed and held that a closing in one part of a large enterprise is an unfair labor practice if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer reasonably could have foreseen that such closing would likely have that effect.<sup>34</sup>

The *Robinson* court, in reliance on *Darlington*, thus drew a distinction between a landlord's absolute right to go out of business altogether and his more limited right to discontinue part of his enterprise so as to benefit the rest. Specifically, the court held:

While the judiciary may be powerless to control landlords who no longer wish to remain landlords, it can prevent landlords from conducting their business in a way that chills the legally protected rights of tenants . . . .

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<sup>30</sup>380 U.S. 263 (1965).

<sup>31</sup>*Id.* at 274-75.

<sup>32</sup>*Darlington Mfg. Co.*, 139 N.L.R.B. 241 (1962).

<sup>33</sup>*Darlington Mfg. Co. v. NLRB*, 325 F.2d 682 (4th Cir. 1963).

<sup>34</sup>380 U.S. at 274-75.

. . . Thus we hold that the landlord's right to discontinue rental of all his units in no way justifies a partial closing designed to intimidate the remaining tenants.<sup>35</sup>

It is interesting to note that the *Robinson* decision does not completely follow the actual holding in the *Darlington* case. *Darlington* required proof of an illegal purpose on the part of the employer to "chill unionism" in any of his remaining plants;<sup>36</sup> *Robinson*, on the other hand, allowed a presumption that the intent of the landlord was to coerce his remaining tenants into non-assertion of their rights.<sup>37</sup> Hence it is arguable that the *Robinson* court overlooked an important limiting factor which the *Darlington* decision recognized: the right to go out of business even in view of the protected rights of the employees. Because of the collision of these disparate rights, the *Darlington* court refused to base its decision on a presumption of motive. Thus it is arguable that if the landlord's motive in *Robinson* was to "chill" the legally protected rights of his remaining tenants, proof of such motive was an essential condition precedent for the tenants' cause of action. In fact, based on the *Darlington* analogy, it was mandatory.<sup>38</sup>

However, the *Robinson* court resolved this apparent conflict with *Darlington* by drawing a further analogy to labor law. In particular, the court employed a labor law test used to determine when the employer's acts have constituted discrimination in violation of the National Labor Relations Act.<sup>39</sup>

The majority of labor law cases in this area have required proof of an "unlawful purpose" on the part of the employer.<sup>40</sup> However, under some circumstances, the employer's actions have been determined so "inherently destructive" of important employee rights that no proof of an anti-union motivation is needed.<sup>41</sup> Under those circumstances, the

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<sup>35</sup>No. 24,508, at 10, 23.

<sup>36</sup>380 U.S. at 274-75.

<sup>37</sup>No. 24,508, at 21.

<sup>38</sup>*Cf.* NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938) (employwer may hire replacements during a strike in order to continue his business and is not required to discharge them afterwards even if it means denying reinstatement to strikers).

<sup>39</sup>*See* NLRB v. Great Dane Trailers, 388 U.S. 26 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

<sup>40</sup>*See, e.g.,* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Edward G. Budd Mfg. Co. v. NLRB, 138 F.2d 86 (3d Cir. 1953), *cert. denied*, 321 U.S. 778 (1944). *But cf.* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

<sup>41</sup>Both the Labor Board and the United States Supreme Court have generally applied the "inherently destructive" terminology to situations where the actions of the employer substantially impinge upon the right of the employees to strike. Usually, the actions of the employer operate to

Labor Board can find an unfair labor practice even after the employer has introduced evidence that his conduct was motivated by legitimate business considerations.<sup>42</sup>

In adopting this labor law presumption of motive, the *Robinson* court appears to have promulgated the following guidelines:

(1) If the tenant produces specific evidence of the landlord's retaliatory motive, then the landlord, absent proof of any legitimate business motive, will be prohibited from evicting the tenant.<sup>43</sup>

(2) If the landlord fails to come forward with a legitimate business justification for the removal of the unit, then the jury may presume the landlord's actions to be retaliatory.<sup>44</sup>

(3) If the landlord's removal of the unit is both retaliatory and is supported by a legitimate business justification, then the jury must determine which motive was the causative factor.<sup>45</sup>

Notwithstanding this apparent resolution of the conflict with the *Darlington* case, it is important to note one further discrepancy. In particular, the labor law cases relied on for the presumption-of-motive test were all related to employer actions taken against lawful strikers which did not involve, as did *Darlington*, the decision to completely go out of business.<sup>46</sup> These two situations are distinguishable in that a decision to terminate the entire business extinguishes by implication the protected rights of the employees by precluding any remedial response by the Labor Board. In short, the employer cannot be ordered to reinstate the discharged employees in a business that no longer exists. On the other hand, the cases pertaining to discrimination against lawful strikers all involve continuing business enterprises. As a result, the reinstatement order is a realistic remedy in such situations. Thus, it is arguable that the *Robinson* court made an erroneous analogy.

Finally, after holding that the landlord could not close the rental

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discriminate between strikers and non-strikers. The leading examples are *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967) (employer refused to pay strikers vacation benefits accrued prior to the strike); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) (employer offered 20 years additional seniority both to replacements and to strikers who agreed to return to work).

<sup>42</sup>In these cases it is necessary for the Labor Board and the court to balance the significance of the employer's interest against the impingement of such interest upon the exercise of protected employee rights.

<sup>43</sup>This is basically the *Edwards v. Habib* "retaliatory defense."

<sup>44</sup>No. 24,508, at 21.

<sup>45</sup>*Id.* at 23.

<sup>46</sup>See note 41 *supra*.

unit and that his retaliatory motive could be presumed, the *Robinson* court confronted the problem of the landlord who is unwilling, but not unable, to repair code violations and is therefore prevented from either evicting the tenant or collecting rent.<sup>47</sup> Under such circumstances, it was held that the tenant is entitled to have the premises made habitable through a code enforcement action by the housing authorities or by a proper suit instituted by the tenant.<sup>48</sup>

Although the District of Columbia case law provided substantial remedies for tenants prior to *Robinson*, the effectiveness of such remedies was questionable due to the apparent statutory eviction procedure left open to the landlord.<sup>49</sup> For instance, the *Javins* opinion itself appeared to hold out to the landlord a means of eviction based on retaliation when it stated: "Our holding, of course, affects only eviction for nonpayment of rent. The landlord is free to seek eviction at the termination of the lease or on any other legal ground."<sup>50</sup> Thus *Javins* implied that the landlord could evict that same tenant who had the month before proven the existence of housing code violations by simply giving the thirty-day statutory notice to quit.

Therefore the *Robinson* decision is important in that it closes most of the "gaps" left by the prior decisions. The opinion is based on the fundamental premise that "the scope and effectiveness of tenant remedies for substandard housing will be determined by the degree of protection given tenants against retaliatory actions by the landlord."<sup>51</sup>

In response to these "gaps," the *Edwards v. Habib*<sup>52</sup> decision provided that the tenant may defeat an eviction based on a thirty-day notice

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<sup>47</sup>However, the court stated that [n]one of this is to say that the landlord may not go out of business entirely if he wishes to do so or that the jury is authorized to inspect his motives if he chooses to commit economic hara-kiri." No. 24,508, at 23.

<sup>48</sup>This right of the tenant was recognized in *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970), where the court stated, "In extending all co tract remedies for breach to the parties to a lease, we include an action for specific performance of the landlord's implied warranty of habitability." *Id.* at 1082 n.61.

<sup>49</sup>See, e.g., Note, *D. C. Housing Regulations, Article 290, Section 2902: Construed pursuant to Brown v. Southall Realty Co. and Javins v. First National Realty Corp.—A new day for the urban tenant?*, 16 How. L.J. 366, 374 (1971); Recent Cases, *Landlord and Tenant—Warranty of Habitability—Proof of Housing Code Violations Which Occur During the Term of a Lease Are Admissible When Offered as a Defense to an Eviction Action for the Nonpayment of Rent*, 39 U. CIN. L. REV. 600 (1970).

<sup>50</sup>428 F.2d at 1083 n.64.

<sup>51</sup>Daniels, *supra* note 8, at 943.

<sup>52</sup>397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969).

if the action of the landlord was improper.<sup>53</sup> However, the *Edwards* decision did not go so far as to say that the landlord's decision to take the rental unit off the market would be sufficient to raise the presumption of a retaliatory motive. Therefore, *Robinson* now has established such a presumption and represents a substantial victory for the tenant.

The use of labor law analogy, by the court was questionable, but it must be recognized that Washington, D. C., "is confronted by a serious shortage of housing . . . rentals."<sup>54</sup> Much of the city's good housing is plagued by over-use and insufficient maintenance.<sup>55</sup> In addition, a substantial percentage of the housing units in the District are substandard or overcrowded.<sup>56</sup> When these factors are combined with the express holdings of *Edwards*, *Javins*, and *Brown* (as well as the District of Columbia Landlord-Tenant Regulations patterned after them),<sup>57</sup> it appears that there was no alternative holding by which the *Robinson* court could have preserved the rights of tenants.

Any other decision would have in effect permitted retaliatory evictions. Such a course would have violated both the *Edwards* prohibition and the District of Columbia Housing Regulations. However, in another sense, the decision is extraordinary. The landlord may never be able to evict the tenant so long as he is motivated by a desire to rid himself of the tenant, even if he has a legitimate business reason for such an eviction. More importantly, the "mere desire to take the unit off the market is by itself [never] a legitimate business reason which will justify an eviction."<sup>58</sup>

Thus, in the final analysis, the *Robinson* decision appears to raise difficult questions regarding the supply, maintenance, and availability of adequate low-income housing.<sup>59</sup> Specifically, they include:

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<sup>53</sup>*Id.* at 699.

<sup>54</sup>NATIONAL CAPITAL PLANNING COMM'N, PROBLEMS OF HOUSING PEOPLE IN WASHINGTON, D.C. 53 (1966).

<sup>55</sup>*Id.* at 51; see Brief for Appellee at 38-40, *Robinson v. Diamond Housing Corp.*, No. 24,508 (D.C. Cir., Apr. 3, 1972).

<sup>56</sup>METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, HOUSING GAP QUANTIFICATION: A METHODOLOGY 34-35 (1968), cited in Brief for Appellee at 41 n.42, *Robinson v. Diamond Housing Corp.*, No. 24,508 (D.C. Cir., Apr. 3, 1972).

<sup>57</sup>D.C. Landlord-Tenant Regs. §§ 2902.1(a), (b), 2902.2, 2910 (1970), quoted in *Daniels*, *supra* note 8, at 958, 960.

<sup>58</sup>No. 24,508, at 20.

<sup>59</sup>See REPORT OF THE PRESIDENT'S COMM. ON URBAN HOUSING: A DECENT HOME 68-73 (1968).

- (1) Will it be impossible for landlords to absorb the cost of bringing their units into compliance with the housing code, thus driving additional low-cost housing off the market?<sup>60</sup>
- (2) If this decision does result in the decrease of low-cost housing, then who shall develop, own, and manage such housing?
- (3) If private enterprise is unable or unwilling to finance these massive repairs, should the government assume full responsibility for the construction, maintenance, and operation of a nationwide system of low-income housing?

It must be remembered that the only justification for this decision is that it will serve to "increase rather than decrease the stock of habitable housing in the District of Columbia."<sup>61</sup> In the event this result does not follow, the justification collapses, and there is no further policy basis for the decision.

O. MAX GARDNER III

### Medical Jurisprudence—Determining the Time of Death of the Heart Transplant Donor

Over the past twenty years medical science has made phenomenal strides in the areas of resuscitation, life support, and organ transplantation.<sup>1</sup> With the first human heart transplant<sup>2</sup> the medical and legal communities were forced to re-assess their positions on many legal and ethical issues. Because the heart is a vital and non-paired organ, a heart transplant necessarily results in the death of the donor.<sup>3</sup> Also, it is necessary to remove the heart from the transplant donor as soon as possible after respiratory failure occurs. Because the heart tissue begins to deteriorate immediately upon termination of its oxygen supply, delay

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<sup>60</sup>The Robinson court concluded that this danger is largely imagined, citing only Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971).

<sup>61</sup>No. 24,508, at 27-28.

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<sup>1</sup>See Harvard Medical School Ad Hoc Committee to Examine the Definition of Brain Death, *Report: A Definition of Irreversible Coma*, 205 J.A.M.A. 337 (1968).

<sup>2</sup>The first human heart transplant was performed on Dec. 3, 1967 by Dr. Christiaan Barnard on Louis Washkansky at Groote Schuur Hospital in Cape Town, South Africa. R. PORZIO, *THE TRANSPLANT AGE* 17 (1969).

<sup>3</sup>See, e.g., Timmes, *The Cardiac Surgeon's Viewpoint*, in *THE MOMENT OF DEATH* 14 (A. Winter ed. 1969). The living donor from whom a kidney has been removed can survive on one normal kidney.

in removal minimizes the chance of survival in the recipient.<sup>4</sup> Since the type of patient likely to be a potential donor is one who has suffered irreversible and irreparable brain damage<sup>5</sup> and whose breathing is being maintained artificially by a respirator,<sup>6</sup> the validity of the traditional criteria for determining the time of death—cessation of heart beat and respiration<sup>7</sup>—has been seriously challenged. Mindful of the current state of the arts of artificial life support and transplantation, the medical profession has quietly adopted irreversible coma or “brain death” as an alternative means of establishing the death of a human being.<sup>8</sup>

The heart can be removed from the “medically dead” donor while it continues to be oxygenated by artificially maintained respiration. However, since most state laws continue to recognize the cessation of heart beat and respiration as the legal test for determining the time of death, the stage is set for a direct confrontation between the medical and the legal criteria. A strict application of the traditional criteria would implicate as tortfeasors, or worse, surgeons who remove viable hearts from patients whose vital functions are being maintained artificially.<sup>9</sup> In *Tucker v. Lower*,<sup>10</sup> a wrongful death action<sup>11</sup> stemming from the world’s nineteenth human heart transplant, a Virginia trial court squarely faced the issue of what test should be used to determine the time of death. The

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<sup>4</sup>Editorial, *What and When Is Death?*, 204 J.A.M.A. 539 (1968).

<sup>5</sup>American College of Cardiology, *Bethesda Conference Report: Cardiac and Other Organ Transplantation in the Setting of Transplant Science as a National Effort*, 22 AM. J. CARDIOLOGY 896, 906 (1968).

<sup>6</sup>Shapiro, *Criteria for Determining that Death Has Occurred: The Philadelphia Protocol*, 16 J. FOR. MED. 1, 2-3 (1969). The author advocates turning the respirator off, declaring the patient dead, and then turning the respirator back on to preserve the organs for transplantation.

<sup>7</sup>Haney & Salas, *Problems In Anatomical Gifts*, 18 J. FOR. MED. 140, 142 (1971), demonstrate that even in the more primitive societies heartbeat and respiration are generally the criteria used to determine death.

<sup>8</sup>Curran, *Legal and Medical Death—Kansas Takes the First Step*, 284 NEW ENG. J. MED. 260 (1971). The author concludes that the still-developing field of transplantation should not be locked into strict legal requirements. See also Harvard Medical School Ad Hoc Committee to Examine the Definition of Brain Death, *supra* note 1; Timmes, *supra* note 3.

<sup>9</sup>Letter from Loren F. Taylor, M.D., J.D., Jan. 11, 1971, in 215 J.A.M.A. 296 (1971); Note, *Gifts—The Anatomical Gifts Act of North Carolina*, 6 WAKE FOREST INTRA. L. REV. 155, 161 (1969). The Deputy District Attorney for the City of Los Angeles maintains that murder is technically committed in many transplant situations because of the uncertainty of the legal definition of death. N.Y. Times, May 8, 1968, § A, at 23, col. 1.

<sup>10</sup>No. 2831 (Ct. of Law & Eq., Richmond, Va., May 25, 1972).

<sup>11</sup>The plaintiffs also alleged malpractice and what amounted to civil conspiracy. The court concluded that no *prima facie* case of malpractice had been established and the jury found for defendants on the civil conspiracy allegation.



trial judge resolved this volatile issue by allowing the jury to select the death criteria from a list provided by the court—including the complete and irreversible loss of all function of the brain. The purpose of this note<sup>12</sup> is to examine the medical and legal ramifications of this instruction.<sup>13</sup>

On May 24, 1968, Bruce O. Tucker, age 54, was brought unconscious to the emergency room of the Medical College of Virginia Hospital. He had suffered a fall, sustaining severe head injuries. After cranial surgery Tucker was placed on a respirator which kept him "mechanically alive." At this time the treating physician noted that "[h]is prognosis for recovery is nil and death is imminent." A neurologist was called upon to obtain an electroencephalogram (EEG) recording to determine the state of the patient's brain activity. A single EEG recording was made which indicated no brain activity. The neurologist found no clinical evidence of viability and no evidence of cortical activity. Based upon this examination, he was of the opinion that the patient was then dead from a neurological standpoint. At the same time the neurologist also found that the decedent's heart was beating and that his body temperature, pulse, and blood pressure were all normal for a patient in his condition. The patient showed no evidence of being able to breathe spontaneously. The respirator was doing all the breathing. The neurologist was of the opinion the decedent's condition was irreversible at the time the patient was admitted to the hospital. Later in the day of May 25, in anticipation of a transplantation of Tucker's heart and kidneys, the respirator was turned off, and the patient was pronounced dead.

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<sup>12</sup>The complex issues of euthanasia and organ donation are beyond the scope of this note and will be dealt with only as they relate to the topic of selecting criteria for determining the time of death.

<sup>13</sup>Instruction No. 7. The court instructs the jury that you shall determine the time of death in this case by using the following definition of the nature of death. Death is a cessation of life. It is the ceasing to exist. Under the law, death is not continuing but occurs at a precise time and that time must be established according to the facts of each specific case.

In determining the time of death, as aforesaid, under the facts and circumstances of this case, you may consider the following elements, none of which should necessarily be considered controlling, although you may feel under the evidence that one of [*sic*] more of these conditions are controlling: the time of the total stoppage of the circulation of the blood; the time of the total cessation of the other vital functions consequent thereto, such as respiration and pulsation; the time of complete and irreversible loss of all function of the brain; and, whether or not the aforesaid functions were spontaneous or were being maintained artificially or mechanically.

Tucker v. Lower, No. 2831 (Ct. of Law & Eq., Richmond, Va., May 25, 1972).

Until the respirator was cut off, Tucker maintained vital signs of life—that is, he maintained, with mechanical assistance, normal body temperature, pulse, blood pressure, and respiration. In addition to the evidence relating to the viable state of Tucker's organs at the time he was pronounced dead, the plaintiff presented competent evidence that Tucker could have "lived" at least one more day with the aid of a respirator if his heart and kidneys had not been removed.<sup>14</sup> The court concluded<sup>15</sup> that the plaintiff had established a *prima facie* case for recovery under the Virginia Death by Wrongful Act Statutes.<sup>16</sup>

The administrator of Tucker's estate brought a wrongful death action against the surgeons who participated in the transplant of Tucker's heart and kidneys. Plaintiff alleged that because certain vital signs were normal, the donor was alive at the time the heart and kidneys were removed. The defendants contended that because the brain of the donor had suffered total and irreversible damage, he was medically and legally dead several hours before the heart and kidneys were removed. The judge, apparently influenced by the expert testimony presented by the defendants, allowed the jury to select the *criteria* for determining the time of death. The factual issues that the jury was allowed to consider included the determination of the time of complete and irreversible loss of all function of the brain and whether the vital functions exhibited by the patient before the respirator was turned off were being maintained artificially.<sup>17</sup> The jury returned a verdict for the defendants, apparently accepting the time of complete loss of all function of the brain as a criterion for determining the time of death.<sup>18</sup>

The cases show that the legal criteria for determining the time of death have remained basically unchanged over the past century. The chief criterion for diagnosing the time of death has been the cessation of the vital functions of respiration and circulation.<sup>19</sup> However, most of

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<sup>14</sup>This summary of the facts of the case (Tucker v. Lower, No. 2831 Ct. of Law & Eq., Richmond, Va., May 25, 1972) and its final disposition were obtained from the following sources: the allied papers (pleadings, motions, etc.) of the case; an unreported memorandum opinion written by the trial judge, the Honorable A. Christian Compton; letters from Judge Compton to the writer, July 25, 1972 and Sept. 13, 1972.

<sup>15</sup>Tucker v. Lower, No. 2831 (Ct. of Law & Eq., Richmond, Va., May 25, 1972) (unreported trial court opinion at 6-7).

<sup>16</sup>VA. CODE ANN. §§ 8-633 to 646.1 (1972).

<sup>17</sup>See note 13 *supra*.

<sup>18</sup>Tucker v. Lower, No. 2831 (Ct. of Law & Eq., Richmond, Va., May 25, 1972) (judgment filed by the court).

<sup>19</sup>E.g., *In re Estate of Schmidt*, 261 Cal. App. 2d 262, —, 67 Cal. Rptr. 847, 854 (1968).

the cases in which the question has arisen have involved the issue of survivorship for purposes of inheritance, termination of joint tenancies, or determination of rights in the proceeds of insurance policies. Apparently, no court has ever applied a test for determining the time of death where the issue was the tort liability of a physician.<sup>20</sup> In the property-rights cases, the courts have looked to the medical profession for a "definition of death." In support of their application of the traditional criterion of the cessation of heart beat and respiration, the courts have relied on *Black's Law Dictionary*,<sup>21</sup> on expert medical testimony,<sup>22</sup> and on judicial notice of prevailing medical practice.<sup>23</sup> The criterion is sometimes restated as "the cessation of all vital functions,"<sup>24</sup> and occasional refinements, such as the accompanying permanent cessation of the action of the central nervous system, are sometimes added;<sup>25</sup> but, basically, the traditional criteria have remained unaltered.

In *Smith v. Smith*<sup>26</sup> the first attempt to induce a court to recognize the brain death test was made. There husband and wife received fatal injuries in the same accident, but the wife, who was in a coma due to brain injury, lived seventeen days longer than the husband. The court refused to agree that both husband and wife had died at the same time: "We take judicial notice that one breathing, though unconscious, is not dead."<sup>27</sup> In a similar California case, *In re Estate of Schmidt*,<sup>28</sup> the trial court's memorandum opinion stated that, in the opinion of the medical

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<sup>20</sup>See, e.g., 1 M. HOUTS, COURTROOM MEDICINE: DEATH § 1.03(2), at 31-32 (1971). The author notes critically the scarcity of judicial attempts, other than in property cases, to define death. See also Wasmuth, *The Concept of Death*, 30 OHIO ST. L.J. 32 (1969).

<sup>21</sup>*Smith v. Smith*, 229 Ark. 579, 586, 317 S.W.2d 275, 279 (1958); *In re Estate of Schmidt*, 261 Cal. App. 2d 262, —, 67 Cal. Rptr. 847, 854 (1968); *Thomas v. Anderson*, 96 Cal. App. 2d 371, —, 215 P.2d 478, 481-82 (1950); *Schmitt v. Pierce*, 344 S.W.2d 120, 133 (Mo. 1961). These cases applied the following definition of death from BLACK'S LAW DICTIONARY 488 (rev. 4th ed. 1968): "The cessation of life; the ceasing to exist; defined by physicians as a total stoppage of circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc."

<sup>22</sup>*Gray v. Sawyer*, 247 S.W.2d 496, 497 (Ky. 1952).

<sup>23</sup>*Vaegemast v. Hess*, 203 Minn. 207, 210, 280 N.W. 641, 643 (1938).

<sup>24</sup>*Telefilm, Inc. v. Superior Court*, 194 P.2d 542, 547 (Cal. App. 1948), *rev'd on other grounds*, 33 Cal. 2d 289, 201 P.2d 811 (1949); see *United Trust Co. v. Pyke*, 199 Kan. 1, 4, 427 P.2d 67, 71 (1967).

<sup>25</sup>*Gugel's Adm'r v. Orth's Ex'r*, 314 Ky. 591, 594, 236 S.W.2d 460, 461-62 (1950) (based upon expert medical testimony); *In re Stuerz' Estate*, 124 Neb. 149, 153, 245 N.W. 412, 414 (1932).

<sup>26</sup>229 Ark. 579, 317 S.W.2d 275 (1958).

<sup>27</sup>*Id.* at 589, 317 S.W.2d at 281.

<sup>28</sup>261 Cal. App. 2d 262, 67 Cal. Rptr. 847 (1968).

experts, death might be the inability to be resuscitated or an irreversible coma. The trial court ignored this evidence however, and used the traditional criterion as outlined in *Black's Law Dictionary*—cessation of heart beat and respiration. Appellants argued that the traditional definition was anachronistic in view of the recent medical developments relating to heart transplants, and that the trial court should have accepted the inability to be resuscitated as the definition of death. The appellate court affirmed the definition used by the trial court and stated that the definition offered by the medical experts, though interesting, would not dispose of the survivorship issue at bar because there was no evidence as to the resuscitability of both spouses.<sup>29</sup> Thus, a survey of the existing case law demonstrates that most courts apply the traditional medical criterion<sup>30</sup> and that one court would possibly be willing to apply non-traditional criteria (established by expert medical testimony) if the opportunity were properly presented.

In 1970 Kansas codified a "definition of death"<sup>31</sup> in an attempt to achieve the related goals of obtaining viable organs for transplantation and of protecting transplant surgeons from civil and criminal liability.<sup>32</sup> The statute permits use of an alternative definition of death. A

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<sup>29</sup>*Id.* at \_\_\_\_, 67 Cal. Rptr. at 854.

<sup>30</sup>*See, e.g.,* Comment, *Legal Aspects of Euthanasia*, 36 ALBANY L. REV. 674, 688 (1972).

<sup>31</sup>The text of KAN. STAT. ANN. § 77-202 (Supp. 1971) providing alternative definitions of death is as follows:

Definition of death. A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous respiratory and cardiac function and, because of the disease or condition which caused, directly or indirectly, these functions to cease, or because of the passage of time since these functions ceased, attempts at resuscitation are considered hopeless; and, in this event, death will have occurred at the time these functions ceased; or

A person will be considered medically and legally dead if, in the opinion of a physician based on ordinary standards of medical practice, there is the absence of spontaneous brain function; and if based on ordinary standards of medical practice, during reasonable attempts to either maintain or restore spontaneous circulatory or respiratory function in the absence of aforesaid brain function, it appears that further attempts at resuscitation or supportive maintenance will not succeed, death will have occurred at the time when these conditions first coincide. Death is to be pronounced before artificial means of supporting respiratory and circulatory function are terminated and before any vital organ is removed for purposes of transplantation.

These alternative definitions of death are to be utilized for all purposes in this state, including the trials of civil and criminal cases, any laws to the contrary notwithstanding.

<sup>32</sup>Letter from Taylor, *supra* note 9. Dr. Taylor is a physician and lawyer who assisted in drafting the Kansas statute.

subject is legally dead when either of the following conditions exist: respiration and cardiac function have ceased *or* spontaneous brain function is absent. Apparently, the means for determining whether either of these events has occurred are to be left to the standards of the medical profession. There are some in the medical and legal professions who do not support a legislative statement of the criteria to be used in determining the time of death, and a debate has arisen over the need for legislation such as that enacted in Kansas.<sup>33</sup> Those opposed to the statute fear that the law will stultify medical advances as more becomes known about transplantation and life-support mechanics. They would prefer to rely on the courts to determine the issue as one of fact on a case-by-case basis based on expert medical evidence.<sup>34</sup> Opposed to such a view are those who desire legislative protection for those doctors performing transplants, especially heart transplants, on patients with irreversible brain damage.<sup>35</sup> Although no cases have yet appeared interpreting the statute, it appears that the wording is flexible enough to accommodate the objectives of both camps. The statute provides an alternate "definition of death" in allowing the "absence of spontaneous brain function"<sup>36</sup> to be an indicator of death, but it does not make rigid the means by which the absence of spontaneous brain function is to be determined. The courts are required by the statute to rely upon "ordinary standards of medical practice"<sup>37</sup> in evaluating medical opinion as to the time of death and the criteria used in making the time-of-death determination. Since the Kansas statute is the first legislative definition of death, its passage is not necessarily indicative of a general acceptance by the law of non-traditional death criteria.

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<sup>33</sup>See, e.g., Curran, *supra* note 8; Kennedy, *The Kansas Statute on Death—An Appraisal*, 285 NEW ENG. J. MED. 946 (1971) (criticizing the Kansas death statute on the grounds that it will hamper medical science); Mills, *The Kansas Death Statute: Bold and Innovative*, 285 NEW ENG. J. MED. 968 (1971) (concluding that the Kansas statute will protect transplant physicians legally while allowing flexibility in death determination).

<sup>34</sup>See, e.g., Kennedy, *supra* note 33. In Note, *Human Organ Transplantation: Some Medico-Legal Pitfalls For Transplant Surgeons*, 23 U. FLA. L. REV. 134, 136 n.15 (1970) the following observation is made: "Many physicians have shown a resistance to pressing for a change in the legal definition of death, feeling that a legal enactment would necessarily be rigid and restrictive. There is sentiment that the danger of effective prosecution is remote because expert testimony not supporting the brain death criteria would be impossible to obtain."

<sup>35</sup>See, e.g., Note, 23 U. FLA. L. REV., *supra* note 34, at 156 (suggesting that society should assume through legislation some of the risk now being borne by transplant physicians).

<sup>36</sup>KAN. STAT. ANN. § 77-202 (Supp. 1971).

<sup>37</sup>*Id.*

Another statutory enactment closely related to the 1970 Kansas statute is the Uniform Anatomical Gift Act (UAGA),<sup>38</sup> adopted by more than forty states and the District of Columbia.<sup>39</sup> The UAGA is an attempt to legislate a more efficient means of obtaining organs for the purpose of transplantation.<sup>40</sup> The importance of the Act to the debate over what criterion should be used in determining the time of death lies not in what it says but in what it fails to say. The UAGA specifically omits a definition of death. The Commissioners decided that this was primarily a medical question currently in a state of flux rather than an issue for legal codification.<sup>41</sup> The Act provides simply that "[t]he time of death shall be determined by a physician who attends the donor at his death, or, if none, the physician who certifies the death."<sup>42</sup> The Kansas statute was adopted in part to complement the UAGA as enacted in Kansas by providing the definition of death that was purposely omitted from the UAGA.<sup>43</sup> The case law interpreting the provisions of the UAGA relating to the determination of the time of death is non-existent. The commentators are split along the same lines that formed when Kansas passed its statute providing for alternative "definitions of death." Those who believe that the courts should and will accept what the medical profession declares to be the criterion for determining the time of death oppose any legislation on the matter and support the omission in the UAGA.<sup>44</sup> Those desiring the security of a stated legal guideline advocate modification of the UAGA to provide for procedures

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<sup>38</sup>UNIFORM ANATOMICAL GIFT ACT, as proposed by the Commissioners on Uniform State Laws on July 30, 1968; e.g., N.C. GEN. STAT. §§ 90-220.1 to -220.11 (Supp. 1971).

<sup>39</sup>Dukeminier, *Supplying Organs for Transplantation*, 68 MICH. L. REV. 811, 817 (1970).

<sup>40</sup>The UAGA provides for designation by the donor before his death of the use to which his organs are to be put. If the deceased gave no consent prior to his death for the removal of his organs the Act lists the priority by which the next of kin can give consent after the death of the donor. UNIFORM ANATOMICAL GIFT ACT § 2(b).

<sup>41</sup>UNIFORM ANATOMICAL GIFT ACT § 7, Comment; see Smith & Smith, *Kansas and the Uniform Anatomical Gift Act*, 19 U. KAN. L. REV. 569, 574 (1971).

<sup>42</sup>UNIFORM ANATOMICAL GIFT ACT § 7(b); N.C. GEN. STAT. § 90-220.7(b) (Supp. 1971).

<sup>43</sup>Letter from Taylor, *supra* note 9.

<sup>44</sup>See, e.g., American College of Cardiology, *supra* note 5, at 908 (stating that the subject was correctly treated in the UAGA); Sommer, *Additional Thoughts On the Legal Problems of Heart Transplants*, 41 N.Y. ST. B.J. 196, 199 (1969) (definition of death must ultimately be determined by physicians); cf. Comment, *Suggested Revisions to Clarify the Uncertain Impact of Section 7 of the Uniform Anatomical Gift Act on Determination of Death*, 11 ARIZ. L. REV. 749 (1969) (predicting that the courts will allow the medical profession to use any reasonable standard in determining death).

for determining the time of death.<sup>45</sup>

An important issue common to both the debate over the need for the Kansas statute and the debate over the wisdom of omitting a definition of death from the UAGA is whether courts consider the standard for determining the time of death to be an issue of law or fact.<sup>46</sup> There are actually two standards the courts must consider: first, the criterion for determining if death has occurred, that is, the stage in the decline of life at which the medical profession declares or is allowed to declare a person dead, and, second, the clinical tests to be used in determining if the death criterion has been met.<sup>47</sup> In determining the first standard, several questions are presented. First, a decision must be reached whether to recognize, in certain circumstances, criteria other than the traditional cessation of heart beat and respiration. If the traditional criteria are outmoded, as most of the medical profession claims,<sup>48</sup> is

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<sup>45</sup>Wecht & Aranson, *Medical-Legal Ramifications of Human Tissue Transplantation*, 18 DEPAUL L. REV. 488 (1969); Comment, *Medico-Legal Problems with the Question of Death*, 5 CALIF. W.L. REV. 110, 122 (1968); Note, 6 WAKE FOREST INTRA. L. REV., *supra* note 9, at 155.

<sup>46</sup>The Ad Hoc Committee of the Harvard Medical School, which set forth clinical criteria to be used in diagnosing irreversible coma in 1968, assumed that the issue would be determined by expert medical testimony and took a stance opposed to legislation in the area, as follows:

In this report, however, we suggest that responsible medical opinion is ready to adopt new criteria for pronouncing death to have occurred in an individual sustaining irreversible coma as a result of permanent brain damage. If this position is adopted by the medical community, it can form the basis for change in the current legal concept of death. No statutory change in the law should be necessary since the law treats this question essentially as one of fact to be determined by physicians.

Harvard Medical School Ad Hoc Committee to Examine the Definition of Brain Death, *supra* note 1, at 339.

<sup>47</sup>Heretofore, as seen in the cases discussed in the text accompanying notes 19-25 *supra*, courts apparently have relied upon the medical profession for these criteria. Now that there has been a *de facto* adoption by the members of the medical profession of the brain death definition it remains to be seen whether the courts will continue to rely upon expert medical testimony in establishing a new death standard.

<sup>48</sup>"The death of a person occurs when the brain is totally and irreversibly damaged and nonfunctioning; many other tissues may still be viable and functioning." American College of Cardiology, *supra* note 5, at 908. Beecher, *After the "Definition of Irreversible Coma,"* 281 NEW ENG. J. MED. 1070 (1969), alleges that the definition of irreversible coma as set down in the *Harvard Report* of 1968 has been widely accepted. Corday, *Life-Death in Human Transplantation*, 55 A.B.A.J. 629, 631 (1969), reveals that many physicians have based their criteria for diagnosis of cerebral death on lesser considerations than suggested by the *Harvard Report* and have transplanted hearts of those still having spontaneous respiration. See also Harvard Medical School Ad Hoc Committee to Examine the Definition of Brain Death, *supra* note 1; Task Force on Death and Dying of the Institute of Society, Ethics, and the Life Sciences, *Refinements in Criteria for the Determination of Death: An Appraisal*, 221 J.A.M.A. 48 (1972) (approving of the death criteria established by the *Harvard Report* of 1968); Comment, 5 CALIF. W.L. REV., *supra* note 45, at

"brain death" or irreversible coma to be the stage in a patient's decline at which he may be declared dead even though he exhibits normal (though mechanically maintained) respiration and heart beat? Kansas has responded in the affirmative to this initial question.<sup>49</sup> Second, if a change is to be made in the legally recognized death criteria, should the change be by legislative enactment or should the courts make the change by relying upon expert medical testimony? And if the decision is made to allow the courts to make the change in criteria by relying upon medical testimony, should the court acknowledge the medical realities as a matter of law or as a matter of fact—that is, should the judge instruct the jury as to what is the standard for death-determination, or should the jury be allowed, as in *Tucker*, to decide as a matter of fact in each case what the recognized standard is to be?

However the change is effected, a decision must be made regarding the clinical means used to determine if the acknowledged point at which death legally occurs has been reached. If, as in Kansas, absence of spontaneous brain function is adopted by statute as the point at which death can be legally declared, what clinical indicators of this state are to be recognized? What clinical indicators are sufficiently reliable to make it legally permissible for a surgeon to declare an artificially respirated person dead? Some committees of the medical profession have proposed certain criteria based upon simple clinical observations.<sup>50</sup> Other members of the profession would place principal reliance on the absence of electrical brain activity as recorded by an electroencephalogram.<sup>51</sup> It is obvious that acceptable means must be developed to insure against premature transplants. Are these clinical criteria to be

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121 (present medical definition of death alleged to entail the irreversible loss of neural function); Note, 23 U. FLA. L. REV., *supra* note 34, at 137-38.

<sup>49</sup>KAN. STAT. ANN. § 77-202 (Supp. 1971); see note 31 *supra* for the full text of the statute.

<sup>50</sup>For example, the following is a brief sketch of the criteria set forth in the Report of the Harvard Medical School Ad Hoc Committee to Examine the Definition of Brain Death, *supra* note 1: (1) unresponsivity and unresponsivity to externally applied stimuli and inner need; (2) no spontaneous muscular movements or spontaneous respiration; (3) no elicitable brain reflexes; and (4) flat electroencephalogram. In addition, the report suggests that the above findings again be verified on a repeat testing at least 24 hours later, and that the existence of hypothermia and central nervous system depressants be excluded. It is also recommended that if the criteria are fulfilled the patient be declared dead before the respirator is disconnected.

<sup>51</sup>Hamlin, *Life or Death by EEG*, 190 J.A.M.A. 112-14 (1964). Recently, however, it has been concluded that a majority of neurologists have rejected the proposition that EEG determinations are sufficient as the sole basis for a determination of death. Task Force on Death and Dying of the Institute of Society, Ethics, and the Life Sciences, *supra* note 48, at 53.



required by statute? The Kansas statute makes no reference to the means by which the attending physician is to determine if there is an absence of spontaneous brain function.<sup>52</sup> Is the judge to instruct the jury on the basis of expert medical testimony, or should the jury be allowed to choose among the clinical means presented?

It would seem to be imperative, because of the legal and social consequences, that the time of death be ascertainable by the application of absolute and unchanging criteria.<sup>53</sup> Thus, it should not be within the province of the jury to determine at what stage one ceases to live. Nor should it be within the jury's power to select the technical indicators to be employed in determining if that stage was reached. These decisions are of such great social importance that they should not be left to the vagaries of jury deliberations. The multitude of problems that would arise if the jury were permitted to select the criteria for determining the time of death is obvious.<sup>54</sup>

One of the significant aspects of *Tucker* is that the judge considered the issue of what criteria were to be used in determining the time of death to be one of *fact* to be decided by the jury. In the instruction dealing with the time of death,<sup>55</sup> the jury was allowed to choose the applicable criteria from several elements provided by the court (from expert medical testimony presented). The major choice presented to the jury was between the traditional criterion on the one hand—the cessation of heart beat and respiration—and the complete and irreversible loss of all brain function on the other. This is the first case in which an American trial judge has allowed the jury to consider loss of brain function as a criterion for determining the time of death. However, even though the jury was not instructed to consider the medical testimony controlling,<sup>56</sup> the jury did adopt the brain death standard presented by expert medical testimony, and the practice of relying upon the medical profession for the standard of death was thus continued.

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<sup>52</sup>KAN. STAT. ANN. § 77-202 (Supp. 1971).

<sup>53</sup>Halley & Harvey, *Medical vs. Legal Definitions of Death*, 204 J.A.M.A. 423, 425 (1968), suggest that conflicts between the medical and legal definitions of death should be resolved through an interprofessional co-operative effort.

<sup>54</sup>The kind of problems that would result is exemplified by the possibility of having one jury declare a heart donor alive at the time of the transplantation while another jury found the same donor was dead when his heart was removed.

<sup>55</sup>Note 13 *supra*.

<sup>56</sup>*Id.*

There was no instruction to the jury as to the clinical means to be employed in determining whether the death standard, as selected by the jury, had been met.<sup>57</sup> Thus the court also allowed the jury to determine, as an issue of fact, whether the clinical tests employed by the defendants in reaching their diagnosis of brain death were sufficient to safeguard against premature transplantation. Physicians performing transplantations on patients still exhibiting mechanically maintained vital signs (heart beat and respiration) are less likely to be subject to malpractice and wrongful death liability if the medical profession's death standard is followed by the juries. The judge's instructions and the jury verdict reached thereon are consistent with the provisions of the UAGA, which leaves the determination of the time of death to the attending or certifying physician. Total reliance is placed upon the judgment of the physician. The death-criteria instruction given in *Tucker* is very similar in substance to the Kansas statute which allows "alternative definitions of death." Both allow the "brain death criteria" to be used if supporting medical evidence has been given. Also, both make no mention of the clinical tests to be applied in verifying the diagnosis of "brain death." One major difference is that the Kansas statute makes the death criteria a matter of law whereas in *Tucker* it was a matter of fact. Another difference is that the Kansas statute requires a person to be declared dead if either of the legal standards are met, whereas in *Tucker* the jury was given much greater discretion in its determination of death. Thus *Tucker* has broken the precedent established by the cases relying upon *Black's Law Dictionary* for death-determining criteria and has narrowed the gap between medical reality and legal cognizance in the area of transplant surgery.

### CONCLUSIONS

Two general conclusions may be drawn concerning the effect of *Tucker* on previous law. First, the case re-emphasizes the role of the medical profession in the determination of death. Through the jury's acceptance of the expert medical testimony, the medical profession was allowed to dictate, as a matter of fact, when death occurs and by what clinical tests this determination is to be made. Although the law has little expertise in the field of clinical diagnostics, as the guardian of

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<sup>57</sup>*Id.*

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.<sup>58</sup>

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*,<sup>59</sup> 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.<sup>60</sup> 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.<sup>1</sup> Over half of these fatalities involve alcohol-

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<sup>58</sup>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.

<sup>59</sup>Harvard Medical School Ad Hoc Committee to Examine the Definition of Brain Death, *supra* note 1.

<sup>60</sup>See authorities cited note 48, *supra*.

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<sup>1</sup>McDowell, *How Phoenix Gets Drunks Off the Road*, *READER'S DIGEST*, Feb. 1972, at 52.

related accidents.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> In Nassau County, New York, a twenty-four hour telephone service is maintained so drunks can call for transportation.<sup>5</sup> The Idaho state legislature has cracked down by setting a mandatory ten-day sentence on all drivers convicted of driving under the influence.<sup>6</sup> 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.<sup>7</sup> 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

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

<sup>2</sup>*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).

<sup>3</sup>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.*

<sup>4</sup>TIME, Mar. 6, 1972, at 55.

<sup>5</sup>McDowell, *supra* note 1, at 54.

<sup>6</sup>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. . . ."

<sup>7</sup>State v. McCoy, 94 Idaho 236, \_\_\_, 486 P.2d 247, 248 (1971).

court's inherent right to suspend sentences.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

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

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<sup>8</sup>*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.

<sup>9</sup>*Id.* at —, 486 P.2d at 249-52.

<sup>10</sup>*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).

<sup>11</sup>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.<sup>12</sup>

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*<sup>13</sup> 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.<sup>14</sup> The courts of a handful of states, including New York,<sup>15</sup> New Jersey,<sup>16</sup> North Caro-

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<sup>124</sup> 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.

<sup>1242</sup> 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).

<sup>14</sup>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).

<sup>15</sup>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).

<sup>16</sup>"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 various 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. Gehrman v. Osborne*, 79 N.J. Eq. 430, 441, 82 A. 424, 428 (Ch. 1911). The court held that, if the defendant

lina,<sup>17</sup> Michigan,<sup>18</sup> Ohio<sup>19</sup> and now Idaho,<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup>

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

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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."

<sup>17</sup>*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."

<sup>18</sup>*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."

<sup>19</sup>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."

<sup>20</sup>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. . . ."

<sup>21</sup>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.

<sup>22</sup>94 Idaho at \_\_\_\_, 486 P.2d at 249.

<sup>23</sup>*Id.* at \_\_\_\_, 486 P.2d at 251.

<sup>24</sup>IDAHO CONST. art. 5, § 2.

<sup>25</sup>*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."<sup>26</sup> 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,<sup>27</sup> the power of the attorney general to enter *nolle prosequi* on an indictment,<sup>28</sup> and the power to run sentences concurrently<sup>29</sup> 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.<sup>30</sup> However, in practice the courts usually suspend sentence only for minor offenses, reserving more serious crimes for the governor's pardon.<sup>31</sup> 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

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<sup>26</sup>IDAHO CONST. art. 5, § 13. For a very similar provision see N.C. CONST. art. IV, § 1.

<sup>27</sup>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."

<sup>28</sup>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).

<sup>29</sup>"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).

<sup>30</sup>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.

<sup>31</sup>2 N.C.L. REV. 50, 52 (1923).



punishment and perhaps even the defendant's guilt.<sup>32</sup> Under a suspended sentence with the condition of defendant's good behavior, the conviction and the civil disabilities remain;<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> Certainly, the aims of the Idaho legislature were meritorious in seeking to deter intoxicated drivers by imposing a mandatory ten-day sentence.<sup>36</sup> 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

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<sup>32</sup>30 HARV. L. REV. 369, 371 (1917).

<sup>33</sup>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).

<sup>34</sup>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).

<sup>35</sup>ALI-ABA JOINT COMM. ON CONTINUING LEGAL EDUC., *supra* note 14, at 61.

<sup>36</sup>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.<sup>37</sup>

However, the court noted that the specific wording of the statute in effect deprived the court, an equal branch of government, of adequately performing its function—the administration of justice.<sup>38</sup>

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.<sup>39</sup> The power to interpret statutes and to declare acts unconstitutional is in effect the ultimate veto power.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> Moreover, many leading authorities consider complete separation of powers too impractical for the efficient day-to-day operation of government.<sup>43</sup> 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.<sup>44</sup>

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<sup>37</sup>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.

<sup>38</sup>94 Idaho at \_\_\_\_, 486 P.2d at 251-52.

<sup>39</sup>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.

<sup>40</sup>Fairlie, *The Separation of Powers*, 21 MICH. L. REV. 393, 403 (1923).

<sup>41</sup>Pound, *The Judicial Power*, 35 HARV. L. REV. 787, 791 (1922).

<sup>42</sup>*Cf. id.* at 792.

<sup>43</sup>These are extensively noted in Fairlie, *supra* note 40, at 405-31.

<sup>44</sup>*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."<sup>45</sup> Considering the large number of offenders he deals with, a judge familiar with the aims of penology is a professional sentencer.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup>

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,<sup>49</sup> the North Carolina Supreme Court has long upheld the suspended sentence as valid.<sup>50</sup> 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.<sup>51</sup> Also, the practice has been expressly

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<sup>45</sup>Williams v. Illinois, 399 U.S. 235, 243 (1970).

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

<sup>47</sup>See ALI-ABA JOINT COMM. ON CONTINUING LEGAL EDUC., *supra* note 14, at 61-62.

<sup>48</sup>94 Idaho at \_\_\_, 486 P.2d at 251.

<sup>49</sup>E.g., State v. Bennett, 20 N.C. 170 (1838).

<sup>50</sup>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).

<sup>51</sup>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.<sup>52</sup> 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.<sup>53</sup> The reasoning here is that suspending the imposition of sentence is in the defendant's own behalf, and if he fails to object, he tacitly agrees to the conditions of the suspension.<sup>54</sup>

One reasonable limitation recognized by North Carolina statute and case law is that the terms of suspension can run no longer than five years.<sup>55</sup> The most common condition is suspension upon good behavior or conduct conforming to the law.<sup>56</sup> 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.”<sup>57</sup> 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.<sup>58</sup>

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.<sup>59</sup>

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<sup>52</sup>N.C. GEN. STAT. § 15-197 (1965).

<sup>53</sup>*State v. Griffin*, 246 N.C. 680, 682, 100 S.E.2d 49, 51 (1957).

<sup>54</sup>*State v. Miller*, 225 N.C. 213, 215, 34 S.E.2d 143, 145 (1945).

<sup>55</sup>N.C. GEN. STAT. § 15-200 (Supp. 1971).

<sup>56</sup>Note, 31 N.C.L. REV., *supra* note 51, at 200.

<sup>57</sup>N.C. GEN. STAT. § 15-199 (1965).

<sup>58</sup>*State v. Simmington*, 235 N.C. 612, 614, 70 S.E.2d 842, 844 (1952).

<sup>59</sup>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.<sup>60</sup> On the contrary, if the power to suspend sentence upon good behavior or to place the defendant on probation 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."<sup>61</sup>

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<sup>60</sup>J. WAITE, *supra* note 14, at 95-105.

<sup>61</sup>94 Idaho at \_\_\_\_, 486 P.2d at 251.