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Lewis F. Powell, Jr.

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A LAWYER LOOKS AT CIVIL DISOBEDIENCE*

LEWIS F. POWELL, JR.[†]

We have witnessed, over the past decade, the rise of a heresy which could weaken the foundations of our system of government, and make impossible the existence of the human freedoms it strives to protect. This is known as the doctrine of civil disobedience. Its basic approach is that the ancient justification for revolt against tyranny can somehow be transmuted into a rule for day to day life under a system of government under law. Putting the old wine of revolution into the new wineskin of constitutional government, it argues appealingly that: some laws are "just" and others "unjust"; that each person may determine for himself, in accordance with his own conscience, which laws are "unjust"; and that each is free to violate the "unjust" laws—provided he does so peacefully.

The doctrine of civil disobedience has been associated with the civil rights movement, and for this reason it has gained a wide and respectable following. One would have supposed that lawyers, trained in logic, and the guardians of our legal system, would have rallied promptly to denounce civil disobedience as fundamentally inconsistent with the rule of law. Yet most lawyers have remained silent, and of the few who have expressed opinions a surprising number have written in justification.¹

This remarkable surface consensus—among social scientists; theologians, politicians and even many lawyers—is understandable only in the context of the deep emotions engendered by the civil rights movement. But lawyers, of all people, must retain a wholesome degree of rational detachment in face of emotional causes, however appealing. Our profession has a heavy responsibility for the preservation of the

* This is the John Randolph Tucker Lecture delivered at the School of Law, Washington and Lee University, on April 16, 1966.

† B.S. 1929, LL.B. 1931, Washington and Lee University, LL.M. 1932, Harvard University. President, American Bar Association 1964-65.

¹See, for example, Black, *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 Texas L. Rev. 492 (1965); Wofford,

rule of law.² It is our duty to examine critically and test against proven principles any doctrine affecting the law which is as far reaching as civil disobedience.³

Most of what has been said and written on this subject has related to civil rights. This has inevitably clouded perspective and prevented dispassionate analysis. If it were possible I would like, for the purpose of this paper, to disassociate civil disobedience from civil rights and consider the doctrine solely on its merits. Despite the fashion to the contrary, one may understand and condemn—as I certainly do—the injustices which initially provoked civil disobedience without condoning or approving a concept which in the end could produce even greater injustice.

It is true that the Negro has had, until recent years, little reason to respect the law. The entire legal process, from the police and sheriff to the citizens who serve on juries, has too often applied a double standard of justice. Even some of the courts at lower levels have failed to administer equal justice. Although by no means confined to the southern states, these conditions—because of the history, economic and social structure of that region, and its population mix—have been a way of life in some parts of the South. Many lawyers, conforming to the mores of their communities, have generally tolerated all of this, often with little consciousness of their duty as officers of the courts. And when lawyers have been needed to represent defendants in civil rights cases, far too few have responded.

There were also the discriminatory state and local laws, the denial of voting rights, and the absence of economic and educational oppor-

The Law and Civil Disobedience, The Presbyterian Outlook, Sept. 26, 1960, p. 5; Bickel, *After a Civil Rights Act*, The New Republic, May 9, 1964, p. 11; O'Connell, *Is Civil Disobedience to be Regarded as a Paralegal Right*, Trial, December/January 1965, p. 11; Dean C. Willard Heckel of Rutgers Law School, as quoted by Gunter David in "Defiance of Law: Pros and Cons," Newark Sunday Times, March 13, 1966.

²Former Justice Charles E. Whittaker has spoken out strongly against civil disobedience. See Whittaker, *Law and Order*, address delivered before and published by Tenn. Bar Association, June 17, 1965; and Whittaker, *Will Civil Disobedience Lead to Chaos in Our Society*, Trial, December/January 1965, p. 10. For other articles by nationally known lawyers critical of civil disobedience see Leibman, *Civil Disobedience: A Threat to Our Law Society*, Vital Speeches, Oct. 1, 1964, Vol. 30, No. 24, at 766; Waldman, *Civil Rights-Yes; Civil Disobedience-No*, 37 N.Y. State Bar Journal 331 (1965); and Fuchsberg, Editorial in Trial, December/January 1965, p. 8.

³Burke Marshall has done this incisively as to the relationship of civil disobedience to the civil rights movement. Marshall, *The Protest Movement and the Law*, 51 Va. L. Rev. 785 (1965).

tunity for the Negro. Finally, there was the small and depraved minority which resorted to physical violence and intimidation.

These conditions, which have sullied our proud boast of equal justice under law, set the stage for the civil rights movement. Engrafted thereon—both as a slogan and a justification of tactics—was the concept of civil disobedience. Articulated by Martin Luther King in his much publicized Letter from a Birmingham Jail, this quickly gained nationwide attention and support outside of the South. It met the needs of intellectuals and theologians for a moral and philosophical justification of conduct which, by all previous standards, was often lawless and indefensible. Civil disobedience was thus enthroned as a doctrine, proclaimed from pulpits⁴ and acclaimed in many of the media.

While these conditions go far to explain the wide acceptance of civil disobedience, they shed no light upon its soundness as a doctrine, the legality of its tactics or its significance for the future. Let us now examine these questions, both as they relate to the civil rights movement and to civil disobedience as a concept of general applicability.

THE HISTORICAL ANTECEDENTS

It may be asked at the outset whether the doctrine has, as it is claimed, respectable historical antecedents. Dr. King and others have cited an imaginative list of precedents ranging from revolt against Nebuchadnezzar to the Boston Tea Party and the American Revolution.

There have been many situations in history where the tyranny of a regime has justified revolution. Indeed, we need look only to the contemporary world for numerous examples of totalitarian rule—whether Fascist style or Communist—where fundamental human rights do not exist. As these rights cannot be asserted in the courts, nor reform accomplished through political institutions, revolution is often the only recourse. The chance of success may be remote—as the Freedom Fighters found in Hungary—but few would deny the moral right of a people to overthrow tyrannical rule where no other means of redress are available. The American colonists were in that position,

⁴"Nearly every Protestant denomination has officially endorsed non-violent direct action for racial equality, and the National Council of Churches has engaged in a series of projects to aid the movement." Miller, *Nonviolence in the Racial Crisis*, The Christian Century, July 22, 1964, p. 927.

and the product of their courage is our present system of government.

But the irrelevance of this type of revolution as a precedent or moral justification for civil disobedience must be apparent, even to most of those who rely on it. There is no parallel situation in America today where, despite some conditions of injustice, wrongs can be and ultimately are redressed in the courts, the legislatures and through other established political institutions. It must be remembered that revolution, conceptually and in fact, is outside of and designed to supplant the existing governmental system. Only the most reckless extremists would wish, by the tactics of revolution, to weaken or destroy our representative democracy to meet their personal views of immediacy.

Henry David Thoreau and Gandhi are relied upon as the modern inspiration and authority for civil disobedience. One may wonder how many of those who cite Thoreau have actually read him. His basic premise was "that government is best which governs not at all," and he argued for a utopia in which there would be no government. Thoreau did indeed assert that each man should determine which laws were just and obey only those so classified. He said:

It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have . . . is to do at any time what I think is right.

He was opposed to slavery and to the war against Mexico. He refused to pay taxes, and spent one night in jail. I suppose we all find a certain enchantment in the idea of paying no taxes where one disagrees with the government.⁵ But however appealing this may be, Thoreau's political philosophy is simply a doctrine of anarchy.⁶

Nor is Gandhi's heroic struggle for India's independence an intellectually honest precedent for civil disobedience in America today. India was a colony, and Gandhi was forced to use techniques of disobedience as democratic processes and lawful remedies were wholly unavailable.

American precedents loosely invoked as justification for civil disobedience include Shay's Rebellion, the Whiskey Insurrection, evasion of the Fugitive Slave Law, and the civil disorders in our labor move-

⁵Some of those who oppose American policy in Vietnam, including scholars who hold research grants from the government, are refusing to pay their federal income taxes. See editorial comment, *Richmond Times-Dispatch*, April 1966.

⁶See *One Hundred Years Ago, American Writing of 1848*, p. 2 (Wood ed. 1948).

ment. These may prove that we have had episodic disobedience of law and even some violence in our past. But they fall far short of any body of genuine authority for a doctrine which affirms the right of every man in a representative democracy to choose which laws he will obey.

THE NATURAL LAW CONCEPT

The philosophical justification of civil disobedience is even less impressive to a lawyer than the miscellany of precedents cited in its behalf. In essence, it is that there is a higher law than man-made law, namely, the law of God or of nature. An "unjust law" is one that is "out of harmony" with morality or God's law.⁷ Or as one writer has put it, an act of civil disobedience is "an affirmation of a higher law of God or humanity."⁸ This resurrects the jurisprudence of natural law,⁹ and it also has undoubted appeal to many theologians.

But where does this philosophy leave us in a complex modern society governed by the rule of law? As someone has said "one man's natural law is all too often another man's poison." There is rarely a wide consensus, much less unanimity, as to which man-made laws are in fact just and fair to all concerned. This diversity becomes chaotic when we enter the subjective realms of morality, God's law and natural law.

The segregation issue itself provides a striking example of where the natural law concept leads us. Senator Eastland is quoted as asking: "Is not the segregated way of life a better life? Is not that way the law of nature?"¹⁰ Indeed, it is this view—deemed by thousands of Southerners to be God's or nature's law—that provided the justification for "massive resistance" to the Court's decision in *Brown v. Board of Education*.¹¹

⁷King, *Letter from Birmingham Jail*. The Rev. Adam Clayton Powell, another theologian who frequently invokes the laws of God and morality, is reported recently to have reaffirmed that: "Black people must continue to defy the laws of man when such laws conflict with the laws of God." *Richmond News Leader*, March 30, 1966.

⁸Robert J. O'Connell, *Is Civil Disobedience to be Regarded as a Paralegal Right?*, *Trial*, December/January, 1965, p. 11, 13.

⁹As Prof. Cohen, writing sympathetically in *The Nation*, has said: "It [natural law] has its roots deep in the history of Western thought—in Cicero and Aquinas and Hooker and Grotius and Locke, in Jefferson and a host of others who have sought to justify conduct by virtue of its harmony with some antecedently established superhuman moral law, usually divine." Cohen, *The Essence and Ethics of Civil Disobedience*, *The Nation*, March 16, 1964, pp. 257, 260.

¹⁰See Harris Wofford, Jr., *The Law and Civil Disobedience*, *Presbyterian Outlook*, Sept. 26, 1960, p. 5.

¹¹347 U.S. 483 (1954).

As has been observed:

If the decision to break the law really turns on individual conscience, it is hard to see in law how Dr. King is any better off than former Governor Ross Barnett of Mississippi, who also believed deeply in his cause and was willing to go to jail.¹²

Whatever may be said for the idealism of a view that permits each man to apply his own predilection as to a higher natural or moral law, it affords no basis for a system of organized society.

THE RECORD IN THE COURTS

The first example of disobedience relating to civil rights may have been set by the Southern legislatures and officials who attempted to disobey or evade court-decreed integration of schools. These decrees were earnestly believed by many in the South to be unjust and contrary to established constitutional principles. It was therefore argued that massive, but peaceful, resistance to desegregation orders was a proper form of protest. Indeed, resolutions of nullification or interposition, in varying forms, were adopted in a number of Southern states.¹³ But there was neither popular support at the national level nor legal justification for this form of civil disobedience, and it was—as it should have been—struck down by the courts.¹⁴

The next phase of the disobedience movement, this time against segregation in the South, was sheltered in many of its aspects by the First and Fourteenth Amendments, and it also attracted—for the reasons indicated above—widespread public and political support. It nevertheless resulted in a flood of arrests and litigation. Most of this occurred prior to enactment of the Civil Rights Act of 1964, and—broadly speaking—two types of cases reached the Supreme Court: (i) sit-ins in segregated facilities, testing the validity of state and local segregation and anti-trespass laws; and (ii) demonstrations, resulting in arrests under “breach of peace” laws.

¹²Marshall, *supra* note 3, at 800. King, not surprisingly, thinks there should be a different rule for the “segregationists” whose concept of moral law he brands as “uncivil disobedience” and as “lawlessness.” King, Address, The Association of the Bar of the City of New York, April 21, 1965, pp. 15, 21.

¹³Ala. H.J.R. 18, Act 42, 1956, Spec. Sess. at 70; Fla. S. Con. Res. 17-20, Acts 1956, Spec. Sess. at 401, H.R. Con. Res. 174, Acts 1957, at 1217; Ga. H.R. 185, Laws 1956, at 642; La. Rev. Stat. Ann. § 49:801-10 (Supp. 1964); S.C.J. Res. 914, Acts 1956, 49 S.C. Stat. 2172; Tenn. H. Res. 1, 9, Acts 1957, at 1437, 1449; and Va. S.J. Res. 3, Acts 1956, at 1213.

¹⁴*Cooper v. Aaron*, 358 U.S. 1 (1958); *Buck v. Orleans Parish School Bd.*, 188 F. Supp. 916, 922-27 (E.D. La. 1960).

In all of these cases the Court reversed the convictions under state or local laws.¹⁵ These results represent a striking vindication of some of the tactics associated with disobedience. But the Court has been careful, even in decisions which have profoundly disturbed dissenting Justices, to indicate limitations on these tactics, and certainly there has been no endorsement of civil disobedience as a right or doctrine.

Indeed, Burke Marshall has perceptively suggested that the "theory of civil disobedience [is] wholly inapplicable to the efforts of the protest movement to overturn the segregation laws and practices of the South."¹⁶ There was, of course, disobedience of state and local laws. But Marshall points out that under our federal system the Constitution is the controlling law, and that these tactics were prompted by the failure of many local law enforcement officers to protect constitutional rights, and to recognize the Supreme Court as the ultimate interpreter of the Constitution. He further notes that the action was usually taken only after advice of counsel that the local laws were constitutionally invalid.

Thus, Marshall concludes that, in the sit-in and demonstration cases which reached the Supreme Court, there was "nothing illegal in an ultimate sense;" the conduct in question was "under color of law—federal law—rather than in disobedience of it."¹⁷

Two decisions of the Court, each decided by 5 to 4 margins, merit special attention. In *Hamm v. City of Rock Hill*,¹⁸ the majority held that the Civil Rights Act of 1964 abated convictions of sit-in demonstrators in an eating establishment covered by the Act.¹⁹ The state

¹⁵See *Brown v. Louisiana*, 383 U.S. 131 (1966); *Blow v. North Carolina*, 379 U.S. 684 (1965); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965); *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964); *Fox v. North Carolina*, 378 U.S. 587 (1964); *Mitchell v. City of Charleston*, 378 U.S. 551 (1964); *Williams v. North Carolina*, 378 U.S. 548 (1964); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Wright v. Georgia*, 373 U.S. 284 (1963); *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

¹⁶Marshall, *supra* note 3, at 794-98.

¹⁷It is evident that Marshall believes the civil rights leaders unnecessarily invoked the doctrine of civil disobedience: "Dr. King takes on an argument he need not take on, and defends a position he need not defend, when he relies on his conscience to determine which laws are just and which are not." Marshall, *supra* note 3, at 796.

¹⁸379 U.S. 306 (1964).

¹⁹Indeed, in its broadly ranging opinion, the Court construed the Act as abating

had argued that the defendants should have used the Act's exclusive legal remedies to challenge the segregation rather than resort to self-help or "extra legal" means such as sit-ins. In denying validity to this argument, the majority held that

although . . . the law generally condemns self-help, the language of § 203 (c) supports a conclusion that nonforcible attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution. . . .²⁰

Dissenting Justices took special exception to this holding, with Mr. Justice White doubting that Congress had intended to authorize "massive disobedience to the law,"²¹ and Mr. Justice Black thinking that this interpretation invited persons to take the law into their own hands.²²

The majority opinion in *Hamm* does indeed go far toward sanctioning certain disobedience tactics, rather than resort to prescribed legal means. This, it seems to me, is an unnecessary and regrettable interpretation of the Civil Rights Act. But it is important to remember that this sanction is limited to peaceful (e.g., "non-forcible") action in the exercise of rights expressly conferred by the public accommodations section of the Act. There was no blanket approval of sit-ins either generally or even to implement rights under other provisions of the Act.

The second Supreme Court decision of special interest is *Brown v. Louisiana*,²³ in which convictions for sit-ins at a public library were reversed. The majority opinion could have disposed of the case on its finding that the evidence failed to show a violation of the state breach of peace statute, but it went on to assert broadly that freedoms protected by the First and Fourteenth Amendments include the right to protest segregation policies in a "peaceful and orderly manner . . . in a place where the protestant has every right to be."²⁴

Mr. Justice Black, joined in dissent by three other justices,²⁵ con-

trespass convictions, whether before or after passage of the Act, in both federal and state courts. *Id.* at 315.

²⁰*Supra* note 18, at 311.

²¹*Supra* note 18, at 328. Dissenters were Justices Black, Clark, Harlan, and White.

²²*Supra* note 18, at 318.

²³383 U.S. 131 (1966). The Court's prevailing opinion by Mr. Justice Fortas, was concurred in by the Chief Justice and Mr. Justice Douglas. Justices Brennan and White concurred in the result but on different grounds.

²⁴*Id.* at 142.

²⁵Justices Harlan, Clark, and Stewart. It is interesting to note that Mr. Justice

strued the majority opinion as establishing "a completely new constitutional doctrine," and as holding that:

[T]he Constitution, the First and the Fourteenth Amendments, requires the custodians and supervisors of the public libraries in this country to stand helplessly by while protesting groups advocating one cause or another, stage "sit-ins" or "stand-ups" to dramatize their particular views on particular issues. And it should be remembered that if one group can take over libraries for one cause, other groups will assert the right to do so for causes which, while wholly legal, may not be so appealing to this Court. The States are thus paralyzed with reference to control of their libraries for library purposes, and I suppose that inevitably the next step will be to paralyze the schools. Efforts to this effect have already been made all over the country.²⁶

The minority and majority opinions in *Brown* differed sharply as to the facts, and particularly as to whether there was racial discrimination by this library. It is therefore not clear to what extent this difference influenced the respective views. The four dissenters found no evidence of racial discrimination by this library or against the particular demonstrators.²⁷ The thrust of the minority view seems to be that libraries (and schools), of all places, need protection from this type of interference even where segregation exists. The majority, however, considered this to be a segregated library, and another example of racial discrimination in Louisiana, against which the First Amendment rights may be "peacefully" used—whether in a library or elsewhere.

If the dissenting opinion correctly construes the decision of the Court, *Brown* does introduce into our law "for the first time in history . . . a startling new constitutional doctrine."²⁸ This would mean that any individual or group could exercise the rights of free speech and assembly, in behalf of any cause, by sit-ins in libraries and other public buildings, the only limitation being that they must be peaceful. Those who oppose American policy in Vietnam could thus demonstrate at will in every library in the country. So also could the Com-

Stewart was with the majority in *Hamm* and Mr. Justice White, who dissented in *Hamm*, joined the majority in this case.

²⁶*Supra* note 23, at 165.

²⁷"[T]here simply was no racial discrimination practiced in this case." Mr. Justice Black dissenting, *supra* note 23, at 160.

²⁸Dissenting opinion, *Brown v. Louisiana*, *supra* note 23, at 166. Mr. Justice Black felt so strongly about the "startling (new) doctrine" that he supplemented his written opinion by a verbal statement from the bench denouncing the threat to "public buildings such as libraries, schoolhouses, fire departments, courthouses and executive mansions." N.Y. Times, Feb. 24, 1966.

munist Party and the American Nazi Party, as the First Amendment protects the rights of the unpopular as well as the popular.

It is difficult to believe that the Court's opinion went so far. As recently as *Cox v. Louisiana*,²⁹ a sharp distinction was drawn between "pure speech" and attempts to communicate ideas by conduct:

We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.³⁰

And in the second *Cox* case, although the conviction for breach of peace was reversed, Mr. Justice Goldberg warned that the Court would not sanction

riotous conduct in any form or demonstrations, however peaceful their conduct or commendable their motives, which conflict with properly drawn statutes and ordinances designed to promote law and order, protect the community against disorder, regulate traffic, safeguard legitimate interests in private and public property, or protect the administration of justice and other essential governmental functions.

. . . .

There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations.³¹

In view of these statements, there seems little doubt that the Court would sustain the nondiscriminatory enforcement of a properly drawn statute regulating conduct and prohibiting sit-ins or other demonstrations in libraries. In short, the issue of racial discrimination (hence denial of equal protection) was probably decisive in *Brown v. Louisiana*.

But even this rationalization leaves *Brown* as an unwelcome and disturbing precedent. One would have hoped that libraries would be protected from the disruption of all disobedience tactics, including those directed at racial discrimination. And as pointed out by Mr. Justice Black, if libraries are not immune from this type of intrusion

²⁹379 U.S. 536 (1965).

³⁰*Id.* at 555. The Court also said: "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Id.* at 555.

³¹*Cox v. Louisiana*, *supra* note 29, at 574 (Black, J., concurring).

we can now expect similar conduct in schools, museums and other public buildings. It would have been wiser public policy, and more consonant with the rule of law, to require resort to the courts rather than self-help where public facilities of this character are involved in racial controversy.

What then can be said, in view of these decisions, as to the Supreme Court's position on civil disobedience?³² There has been no case requiring the Court to accept or reject, or even to discuss, disobedience as a "doctrine" or as a "right." And here I use the term civil disobedience as Dr. King and those who follow him use it: namely, as the *right*, under principles of natural or moral law, to determine which laws are just and to disobey unjust laws provided the disobedience is open and peaceable. If and when such a case reaches the Court, rejection of a doctrine so incompatible with an ordered society seems certain. Even the ebullient Dr. King has recognized that his theory is not "legal."³³

But there is a distinction, often overlooked or blurred, between the doctrine of civil disobedience and the tactics associated with it. As noted above, some of these tactics have been approved quite specifically by the Court. The First and Fourteenth Amendments have been held to protect certain sit-ins and public demonstrations. And at least a qualified sanction has been given certain sit-ins as a means of asserting rights specified by the Civil Rights Act.

The Court has, however, carefully noted certain limitations. Emphasis has been placed on orderly or peaceful conduct and violence has been condemned. The interests of the states and localities to regulate use of public thoroughfares, to protect their judicial process and to assure public order, have all been recognized. Yet the hard fact remains that in every case reaching the Court for decision, the convictions below were reversed—and the disobedience tactics thereby sanctioned.³⁴

³²See note, 16 W. Res. L. Rev. 711 (1965), for an excellent analysis of the relevant Supreme Court cases prior to *Brown v. Louisiana*, *supra* note 23.

³³"Civil disobedience can never be legal. . . . In fact, civil disobedience means that it is not legal." Martin Luther King, Address before the Association of the Bar of the City of New York, April 21, 1965, p. 21. But Prof. Harrop A. Freeman of the Cornell Law School is so enthusiastic about this "new moral-political force" he argues it should be recognized as a "legal right." Freeman, *Civil Disobedience*, published by the Center for the Study of Democratic Institutions, 1966, pp. 2, 10.

³⁴Three remarkable district court decisions by Judge Frank Johnson, one sustaining and two others rejecting civil disobedience, deserve the most careful study. These afford helpful guidelines in determining the limitations of disobedience tactics. When read together they are both a ringing reaffirmation of

ESCALATION AND PROLIFERATION

On another occasion I commented that the frightening thing about civil disobedience is that its use and techniques tend inevitably to escalate.³⁵ If this is a justifiable concern, it is a most serious one. Let us examine—briefly as we must—the record.

NOT CONFINED TO "UNJUST" LAWS

Most of the court cases have involved direct disobedience of state or local laws deemed to be unjust. Sit-ins in public accommodations have been aimed at laws providing for segregated facilities or the anti-trespass laws which implemented segregation. Less direct, but nevertheless related to laws deemed to be unjust, have been the street demonstrations in southern communities against denial of voting rights.

But as the use of disobedience tactics has expanded, the relationship between the act of protest and the law protested has become increasingly attenuated.³⁶ For example, when James Farmer and other CORE workers were arrested for lie-downs at the World's Fair in New York, the breach of the peace law they violated was not questioned. They were simply using disobedience techniques, as Farmer is quoted as saying, to dramatize "the contrast between the glittering world of fantasy and the real world of brutality, bigotry and poverty."³⁷ If valid breach of peace and trespass laws may be violated at will to protest these age old infirmities of mankind, rather than seeking to ameliorate them by lawful and democratic processes, there would soon be little left of law and order.³⁸

Another example of indirect coercion, involving organized violation of admittedly valid and just laws, is the school boycott used in New York and elsewhere by Negroes to protest failure to accelerate integration and by whites to protest busing of children from neighborhood schools. Whether the protest was for or against integration, the

First and Fourteenth Amendment rights and a blunt denial of any right or privilege to engage in civil disobedience per se, whether peaceful or not. *Forman v. City of Montgomery*, 245 F. Supp. 17 (M.D. Ala. 1965); *Johnson v. City of Montgomery*, 245 F. Supp. 25 (M.D. Ala. 1965); *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965).

³⁵Powell, *The State of the Legal Profession*, 51 A.B.A.J. 821, 827 (1965).

³⁶See Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, Commentary, February 1965, p. 25.

³⁷See Bickel, *After a Civil Rights Act*, *The New Republic*, May 9, 1964, p. 14.

³⁸Burke Marshall has commented upon the inappropriateness of "direct action" [e.g., sit-ins and demonstrations] where the problems are poverty, health, and education. These can only be dealt with by "long range political action." Marshall, *supra* note 3, at 801, 802.

compulsory attendance laws were wilfully and extensively violated to the detriment of many thousands of innocent children.³⁹

NOT CONFINED TO SOUTH

In its relatively short life civil disobedience has become encrusted with a number of myths. One of the more persistent is that it is a doctrine confined, in its conception and application, to conditions in the South.

When the point is made that grievances should be remedied through the ballot box or in the courts rather than in the streets the answer given is that these democratic and orderly means are not available in the South. Unfortunately, as I have indicated earlier, this was too often the situation in certain areas—but by no means all—of the South.⁴⁰ It is also fair to say that redress has always been available in the federal courts and in far more state courts than most critics recognize. Moreover, legislation at both the national and state levels has demonstrated that reform—even if at times the process is slow—may be achieved through orderly political action.

Civil disobedience tactics undoubtedly accelerated the pace of legislative reform. But the ultimate price of this acceleration may be costly indeed—in terms of racial bitterness and discord, and particularly in the disrespect for law and order engendered and the lawlessness in the streets which the doctrine of disobedience has encouraged. Moreover, if our system is to survive, worthy ends can never justify resort to unlawful means.⁴¹

³⁹The boycott tactics of Rev. Dr. Milton A. G. Lamison, New York civil rights leader, were characterized editorially as "shocking violence" and a "lesson in delinquency." *N.Y. Times*, Feb. 19, 1965.

⁴⁰One of the unfortunate by-products of the racial strife of the past decade has been the wholesale indictment of "The South." If by this term is meant the states which supported the Confederacy, there are eleven which seceded and three others which were divided in their loyalties. Conditions in these states with respect to civil rights have varied enormously. This is also true of conditions within particular states. The frenetic and unrestrained attacks on "The South" and "Southern justice," without distinction between totally different factual situations, and with little or no recognition that *de facto* racial discrimination is widely practiced in other sections of the country, has revived much of the regional bitterness of the reconstruction era. The indiscriminate and often intemperate nature of these attacks has also prevented or retarded in many communities the type of biracial communication and tolerance which has been so urgently needed.

⁴¹Mr. Justice Douglas has said: "We reject the philosophy that the end justifies the means. The vitality of human rights means respect for procedure as well as respect for substantive rights. . . . History shows that man's struggle to be free is in a large degree the struggle to be free of oppressive procedure." Address

But however one may view the justification for its use, civil disobedience has not been limited either in theory or in practice to the South. Indeed, the most militant advocates of disobedience have never confined its applicability to any one area nor discontinued its use when initial goals were achieved—in the courts or by legislation. Dr. King, the author of the doctrine in its contemporary form, has been quite explicit on this point:

There may be a community where the Negroes have the right to vote, but there are still unjust laws in that community. . . . I think wherever unjust laws exist, people on the basis of conscience have a right to disobey those laws.

. . . .

I would say that there are very few unjust laws in most of our northern communities. . . . But there is injustice and there are communities which do not work with vigor and determination to remove that injustice. In such instances I think men of conscience and good will have no alternative but to engage in some kind of civil disobedience in order to call attention to the injustices. . . .⁴²

The fact is that civil disobedience has been preached and practiced in all sections of the country. Many examples come to mind: the sit-ins in public offices and buildings, including those of the Governor of New York, the Department of Justice and even the White House; the picketing and boycotting of schools; the stall-ins and lie-downs related to the Fair in New York; the menacing and prolonged demonstrations against Girard College in Philadelphia;⁴³ the sit-ins on college campuses, and especially the disorderly and obscene conduct at Berke-

by Mr. Justice Douglas, Judicial Conference of the Americas, San Juan, Puerto Rico, May 26, 1965.

⁴²King, Address before Association of the Bar of the City of New York, April 21, 1965, pp. 21, 24.

⁴³In a story entitled "NAACP is Waging a 'War of Attrition' on Girard College," the N.Y. Times reported that "Several hundred policemen are manning wooden barricades to protect the 10-foot high walls of a [private] school for white orphans from militant Negro pickets." The paper further reported that this conduct went on nightly as "a picketing marathon"; that one of the boasts of the civil disobedience leaders is that "We'll not only have Girard College. We'll bankrupt the City of Philadelphia too," referring to the nightly need for 250 to 800 policemen to protect the school. N.Y. Times, May 14, 1965.

ley;⁴⁴ and the campaign of studied coercion in the streets against the school administration in Chicago.⁴⁵

The disorders in Chicago in 1965 may be a "spring lark" compared to what lies ahead. As this is being written (spring of 1966), Dr. King is launching a new "campaign to remove the Gargantuan structures of injustice in the North."⁴⁶ The commendable specific objectives include nothing less than the eradication of poverty and slums.⁴⁷ But the announced methods seem less commendable, especially in a community long concerned with these problems,⁴⁸ where all citizens vote, and where the courts are especially sensitive to any discrimination. Dr. King proposed:

We must organize this total community [Chicago] into unities of political and social power. We must also reaffirm our allegiance to the time-honored tactics and strategies that have served us so well in the past ten years. As long as injustice is around, demonstrations will be necessary. So when it is appropriate we will encourage sit-ins, stand-ins, rent strikes, boycotts, picket lines, marches, civil disobedience and any form of protest and demonstrations that are nonviolently conceived and executed.⁴⁹

⁴⁴See hearings, Subcommittee of the Judiciary Committee of the United States Senate, 89th Cong., Part I, page 17, *et seq.*, May 17, 1965. See also statement of Dr. Max Rafferty, California State Superintendent of Public Instruction, reported in *U.S. News & World Report*, May 17, 1965, p. 70; and Lipset and Wolin, *The Berkeley Revolt*, 1965.

⁴⁵Civil rights groups in Chicago were determined to "get" Superintendent Willis because he would not further disrupt public education by busing pupils and dismantling the neighborhood school system. As a result, Chicago experienced in the summer of 1965 a series of "nonviolent" eruptions numbering nearly 100 separate demonstrations directed against the Democratic Mayor and the Board of Education to force removal of Mr. Willis. Groups of demonstrators, purporting to be practicing "peaceful" civil disobedience, lay down in the middle of streets during the rush hours, blocking traffic and causing extreme inconvenience to the public generally. More than 800 people were arrested during the summer.

⁴⁶Martin Luther King, Address at Chicago Freedom Festival, The Amphitheatre, March 12, 1966 (References are to the mimeographed text of this address as released to the Press). It may surprise many, especially in the North, to have Dr. King also say: "While the South burst forth with the dynamic vibrancy of new democracy, the Negro in the North found himself increasingly pressed down by the cruel weight of vicious and discriminatory forces."

⁴⁷One of the most novel extensions of disobedience tactics was Dr. King's recent "assumption of control" of a Chicago slum tenement building for the purpose of collecting and applying the rents, presumably due the landlord, to renovate the building. King conceded his action was "supra legal," but relied on moral law as his justification. *N.Y. Times*, Feb. 26, 1966. A Chicago Circuit Court subsequently enjoined this seizure. *Chicago Tribune*, April 7, 1966.

⁴⁸See *N.Y. Times*, March 24, 1966, Special report by Gene Roberts.

⁴⁹King, Address in Chicago Amphitheatre, *supra* note 46, at 8. One of the evol-

Thus, civil disobedience is practiced not merely, as its apologists so often say, where the right to vote is denied or the local courts are hostile; rather it is now practiced wherever impatient leaders deem it a more efficacious means than the normal processes of a democracy.

NOT CONFINED TO CIVIL RIGHTS

Perhaps the greatest popular myth is that civil disobedience is confined to civil rights causes. It is true that initially the use of disobedience occurred predominantly in the civil rights movement and its most articulate advocates have been the leaders of this movement.⁵⁰

Yet, just as its use has exploded geographically across the country, so have the "causes" proliferated. First, the civil rights objectives have broadened from specific discriminatory laws and practices of the South to the limitless problems of bias, poverty and unemployment everywhere. Other causes in which disobedience tactics have been used include such sweeping subjects as American policy in Vietnam, peace generally, disarmament, control of the poverty program, and the "participatory democracy" now advocated by elements of the New Left.

ANTI-VIETNAM PROTEST

It may be illuminating to take a closer look at some of these. The anti-Vietnam protest has gained momentum as our commitment in Southeast Asia has expanded. A number of national organizations have been formed, much of the academic community has mobilized, and a significant portion of the civil rights leadership has become committed more or less to this protest against major American policy.⁵¹

ing concepts of civil disobedience is "total community" involvement, meaning (among other things) increasing popular participation in demonstrations.

⁵⁰This association with one of the most appealing causes of our time goes far to explain the remarkable sympathy and toleration with which civil disobedience has been accepted by the public generally. But the intellectual leadership for civil disobedience as a doctrine comes from political activists who are not so naive, and who fully understand the potential of civil disobedience as an extra-legal means of attaining goals they deem desirable. See collection of essays entitled "*Civil Disobedience*," published by The Center for Study of Democratic Institutions, 1966.

⁵¹King, Farmer, Rustin and others have frequently expressed sympathy with this protest. For example, it was reported that King "endorsed . . . in principle" the far-out policy statement of SNCC which condemned the United States involvement in Vietnam and expressed sympathy for persons who avoid the military draft. *Richmond Times-Dispatch*, Jan. 13, 1966. It has also been said that "King [has] committed his Southern Christian Leadership Conference to the

The Vietnam war and the role of this country in Asia are indeed subjects of grave national concern. They should be responsibly debated and questioned—as they have before Congressional Committees, on the campus and in the media—and no one should stigmatize the dissenter's vital role in this democratic process.

The concern arises not from this wholesome process but from the use of undemocratic means by some and from vicious anti-American action by others.⁵² The employment of civil disobedience tactics by these extremists has become commonplace. In addition to the nationally organized and coordinated demonstrations (sometimes with Viet Cong flags flying), there have been numerous sit-ins, attempts to stop troop trains, incitements to burn draft cards and evade military service, and anonymous telephone calls to families of service men. Many who speak for this movement bitterly attack American "aggression" and "brutality," and rarely—if ever—criticize the conduct or record of the Communist enemy.⁵³

THE NEW LEFT

Closely associated with the anti-Vietnam protest is the movement called the New Left. This is a conglomeration of activist organizations and groups, many with campus or student orientation, which reflect a varying spectrum of leftist thought and action. This movement is to be distinguished from traditional American liberalism, regarded by the New Left with disdain.

Two of its more prominent organizations are the Student Non-violent Coordinating Committee (SNCC) and Students for a Demo-

cause that the United States should quit defending South Viet Nam and let those who want to crush civil rights take over in that nation." Roscoe Drummond, syndicated column in *Richmond Times-Dispatch*, April 20, 1966. See also article by Roy Reed, *N.Y. Times*, April 14, 1966.

Bayard Rustin thinks "race relations" and "international relations" are "inseparable," and that the "non-violent" direct action movement will merge these two issues "more overtly in the years to come." See Oppenheimer and Lakey, *A Manual for Direct Action, Strategy and Tactics for Civil Rights and All Other Nonviolent Protest Movements*, published by Quadrangle Books, 1965, with foreword by Rustin, p. x. This textbook for disobedience tactics suggests that the lessons learned in the civil rights movement be applied to the "peace movement."

⁵²See Staff Study, Subcommittee of the Committee on the Judiciary of the United States Senate, *The Anti-Vietnam Agitation and the Teach-In Movement*, Oct. 13, 1965, pp. vii, viii, xv. This study refers to the extent of Communist participation and to the "call for massive civil disobedience."

⁵³See, for example, statement by Student Nonviolent Coordinating Committee (SNCC) charging the United States with "murder" and "aggression" in Vietnam, *N.Y. Times*, Jan. 7, 1966, p. 1.

cratic Society (SDS).⁵⁴ Both were initially concerned with civil rights, but have expanded their targets to include American foreign policy and various domestic demands.

It is said that "SNCC has become a magnet, pulling the entire civil rights movement to the left, pushing the NAACP (not a part of the New Left) out of the courtroom and into the streets. . . ." ⁵⁵ Both SNCC and SDS have been leaders of anti-Vietnam demonstrations and in divisive tactics. SDS "has evolved a way-out foreign policy that opposes the West in Vietnam, the Congo and much of Latin America" ⁵⁶ and has been under investigation by the Department of Justice for alleged "aiding and abetting of draft evasion." ⁵⁷

Other organizations associated in varying degrees with New Left causes include the W.E.B. DuBois Clubs of America,⁵⁸ Progressive Labor Party,⁵⁹ Vietnam Day Committee, May 2nd Movement,⁶⁰ Student Peace League, Youth Against War and Fascism, Spartacists, and the Young Socialist Alliance.

On the domestic scene, although the New Left groups have not yet coalesced into a united front, the objective of extreme segments of the movement is to substitute, by coercive means if necessary, a "participatory democracy." This is described as a "communitarian" system, modeled much after the theory (but obviously contrary to

⁵⁴See Newfield (Assistant Editor of *The Village Voice*), *The New Student Radicals*, Current, July 1965. Newfield stated that (in July 1965) SNCC had "260 full-time field secretaries" and SDS had about "60 formal chapters and 50 staff members." SDS is more recently reported to have up to 10,000 members, including 300 professors. See N.Y. Times, Oct. 19, 1965 and Oct. 20, 1965.

⁵⁵Newfield, *supra* note 54. The NAACP has been far more restrained in its use and endorsement of civil disobedience than other more militant civil rights groups. Indeed, Roy Wilkins is quoted as declining to support civil disobedience as a doctrine because he thought segregationists could invoke it to disobey the Civil Rights Act. See editorial, *Memphis Commercial Appeal*, reprinted in *Richmond Times-Dispatch*, June 6, 1965.

⁵⁶Newfield, *supra* note 54.

⁵⁷Newfield, *Idealism and Action*, *The Nation*, Nov. 8, 1965, p. 330.

⁵⁸Cited by the Attorney General as a "Communist Front" group. See N.Y. Times, March 27, 1966, pp. 1, 32. Also described in 1965 Annual Report of the FBI as "another major weapon which the Communist Party is directing against the young people." It is said to have 35 chapters, mostly on college campuses. FBI Annual Report, fiscal year 1965, p. 24. See also hearings, Subcommittee of the Senate Judiciary Committee, Part I, May 17, 1965, p. 31.

⁵⁹Said to have been implicated in the Harlem riots of 1964. See N.Y. Times, Dec. 31, 1965.

⁶⁰Said to be "actively sympathetic to the National Liberation Front, which seeks to overthrow the South Vietnam government," to have "sent first aid supplies to the Vietcong," and to contend that the struggle in Vietnam is between American "imperialists" and a "freedom movement of oppressed people." N.Y. Times, Oct. 18, 1965.

the practice) of Castro's Cuba and Mao's China, in which the peoples' will would be expressed directly (e.g., in mass meetings and demonstrations) rather than by elected representatives.⁶¹

The call for "participatory democracy," in an organized sense, originated in 1962 with the formation of SDS. The manifesto then adopted, described as the "basic intellectual doctrine of the New Left," demands "participatory democracy" in all economic, political and human relationships.⁶²

Staughton Lynd has been described as a leader in the movement for participatory democracy. In quoting from and commenting upon Lynd's views, Father Walsh of Wayne State University has said:⁶³

Writing in *Liberation*, Staughton Lynd, often described as the foremost intellectual of the new activism, says: "We have moved into a twilight zone between democratically delegated authority and something accurately called 'fascism.'" For Lynd the answer is participatory (as distinct, it seems, from representative) democracy, which means "ordinary people, making decisions for themselves . . . a new politics which forces the representative back to his people, and politics back to life." To bring about this change he admits is revolutionary; it may mean students chaining "themselves to the Capitol this summer in wave after wave of massive civil disobedience; it could mean people organized from all over the country setting up their own 'Continental Congress,' defying their elected representatives, sending emissaries to make direct contact with the people of other countries." Lynd admits this kind of revolution makes sense "only if our situation is desperate." But he adds, "I think it is desperate. . . ."

The demonstration and the sit-in are the standard weapons of the

⁶¹See Kristol, "What's Bugging the Students," *Atlantic Monthly*, Nov. 1965, p. 108, 110, 111. Advocates of a participatory democracy "dismiss American democracy as a sham." What they seek is a "pure self-perpetuating popular revolution, not a 'planned economy.' . . . This is why they are so attracted to Castro's Cuba and Mao's China, countries where the popular revolution has not yet become 'bourgeoisified.' As for mass terror in Cuba and China—well, this actually may be taken as a kind of testimony to the ardor and authenticity of the regime's revolutionary fervor. Our radical students, like other radical students before them, find it possible to be genuinely heartsick at the injustices and brutalities of American society, while blandly approving of injustice and brutality committed elsewhere in the name of 'the revolution.'" *Id.* at 111.

⁶²Newfield, *supra* note 57, at 330, 331. Another militant organization said to favor "participatory democracy" is the Student Nonviolent Coordinating Committee (SNCC), Newfield, "The Question of SNCC," *The Nation*, July 19, 1965, pp. 38, 39.

⁶³Father Joseph L. Walsh, "What the Students Want," *Commonweal Magazine*, Nov. 19, 1965, pp. 206, 207.

New Leftists.⁶⁴ Lynd's proposal of "wave after wave of massive civil disobedience" to remake America suggests how difficult it may be to prevent the expanding use of coercive disobedience methods by the increasing number of malcontents who have little sympathy for normal democratic processes.⁶⁵

CIVIL DISORDER

The concept that civil disobedience is non-violent and peaceful—indeed even "loving"—has been pervasively and skillfully woven into the speeches and literature on this subject. It is fair to say that the more responsible leaders of the civil rights movement also have made a genuine effort—and with considerable success—to prevent serious disorders in most of the organized demonstrations.⁶⁶

This has resulted in a carefully nurtured impression that disobedience is essentially a peaceful (nonviolent) procedure, resulting in little or no disorder and practiced without infringement of the rights of other citizens. Like the other myths, this impression will not stand critical examination.

An unauthorized sit-in on public or private property is normally a trespass and a violation of law. It is also "one of the surest ways anyone can pick out to disturb the peace."⁶⁷ This is especially true where groups physically block or occupy, by sit-ins or lie-downs, public offices and private property. In short, a sit-in is not a peaceful act and it frequently provokes actual disorder.⁶⁸ The Supreme Court has sustained the validity of civil rights sit-ins under the circumstances discussed above, but one may be confident that in a proper non-civil

⁶⁴"It is the civil rights movement which instructed them (New Leftists) in the tactics of civil disobedience, that are now resorted to at the drop of a hat." Kristol, *supra* note 61, at 110.

⁶⁵An illuminating example of the New Left's contempt for democratic processes is the boycott by SNCC of the 1966 Alabama primary election. Commenting editorially on this "attitude of extremism," the New York Times of April 21, 1966, said: "The SNCC officials insist they would prefer segregationist officials because their presence would keep Negroes aroused and militant. In other words, they reject reforms and improvements that could be achieved politically in favor of a revolutionary posture toward all of society and government."

⁶⁶The historic march on Washington in 1962 and the Selma to Montgomery march are the "show pieces" of nonviolent demonstrations. Yet each required enormous organization and the mobilizing of large forces of police and troops to assure order.

⁶⁷*Brown v. Louisiana*, *supra* note 23, at 162 (dissenting opinion by Mr. Justice Black).

⁶⁸No one would suggest, for example, that the sit-ins on the Berkeley campus were peaceful, and scores of the offenders were convicted of disorderly conduct.

rights case the Court will reaffirm traditional concepts of trespass and breach of peace.

The typical street demonstration is usually a civic disorder in fact, whatever it may be in law. Fortunately, the marchers in most civil rights demonstrations to date have been well disciplined, elaborately escorted by police, and therefore essentially orderly. But there have been far more actual disorders than many suppose, both by the marchers and by those incensed by the demonstrations. And the threat of serious violence is ever present.⁶⁹

Moreover, even the nonviolent demonstrations frequently exact a high price from the public generally. They disrupt traffic, create discordant noises, litter the streets, and deny the streets and sidewalks to other citizens. They also impose heavy responsibilities upon police and are burdensome to the public treasury.⁷⁰ The payment of some price to allow due exercise of cherished First Amendment rights may be justified so long as public order and the rights of others are safeguarded. The problem—and a very difficult one indeed where multitudes take to the streets and are told that only just laws need be obeyed—is to strike a balance which preserves the liberties of all. There is mounting evidence of imbalance and that the use of demonstrations is getting out of hand.

RELATIONSHIP TO RIOTS

Possibly the most serious aspect of the expanding use of protest methods in the name of civil disobedience is the resulting incitement to mob violence. No one knows the extent to which the doctrine of disobedience, and especially the widespread resort to the streets, has contributed to the general deterioration of respect for law and order and specifically to major outbreaks—such as riots in Harlem, Rochester, Philadelphia, Chicago and Watts.⁷¹ Yet few objective observers would

⁶⁹Disorders have frequently occurred in major demonstrations: e.g., in Chicago in 1965 when hundreds were arrested for blocking traffic and other disorders; in the "Julian Bond" demonstrations led by King in Atlanta (See, *Richmond Times-Dispatch*, Jan. 15, 1966); and in a number of the anti-Vietnam demonstrations; see for example, *N.Y. Times*, March 27, 1966.

⁷⁰The payroll of the National Guard, mobilized to assure that the Selma march was in fact orderly, exceeded \$500,000. See Marshall, *supra* note 3, at 788 for a description of the Selma march. Leaders of the marathon demonstrations against Girard College, where hundreds of police were required to protect the college, boasted that they would bankrupt the City of Philadelphia. *N.Y. Times*, May 14, 1965.

⁷¹In the August 1965 anarchy in Watts, which lasted for three days, 34 per-

deny that the contribution has been significant.⁷²

The disquieting question is whether there will be further and more serious outbreaks. The talk of "nonviolence," however sincere, may be less persuasive than the continuing examples of marching demonstrators, the purveying of hate and blame, and the preaching of a doctrine that "one has a moral responsibility to disobey unjust laws."⁷³ Or, putting it differently, is it possible for the masses—especially the economically deprived and emotionally inflamed—to draw fine distinctions between "just" and "unjust" laws or between various methods of disobedience? Can we reasonably expect throngs in the streets to understand and observe subtle differences between peaceful protest, disorderly conduct, and mob violence?⁷⁴

No one has warned against the probable answers to these questions more eloquently than Mr. Justice Black:

Experience demonstrates that it is not a far step from what to many seems the earnest, honest, patriotic, kind-spirited multitude of today, to the fanatical, threatening, lawless mob of tomorrow. And the crowds that press in the streets for noble goals today

sons were killed, 1,032 injured, nearly a thousand buildings were damaged or destroyed, and property loss alone exceeded forty million dollars. A total of 3,952 persons were arrested for one crime or another, and in the words of the Study Commission, this "lawlessness . . . had terrified the entire county (of Los Angeles) and its six million citizens." Report by the Governor's Commission on the Los Angeles Riots, Dec. 2, 1965, pp. 1, 2.

⁷²For example, Charles E. Rice, Professor of Law, Fordham University, wrote that a "contributing factor" to the first Watts riot was "the anarchic effect of the campaign of nonviolent civil disobedience." N.Y. Times, Aug. 29, 1965 (letter to editor).

John A. McCone, who headed the California Commission to investigate the 1965 riots, commented on the reoccurrence of rioting in Watts in March, 1966: "A contributing cause [to the initial riot] was the continuing exhortation of some leaders of the civil rights movement for extreme action to correct real or imagined wrongs." Richmond Times-Dispatch, March 17, 1966, p. 18. The Commission itself made the following finding as to the "aggravating events" causing the Watts riots: "Throughout the nation, unpunished violence and disobedience to law were widely reported, and almost daily there were exhortations here and elsewhere, to take the most extreme and even illegal remedies to right a wide variety of wrongs, real and supposed." Report of Governor's Commission, *supra*, note 71, pp. 4, 85.

Arthur Krock, in discussing causes of racial riots, cited: "The preachment of Dr. Martin Luther King that individuals have a right to select the laws they will obey. . . ." New York Times Service, as published in Richmond Times-Dispatch, April 17, 1966.

⁷³Martin Luther King, *Letter From A Birmingham Jail*. See Cohen, "Essence and Ethics of Civil Disobedience," The Nation, March 16, 1964, p. 257, 260.

⁷⁴See Charles E. Whittaker, *Dangers of Mass Disobedience*, Reader's Digest, December 1965, pp. 121-4; see also Whittaker, *supra*, note 2.

can be supplanted tomorrow by street mobs pressuring . . . for precisely opposite ends.⁷⁵

But others, concerned with the "causes," do not fear the consequences of spiraling disobedience in the streets. Professor Black, a widely known constitutional scholar, has discussed sympathetically the idea of mounting "a massive and general campaign of civil disobedience . . . against the power structure of some state with the aim of producing a total change."⁷⁶ This would take place in a state which has demonstrated, through its denial of civil rights, that "it cannot and will not fulfill its basic obligations to federal law and human justice."

Professor Black thinks that such an attempt to overthrow a state government by civil disobedience is a definite possibility and should be "welcomed." While he does not discuss techniques, Black does recommend the full support and cooperation of the Federal Government—by federalizing the National Guard (to prevent their use to put down the insurrection), by providing additional federal judges (to broaden opportunity for *habeas corpus*), and by assuring the "inter-state movements of goods and people (from other states) for the sustaining and counseling of the civil disobedience movement."⁷⁷

In pondering techniques which might be employed in such a revolution, it may be remembered that there was a written plan, considered but not used, to paralyze Montgomery and create a major crisis by the "physical use of thousands of bodies to prevent the passage of traffic upon roads, the running of buses and trains, and the landing of planes at airports."⁷⁸

Is there any wonder, in view of the record and all of these incite-

⁷⁵*Cox v. Louisiana*, *supra* note 29, at 584 (Black, J., dissenting).

⁷⁶Black, *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 Texas L. Rev. 492 (1965). In commenting on this startling proposal, Burke Marshall states that the "total defiance" suggested by Professor Black, and a somewhat similar view expressed by Professor Bickel, "are political suggestions and political judgments . . . outside of our ordered system of law. . . ." Marshall, *supra* note 3, at 799.

⁷⁷Black, *supra* note 76, at 500-506. Professor Black argues curiously that conduct which he admits could not be tolerated against a unitary government, should be tolerated against state governments because of our federal system. This impatience with the delay in bringing conflicting state law into conformity with federal law—a delay deliberately imposed by our system of checks and balances—suggests disagreement with basic concepts of our constitutional system of which federalism is an integral part.

⁷⁸See Marshall, *supra* note 3 at 792, 797. Mr. Marshall characterized this plan as "revolutionary," involving deliberate and "massive violations of law," far beyond the Gandhian concept of genuine peaceful disobedience.

ments, that there have been riots and expanding lawlessness? And who can say what discord lies ahead?

It has been said wisely:

Once you give a nervous, hostile and ill-informed people a theoretical justification for using violence in certain cases, it is like a tiny hole in the dike: the rationales rush through in a torrent, and violence becomes the normal, acceptable solution for a problem. . . . A cardinal fact about violence is that once initiated it tends to get out of hand. Its limits are not predictable.^{78a}

Although there can be no doubt that civil disobedience has contributed significantly to lawlessness in the streets, it is a justification rather than a fundamental cause. The central causes of unrest in urban slums involve complex and deep-seated social and economic problems.⁷⁹ These constitute, together with the related problems of crime, the most serious domestic crisis of this decade. I have spoken of this, and the urgency of an adequate poverty and educational program, on other occasions.⁸⁰ But this is a paper on civil disobedience, and my conviction is that due process and democratic procedures, even though painfully slow at times, are a far more dependable and certainly less dangerous means of correcting injustice and solving social problems.

THE FUTURE: WHERE DOES CIVIL DISOBEDIENCE GO FROM HERE?

So much for a review—obviously an incomplete one—of the origin, characteristics and proliferation of contemporary civil disobedience. It is perhaps now appropriate to ask where America may be headed—if we continue on the widening path of disobedience.⁸¹

We live in a period of unprecedented unrest and discord. Throughout the world, change is being accomplished at a reckless pace and far too often by force and revolution. The street mob demonstrating against everything from visiting dignitaries to the ruling regime is the symbol of our times. These mobs sometimes reflect spontaneous uprisings by oppressed peoples; more often, they are synthetically created

^{78a}Dr. Howard Zinn, Chairman, Department of Social Science, Spelman College, *The Nation*, March 17, 1962, pp. 227, 229, 230.

⁷⁹See Report of Governor's Commission, *supra*, note 71.

⁸⁰See Powell, Address, National Conference on Law & Poverty, 51 ABA Journal 751 (1965).

⁸¹"People who are prepared to pursue any course of action leading to social change may find themselves in the contradictory position of using such violent and uncontrollable means that there is no society left to enjoy the benefits of the changes they seek." Zinn, *supra* note 78a, at 229.

and deliberately manipulated by cynical leaders seeking personal power.

We are blessed in America by a system of government which provides expressly for the accomplishment of change by orderly processes. The Constitution, both by amendment and interpretation, has proved to be a remarkably flexible and resilient charter of government and of personal liberty. The street mob and massive civil disobedience, so familiar in countries not governed by the rule of law, have had no place in our country.⁸²

The question now being seriously asked is whether we *are* making a place for these techniques of coercion and lawlessness. The record of the past decade is sobering to anyone concerned with due process. We started with massive disobedience of Supreme Court decisions by segregationists. The concept of disobedience was then adopted and enlarged, far more skillfully and effectively, by integrationists in the civil rights movement. More recently we have witnessed an ever-growing diffusion and expansion of the use of civil disobedience, of the causes in which it is employed, and in the character of its tactics.

There are no indications that this trend has abated. Too many militant leaders have found in civil disobedience a sure road to personal publicity and power. Moreover, many people of good will—including scholars and large segments of the clergy⁸³—have become so enchanted by the “causes” that they give little thought to the means employed or to where the disobedience road could lead.⁸⁴

⁸²Whatever other functions governments may perform, a principal function of all government is to regulate and control the use of force within the society that it encompasses. Perhaps the principal difference between our system of government, with its checks and balances and constitutional safeguards, and the rule of the totalitarian state or the totalitarian mob, is the deliberate restraint imposed on the use of force. We endanger the rule of law whenever we permit coercion to be substituted for due process—whether against individual citizens or against government itself.

⁸³A few members of the clergy have spoken out against civil disobedience. Cardinal Cushing has said: “We are free to disagree with the law but not to disobey it. . . . observance of the law is the eternal safeguard of liberty, and defiance of the law is the surest road to tyranny.” *N.Y. Times*, March 28, 1966. To the same effect, see sermon of Dr. Robert B. Watts, Episcopal minister in San Diego: “We must once and for all reject the doctrine of a morally justified civil disobedience.” *Richmond Times-Dispatch*, Sept. 7, 1965. See, also, letter to the *Herald Tribune* by Rabbi Jacob S. Cohen of New Jersey, stating that civil disobedience has contributed to disorder. *Richmond Times-Dispatch*, Oct. 11, 1965.

⁸⁴One chilling example of where the doctrine of disobedience may inadvertently lead us is the spiraling addiction to drugs (especially LSD) by teenagers and college students. This is attributed in part to the “growing collegiate uncertainty about how binding laws ought to be.” Fred M. Hechinger, *Drugs—Threat on Campus*, *N.Y. Times*, Sunday, April 10, 1966.

Those drawn to civil disobedience by the worthiness of causes might reflect that the doctrine is urged as one of universal application, with its moral imperatives and techniques available to all. If sit-ins and massive demonstrations are justified for the "worthy" they are equally justified for the "unworthy," as under this doctrine each man may determine which laws are unjust, and each has the "moral duty" to disobey them. The fortunate fact that the Ku Klux Klan has not yet engaged in massive disobedience against civil rights legislation suggests no unique respect for law by Klansmen but rather a lack of numerical strength and organization, elements which it could acquire.

In simplest terms, we are talking about the foundations of an ordered society. As Mr. Justice Goldberg has said:

The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.⁸⁵

The logical and inescapable end of civil disobedience is the destruction of public order, and in the anarchy which follows, all liberty would be lost.

Although many voices still call, irresponsibly I think, for "enlargement of the role of civil disobedience,"⁸⁶ we may assume that most of these would draw the line at some point—if they could. But there may be real doubt whether the forces and passions already set in motion can be reversed short of grave damage to basic values of a free society.

We may already have reached the point where the long-range success of the civil rights movement is endangered, especially the hope that racial minorities will be genuinely accepted and respected by their fellow citizens. Much ill will has been engendered by disobedience tactics. As disobedience campaigns move into the North and assume more massive proportions, as class and racial discord are openly fomented, and particularly if further rioting occurs, the ugly barriers of resentment and hatred will have been reinforced for decades to come. It is difficult to imagine a more unfortunate result.

Moreover, the very rights and causes now sought to be vindicated through these tactics can, in the end, be assured only so long as laws are observed and due process followed. It has been wisely said that "minority groups . . . are the ones who always suffer the most when street multitudes are allowed to substitute their pressures for the

⁸⁵*Cox v. Louisiana*, *supra* note 29, at 554.

⁸⁶See, for example, Keeton, *The Morality of Civil Disobedience*, 43 Texas L. Rev. 507 (1965). See also collection of essays on *Civil Disobedience* by the Center for the Study of Democratic Institutions, 1966.

less glamorous but more dependable and temperate processes of the law."⁸⁷

The ultimate danger is to the rule of law and the framework of government which sustains it. Extremist groups of the New Left, already bold enough to counsel draft evasion, carry Vietcong flags and tolerate, if not encourage, Communist participation,⁸⁸ now threaten the massive use of civil disobedience to force changes in our form of government.⁸⁹

While we need not, at this time, view such a threat with undue alarm, the principles involved go far beyond any particular group or groups. History has demonstrated that once a society condones organized defiance of law and due process, it becomes increasingly difficult to protect its institutions and to safeguard liberty.

One may hope, with reason, that America has not yet reached this point of no return. And yet we would be foolish indeed not to heed the warning of a great liberal judge, whose concern for civil rights and freedom of dissent is exceeded only by his concern for our country. Mr. Justice Black has recently said:

Governments like ours were formed to substitute the rule of law for the rule of force. Illustrations may be given where crowds have gathered together peaceably by reason of extraordinarily good discipline reinforced by vigilant officers. "Demonstrations" have taken place without any manifestations of force at the time. But I say once more that the crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow. If we ever doubted that, we know it now. The peaceful songs of love can become as stirring and provocative as the Marseillaise did in the days when a noble revolution gave way to rule by successive mobs until chaos set in. . . . It . . . [is] more necessary than ever that we stop and look more closely at where we are going.⁹⁰

⁸⁷*Cox v. Louisiana*, *supra* note 29, at 583 (Black, J. dissenting).

⁸⁸See Staff Study, Subcommittee of the Senate Judiciary Committee, *supra*; FBI Annual Report (1965), p. 24; FBI Bulletin, Vol. 35, No. 2, Feb. 1966; Newfield, *supra* The Nation, Nov. 8, 1965, pp. 330, 333; Editorial Comment in Richmond Times-Dispatch, Feb. 28, 1966. See also advertisement for "Ad Hoc Committee of Veterans for Peace in Vietnam," publicizing demonstration planned for March 26, signed by Gus Hall, Herbert Aptheker, and others. N.Y. Times, March 20, 1966.

⁸⁹See Walsh, *supra* note 63, quoting Staughton Lynd, at 207; see generally Kristol, *supra* note 61, at 108, 110, 111; Newfield, *supra* note 62, at 38, 39; and Newfield, *supra* note 57, at 330, 331; Marguerite Higgins, *Radical Crusades Peril U.S. Colleges*, Philadelphia Inquirer, Sept. 23, 1965. Miss Higgins quoted a New Left leader as saying "the larger goal [is] bringing about radical changes in the structure of the United States society."

⁹⁰*Brown v. Louisiana*, *supra* note 23, at 168 (Black, J. dissenting).

LEGAL AID: OPPORTUNITY OR OCTOPUS?
A SEMINAR ON LEGAL SERVICES FOR THE POOR

sponsored by

THE JUNIOR BAR SECTION OF THE VIRGINIA STATE BAR ASSOCIATION

featuring

E. CLINTON BAMBERGER, JR.
Director of Legal Services
Office of Economic Opportunity

F. WILLIAM McCALPIN
Chairman, Special Committee on
Availability of Legal Services
American Bar Association

WAYNE THEOPHILUS
Attorney in Charge
Legal Aid Society of Pittsburgh

with a special Foreword by

SARGENT SHRIVER
Director
Office of Economic Opportunity

Perhaps no subject today raises more controversy among attorneys than the subject of Legal Aid. To some it presents the golden opportunity to fulfill the traditional role of the lawyer to provide legal services and to make the phrase "equal justice under law" a reality. To others, perhaps a majority, it raises the vision of an octopus whose tentacles threaten the independence of the organized bar; a vision that this is the initial step toward socialized legal practice.

With this controversy in mind, the Legal Aid Committee of the Junior Bar Section of the Virginia State Bar Association, under the chairmanship of Mr. David G. Simpson of Winchester, Virginia, sponsored the following seminar. Presented at Arlington, Virginia, on 29 January 1966 the seminar had as its purpose the presentation of the concept, scope, and problems of Legal Aid today.

Many rumors are heard about Legal Aid and the entry of the Federal Government into what has traditionally been a privately-handled area of the law. Since these questions are of prime importance the Washington and Lee Law Review presents this transcript of 3 outstanding attorneys in the field of Legal Aid. The editorial board gratefully acknowledges the assistance and co-operation of the seminar panelists, the efforts of Mr. Simpson, who made publication of the seminar possible, and the support of Mr. Shriver in the contribution of his excellent Foreword.

FOREWORD

SARGENT SHRIVER*

"Revolution!" may not seem to be a rallying cry to inspire enthusiasm in the legal profession. Certainly, neither lawyers nor laymen envision the bar as a hotbed of radicalism, and perhaps this popular conception of lawyers has a certain validity, for no doubt many attorneys would be among the first to be guillotined should such an unlikely event as a violent revolution ever occur in this country. Revolutionaries today as in 1789 still might be expected to respond passionately to Robespierre's command: "The first thing we do, we kill all the lawyers!"

But under the common-law legal system which we have inherited from England, American lawyers in a very real sense *are* keenly responsive to the cry for revolution. Indeed, from the Magna Carta to the present time, with rare exceptions, lawyers have been responsible for nearly every revolutionary change our society has experienced. It was the lawyers in England who devised ways to achieve private ownership of land when all property technically belonged to the king; it was the lawyers in America who developed the corporate forms of business enterprise which have allowed American business to flourish so astonishingly; and it was the lawyers who under the New Deal forged new tools to aid people out of the chaos and rubble of the depression. Most recently, it is once again the lawyers who take credit for the fact that the civil rights revolution has taken place almost entirely in the courtroom and not on the streets.

Development, modification, and change are built into our legal system, and the legal profession, which perhaps sees itself more conservatively as the guardian and custodian of tradition, is in fact our most revolutionary body, because its entire *raison d'être* is the accomplishment of change. Every time a case turns on the law rather than the facts, one of the attorneys must be arguing for a new interpretation of the law, and when his argument prevails, a slight modification occurs in the entire legal system. It is this role—the role of gatekeeper to the future, admitting changes and modification in the system, but insisting that they be carefully examined, and, when admitted, accompanied by legality and order—that has earned for American lawyers their justifiable prominence in our national life. It is our constitutional commitment to the achievement of revolutionary

* Director, Office of Economic Opportunity.

change by non-revolutionary means which makes the Anglo-American legal system one of the most enduringly just and stable legal systems the world has ever known.

And yet it is a shocking fact that a legal system which prides itself on the motto "Equal Justice for All" still tolerates, in 1966, a restriction of that justice to people who happen to have no money. Because the poor cannot afford legal fees, they have no lawyers, and because they have no lawyers, they are the natural prey of almost everyone with whom they come into contact: merchants, landlords, employers, and even the welfare workers whose purpose should be to help and comfort them. As William McCalpin reveals in his address to this Seminar, the need for legal services for the poor is great and the bar has significantly failed to make its services available to them.

Acting under the authority of the Economic Opportunity Act of 1964, OEO has attempted to meet this problem by the establishment of the Legal Services Program. The functioning of this program is carefully and thoroughly described in this Seminar by its Director, Clinton Bamberger, a distinguished lawyer in his own right. The Virginia Bar Association, like many other bar associations in this country, is responding with interest and enthusiasm to the challenge of the Legal Services Program, and the sponsorship of this Seminar is merely one indication of the concern which it has manifested in the legal problems of poor people, and in OEO's attempts to deal with them. This Seminar and the other activities of the Virginia Bar Association in this field are proof of the fact that the bar has no intention of abandoning its traditional role of leadership in achieving change.

The transcript of the Seminar makes exciting reading. It consists of addresses by three attorneys with expertise in the field of legal services for the poor: F. William McCalpin, Chairman of the Special Committee on the Availability of Legal Services of the American Bar Association, who discusses the present and actual need for a federally supported program of legal services for the poor; Clinton Bamberger, the Director of the Legal Services Program of the Office of Economic Opportunity, who discusses what the government's program is trying to accomplish, how it works, and the role of local attorneys; and Wayne Theophilus, Director of the Legal Aid Society of Pittsburgh, who discusses in detail the actual workings of a Legal Aid Society, the philosophy underlying it, the attorney-client relationship, and the kinds of problems dealt with.

It may be that the excited interest in legal services shown by the participants in this Seminar is not shared by every member of the

Virginia Bar. Indeed, there are certainly lawyers who are adamantly opposed to the program, just as there are lawyers who are adamantly opposed to women's suffrage, civil rights for Negroes, and the other social achievements of the Twentieth Century. But the leading role being played by such great lawyers as Lewis Powell, a Richmond lawyer and immediate past President of the ABA, and Edward W. Kuhn, the present President of the ABA, indicate that the responsible leaders of the bar are just where they have always been: at the doorway to the future, guiding and channelling the changes to be made.

The Junior Bar Section of the Virginia Bar Association has performed an important public service by sponsoring this Seminar. As other lawyers throughout the country begin to take similar responsibility for making "Equal Justice under Law" a reality for all, we may reach a time when a Twentieth Century Robespierre would cry, "The *last* thing we do would be to kill the lawyers." Hopefully, that time is not far away.

REMARKS OF MR. McCALPIN¹

When I got Mr. Collins Denny's request to appear here some weeks ago I wasn't sure initially whether I was being invited because of the American Bar Association hat that I wear or because of the fact that I am also a Board Member of the Legal Aid Society of the City and County of St. Louis which got the first grant from OEO in the pre-Bamberger days when it was a whole lot easier.

Assuming, however, that Mr. Theophilus will fill that void of what it is like to work one of these things at the operational level, let me don my Special Committee on Availability hat and cast the net just a bit wider and come back into legal aid in the course of my remarks.

Our profession has not, I submit, adequately met our responsibility to make our services fully available to the public who need and want them. The message of current developments beginning with the *Button* case,² which amount almost to a revolution in legal services,

¹ Chairman, Special Committee on Availability of Legal Services, American Bar Association. St. Louis Univ., A.B. 1943; Harvard Univ., LL.B. 1948; Lecturer, St. Louis Univ. School of Law, 1953-61; Member of Missouri Bar, American Bar Ass'n (House of Delegates, 1966), and St. Louis Bar Ass'n (President, 1961-62). Member of firm of Lewis, Rice, Tucker, Allen & Chubb, 1555 Railway Exchange Building, St. Louis, Mo. 63101.

²*N.A.A.C.P. v. Button*, 371 U.S. 415 (1963). Held unconstitutional as applied to the NAACP a Virginia statute forbidding solicitation on behalf of "any particular attorneys" which had been interpreted to proscribe as criminal a person's advising another that his legal rights had been infringed and referring him to a particular attorney or group of attorneys. The Supreme Court said that

is that we are being handed a challenge and perhaps a last opportunity to live up to our professional responsibility. The threat of these developments is that unless we do so, someone else will do the job for us.

I make this rather bald accusatory statement in spite of the fact that probably every lawyer in this room has in the past and may even now be offering his professional services in behalf of some poor, unfortunate individual free of charge.

Let us not delude ourselves, however, that this meets the problem. In the first place, it is only a pretty select group of the poor, your cook, or the cleaning woman's daughter or someone of that sort who get into our offices, and when they do they come with a rather narrow category of problem: perhaps a police court appearance or a domestic relations case.

While the problem of an individual indigent may be the responsibility of an individual lawyer, the needs of the poor as a class are and have been the responsibility of the whole profession. We, as a profession, can take some, but really all too little credit for the organized services of legal aid societies in behalf of indigent clients.

It is true that we have sponsored 252 legal aid offices, an additional 136 voluntary legal aid societies and 194 defender offices to render civil and criminal legal aid to indigent persons. It is comforting to know that in the most recent year for which figures were available these agencies handled more than 650,000 new cases³ in addition to an undetermined number of open and continuing files.

If there has been a general tendency on the part of the bar to be satisfied with this performance, that complacency has not been shared by those closest to the problem. For years Legal Aid Committees of the American Bar Association and of state, county, and local bars have indicated a need larger than they have been able to serve and have besought greater means and facilities for the rendition of these serv-

there "inheres in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority." *Id.* at 434.

See also, *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). Held that an injunction issued under the same Virginia statute, prohibiting a labor union from advising injured members or their dependents to obtain legal assistance before settling claims, infringed rights guaranteed by the 1st and 14th Amendments.

³The period covered was essentially 1964, although certain reporting organizations included figures for fiscal 1964. From an unpublished A.B.A. compilation "Statistics of Legal Aid and Defender Work in the United States and Canada."

ices. I am sorry to say that these pleas have not usually been met with an enthusiastic response from either the public or the bar.

In recent years the desperate dimension of this unmet need has become steadily more visible. The problems of the urban poor have received the attention of a number of experimental projects. Many of these have included elements designed to alleviate the legal problems of the poor or to attack nonlegal problems through the employment of legal process.

Among these experiments were Community Progress, Incorporated, in New Haven, Action for Boston Community Developments, and Mobilization for Youth in New York, all of which pre-dated the Economic Opportunity Act of 1964 and which became in some measure the springboard for the current programs of the Office of Economic Opportunity.

As a result of these experiments the involved members of the legal profession began to be aware not only of the fact that established legal aid societies were inadequately meeting the needs of the poor for legal services in what might be termed conventional legal problems but that there was precious little being done about a whole host of unconventional problems which might be attacked through the employment of the legal process.

These community programs demonstrated quite adequately that the urban poor are essentially immobile. If it were not so tragic it would be quixotic that in this motorized and mechanized age many of the urban poor rarely travel more than 5 or 6 blocks from their place of habitation. Consider this in light of the fact that the vast majority of established legal aid offices exist at the courthouse or at the bar association office in the downtown commercial area, usually well removed from the substandard housing areas where the poor live.

We began to learn through these experimental projects that if our services were to be really available to those who need them, then we had to get out of the courthouse and the bar association office and into the neighborhoods where the poor live. When we have done so the results have been startling. The volume continues to rise at the downtown office and in the neighborhood office the case load soon equals or exceeds that of the old, existing and continuing office. Thus, a real need has been unfulfilled simply because of the geographic distance between the client and the legal aid lawyer.

In addition, many of our legal aid societies, for budgetary reasons, because of pressure from support groups within the community, or perhaps even because of the philosophy of the sponsoring bar associa-

tion, have imposed limits on the types of legal services they will render or, to state it perhaps more accurately, they have refused to render legal services in certain types of legal problems.

On top of this there has been the slow appreciation of new legal problems or of the possibility for the employment of the legal process to solve old problems. Very few legal aid societies have represented displaced slum dwellers against the local land clearance authority. Equally few have represented public housing tenants against the local public housing authority.

It is true that many legal aid societies have represented welfare recipients or applicants where aid has been denied or cut off. A day in a welfare office will, however, convince any lawyer that this potential for the employment of legal services is virtually untapped. And I may say that this also is the view of the Department of Health, Education, and Welfare.

What lawyer or legal aid society has represented the son of an impoverished family who becomes a forced drop-out at the insistence of a local board of education? Yet I can cite you examples where this has happened in clear violation of existing state statute.

The sad truth of the fact is that the poor badly need legal representation as against the very welfare authorities which were created to assist and protect them. And we, as a profession, have been slow to grasp that fact. Thus even in this area of the poor where we have occasionally prided ourselves on discharging our professional responsibility there is a yawning gap between the need for legal services and the fulfillment of that need.

It is an uncomfortable fact that the advent of Community Progress, Incorporated, ABCD, and Mobilization for Youth has opened our eyes to that gap. Yet these needs to which our eyes have but recently been opened are only the visible 20% of the iceberg. What of the other 80% of our population? Here there has never been any grounds for professional complacency.

It is true that beginning 25 or 30 years ago we, as a profession, took note of the necessity for making our services more available to citizens of moderate means, able to pay something, though perhaps not what we would regard as a full legal fee. In 1950 the American Bar Association named its Committee on Lawyer Referral Services and both before and after that State and local bar associations adopted and instituted the same device.

Today there are nearly 400 legal aid agencies in the United States, but barely more than 200 lawyer referral services. Great credit is

due the more than 17,000 lawyers enrolled in lawyer referral panels serving the needs of perhaps 150,000 middle-income citizens annually. The fact, though, is that this figure represents less than 10% of the lawyers in this country who serve only a tiny fraction of 1% of the middle-income citizens.

Scholars and leaders of the bar have noted the profession's failure to discharge its service responsibility to these citizens for more than a quarter century. Perhaps the earliest was Dean, later Judge Clark of the Second Circuit, writing with Miss Emma Corstvet in a 1938 issue of the *Yale Law Journal*.⁴ In the same year the late Professor Karl Llewellyn addressed himself to the same problem in an article entitled, "The Bar's Troubles, and Poultices—and Cures?"⁵

Down through the years the bars of half a dozen States have conducted surveys and studies designed to measure either the need for legal services or the performance of the bar in meeting the need, and these studies have uniformly demonstrated substantial failure on the part of the profession to discharge its total responsibility.

Just over 2 years ago in October 1963, an eminent scholar and teacher addressed himself to these problems in the Carpentier Lectures delivered by him at Columbia University. In those lectures, published under the title, "A Lawyer when Needed,"⁶ Professor Elliott Evans Cheatham said: "Yet these growing classes—the middle classes—with an increasing need for legal services, do not obtain in proportionate measure the legal services they need, at least from lawyers. The wide gap between the need and satisfaction by the bar had been indicated by numerous studies beginning in the 1930's. Lawyers have been kept aware of this by the extent of unauthorized practice of law by laymen and by the ingenuity and the insistence of laymen in developing new group methods of obtaining legal services."

He concluded that lecture by saying: "Some conclusions are submitted on the conditions that have been described: Legal service needed by the middle classes is not rendered at all, or else it is performed by laymen inexpert in the law and free from professional control, or it is performed by lawyers who are retained by intermediaries under no supervision by the courts, the profession, or any public body."

The proof of Professor Cheatham's remarks was published 9 months

⁴Clark & Corstvet, *The Lawyer and the Public*, 47 *Yale L.J.* 1272 (1938).

⁵5 *Law & Contemp. Prob.* 104 (1938).

⁶Cheatham, *A LAWYER WHEN NEEDED*, Columbia Univ. Press (1963). An abridged and footnoted version appears in 63 *Colum. L. Rev.* 973 (1963).

later in the Progress Report of the Group Legal Services Committee of the State Bar of California.⁷ On the basis of evidence which it detailed in its voluminous report, a large majority of that committee concluded that there was so great an unfilled need for legal services as to be a cause for public concern.

I am chagrined to report that a part of that evidence was an analysis made at the Center for the Study of Law and Society of the University of California of a survey conducted in my own home state in 1963.⁸ This analysis revealed that in Missouri only 25% of persons who bought or sold a home consulted a lawyer; that nearly 2/3 of persons involved in an automobile accident producing either a personal injury or property damage in excess of \$100 did not see a lawyer. And while 2/3 of those who had a will had had it drafted by a lawyer, only 17% of the public in fact had a will.

Coincident with these revelations we have become aware of the phenomenon now known as group legal service programs. I need not describe in detail to a bar which has been so deeply involved in the *Button* and *Brotherhood* cases⁹ what group legal service programs are. You know about them firsthand. Let me only say to you that since the adverse decisions in those cases, many additional examples of such programs have come to light in Maryland, New York, Illinois, and elsewhere.

Without in any way seeming to approve of such programs, I do suggest that one reason for their existence may lie in the fact that we as a profession have been remiss in making our services available to the public on a basis which the public understands and accepts; and let us not forget that in the final analysis it is that same public which grants us our licenses who will determine when and how they shall be used.

Here, then, are the challenges which are hurled at us, not just by the poor, but by the whole American public. "We need legal services," they say to us in fashioning group legal service programs, in enacting the Economic Opportunity Act of 1964. "You devise the methods," they in effect say, "but do so in a method which is acceptable to us." I scarcely need add that the same public which has created group legal service plans now validated by the Supreme Court of the United States, the same public which has, through its representa-

⁷39 J. State Bar of Calif. 639 (1964).

⁸Originally compiled as a joint undertaking of The Missouri Bar and the Pren-Hall Foundation, later published in *LAWYER'S PRACTICE MANUAL*, Pren-Hall, Inc. (1964).

⁹*Supra* note 2.

tives, enacted the Economic Opportunity Act of 1964, can take further steps if we continue to ignore their pleas.

The reason that I am here today is that the American Bar Association, under the wise and able guidance of a great Virginia lawyer, Lewis F. Powell of Richmond, has heard this plea and heeded it. It was he who perceived the problem, even before the California report was published and the Economic Opportunity Act enacted. He sent me here to Washington in November and again in December of 1964 to learn the facts, to report to him and to help shape the response of our profession.

Part of the current posture of that response is the Special Committee on Availability of Legal Services created under his guiding counsel. We, as a committee, are directed to ascertain the nature and extent of the unfilled needs for legal services; to evaluate existing methods of providing those services; and to consider new, supplemental or alternative means, specifically including an examination of group legal service programs.

Our work has only just begun. I can say, however, that we have already begun to identify ways to make it possible for the entire bar to make its services available to more and more of the public. We have already decided that we must consider very seriously the identification, training, and utilization of sub-professionals in the legal profession to do for us what nurses, dieticians, x-ray technicians, laboratory assistants, physical therapists, and others do for the medical profession.

Most of us feel that cost is a part of the problem. To overcome this obstacle to making our services more fully available, we intend to consider very seriously whether or not an application of the insurance principle, along the lines of Blue Cross, is not a possibility, whether tax deductions for necessary, basic legal services are not as justified as deductions for medical services and, indeed, whether the subsidy system adopted by our English brethren may possibly have any application in this country.¹⁰

Finally, we know that legal aid and lawyer referral as we have known them in the past can and must be improved.

I think it is entirely appropriate that I should appear here on this platform today with Clint Bamberger, because I think there is a necessary connection and relationship between what he is doing in the Office of Economic Opportunity and what the Special Committee

¹⁰Mr. McCalpin explains the operation of the English subsidy system in the Q & A portion, *infra* at 261-62.

on Availability of Legal Services sees as necessary and useful in the development of the practice of law in the future.

I know, for instance, that there is in the works a submission from the Missouri Bar to the Office of Economic Opportunity, part of which is designed to train secretaries, investigators, and court attaches, and broader subprofessional training programs are in prospect.

Durham, North Carolina, and the State Bar of Wisconsin have already submitted proposals to OEO for experimentation with the English subsidy idea on local and regional bases.¹¹ The District of Columbia and the Legal Aid Society of the City and County of St. Louis have already been funded by the Office of Economic Opportunity to reach out from the courthouse and the bar association office into the neighborhood of the poor with revitalized legal aid services.

There is an unfilled public need for legal services. There exist more ways to fill that need than we have heretofore tried. The existence of the OEO and its programs offer us the opportunity for research and experimentation with new methods for providing services. While it is true that OEO programs must, by legislative mandate, be directed specifically at the very poor, let me suggest that these programs should generate devices to serve all the people. Beyond that, they promise to broaden the acquaintance of a whole generation of the poor with the possibilities afforded by lawyers and the law.

If we will but look upon the current Federal programs not as the solution to our problems or as a threat to our institutions, but rather as a laboratory for experimenting with new and improved ways to make our services available to all the people, we can surely meet the challenge which has been hurled at us.

REMARKS OF MR. BAMBERGER¹²

Those of us who are concerned with the development of legal services programs for the poor are sometimes inclined to stimulate bar associations by telling shocking stories of injustices and indignities suffered by poor people who are not represented by lawyers. And the most significant conclusion from these stories is the irony of the fact that

¹¹These proposals are elaborated upon in the Q & A portion, *infra* at 262-63. On April 26 the *Washington Post* reported the announcement by OEO Director Sargent Shriver of a grant of \$240,000 to the Wisconsin Bar Association for implementation of its rural area "judicare" program. A similar program was announced for the establishment of 5 legal services offices on the Navajo reservation in northeastern Arizona.

¹²Director, Legal Services Agency, Office of Economic Opportunity, 1200 19th Street NW, Washington, D.C. 20506. Loyola College, B.S. 1949; Georgetown

they frequently arise out of contacts between the poor and institutions which we have created to serve the poor and to better their lot.

Let me tell you a few capsules to give you the flavor of this:

Investigators pay a midnight visit to the welfare recipient and find a male friend there. Under a prevailing interpretation of very vague regulations, he is presumed to live with her and to be able to support her. Her welfare is terminated.

A migrant farm worker seeks help from a state agency during a crisis. He doesn't get it because he is a nonresident. As a matter of fact, he is probably a nonresident of every state in which he ever works or lives.

Unemployment compensation recipients required to serve on public works projects refuse to cut brush in knee-deep snow during sub-freezing weather. They are convicted of interfering with administration of the compensation laws.

A poor child is suspended from school for unspecified misconduct which he did not commit. He is too frightened to challenge his suspension and his parents are too ignorant.

These are true examples of actual cases. They describe a consistent and pervasive pattern that shapes the life of poverty. They are evidence of society's failure to provide the poor with adequate legal services.

For more than a half century the organized bar has labored without noticeable public support to furnish adequate legal aid for the poor. Expanded legal aid is still necessary. But even if the bar's traditional concept of legal aid, a concept which is often much at variance with the much loftier ideal and ambitions of the leaders of the legal aid movement, is multiplied a hundredfold, it will not achieve the ideal of equal justice under law.

Before the poor take the initiative to seek legal services they must be taught to recognize the legal aspects of their experiences so that they know when a lawyer's aid is needed. The poor must be encouraged to seek legal assistance when they perceive that it is needed.

An office in a store front may seem demeaning to some lawyers, but formidable office buildings are alien to slum dwellers. Riding

Univ., LL.B. 1951; Instructor, Univ. of Maryland School of Law, 1964-present. Member, Standing Committee on Rules of Practice and Procedure, Court of Appeals of Maryland, 1958-present; Assistant Attorney General of Maryland, 1957-58. Member of American Bar Ass'n, Maryland Bar Ass'n, Baltimore Bar Ass'n, International Ass'n of Insurance Counsel. Member (on leave) of firm of Piper & Marbury, Baltimore, Md. Mr. Bamberger resigned his OEO post as of 29 June 1966.

circuit may seem old-fashioned, but it may be the only way that lawyers and the law can reach migrant workers and farm families.

The poor must be served by competent advocates in the formulation, the enactment, and the elaboration of the laws which affect them. And our traditional attitudes toward breaking this cycle of poverty has been that the social worker, the public health experts, the urban planners, the lawyers, in short, the comfortable, know what is best for the poor, and the poor need not raise their voices because they will not be heard, and if heard, they will not be heeded, because they don't know what is good for them.

I don't mean to deprecate the motives from which spring these charitable approaches. What I mean to suggest is that this approach is not only bad for the poor in many respects, but it is bad for ourselves and it is bad for the legal system that we are sworn to uphold.

Let me give you some examples. Building codes are enacted to insure minimum standards of decency in today's homes, but the tenant who complains about rat infestation finds himself evicted by a court order as a trouble-maker without redress.

Low-cost public housing was created because of the inability or unwillingness of the private sector to furnish adequate housing for the poor. But inflexible standards of indigency or of eligibility have served to dampen ambition and to remove from public housing communities the very families whose example and influence would be most beneficial to their neighbors.

Public assistance laws have saved inestimable numbers of our fellow citizens from starvation, but the present scheme of public assistance has also assaulted their privacy, reinforced their dependency, and disintegrated their family.

I could go on. I hope the point is clear. Do you think that a corporation code or a fiduciary law or banking regulation which had such disturbing paradoxical effects would long survive the onslaught of lawyers? Of course not. But an urban renewal program or a consumer credit law or a public health scheme can, because the poor who are affected by them have no spokesman.

Stand by the bench in a court of lesser jurisdiction and listen while evictions issue unchallenged, while judgments by default are rattled off in a dreary monotone and while writs of repossession are signed in bundles. The judge is bored while he listens to a lawyer for the landlord or the merchant recite a tedious litany. The poor are not represented. A search for truth and for justice built upon an adversary system walks half blind when one side is not represented. And all of

us, not just the poor, lose when the poor are not advised and represented by lawyers.

A large body of our law is considered only by the legislative and the executive branches of government and never tested and scrutinized by the judiciary. Legislators and administrators are not omniscient. What they do is improved when lawyers debate what they did and a judge with a mind sharpened and enlightened by the debate construes and applies the legislative rule.

Lawyers make our laws better and they make our public officials more responsible. But so many of our laws which affect poor people are no better because there are no lawyers for the poor or, at best, only insignificant representation of the poor. No other economically defined segment of our population is so pervasively affected by statutes, regulations, and administrators as are the poor. Public assistance laws, public housing laws, fair employment and open occupancy statutes, consumer credit legislation, statutes which govern landlord and tenant relations, these laws affect the poor more than they affect you and me.

Attorney General Katzenbach expressed this more than a year ago when he said, "To us, laws and regulations are protections and guides, established for our benefit and for us to use. But to the poor, they are a hostile maze, established as harassment, at all costs to be avoided."¹³

It ought to be obvious that there is an essential role for the law and for lawyers in this nation's War on Poverty—in this nation's effort to better the lot of the impoverished and, in so doing, to improve the quality of our own lives.

Under the Economic Opportunity Act the Federal Government is extending significant financial assistance to local community action programs, including legal services programs for the poor. Congress is authorizing the underwriting of such programs with up to 90% federal financing. But let me emphasize that the initiative in planning community action programs, including legal services programs, rests with the individual communities. My office is ready to assist any community in drafting a legal services proposal and to make available the assistance of experienced consultants. But we respond only to invitations, to questions and to expressions of interest. We have not and will not impose ourselves and our program on anyone.

We are encouraged by the degree of local initiative in Virginia. There are lawyers in this Commonwealth who have a sense of respon-

¹³From a speech delivered by Attorney General Katzenbach to the Conference on Extension of Legal Services to the Poor in Washington, D.C., 12 Nov. 1964.

sibility to the poor. Virginia lawyers, like lawyers in my home State of Maryland, have long and often served individual impoverished clients. But I don't think you should be surprised or offended when I say that the organized efforts of the bar in Virginia to extend legal services have not been outstandingly successful.

To my knowledge there are only 3 legal aid societies actively in existence in Virginia.¹⁴ Norfolk has none, though I understand that the Norfolk Bar, under the leadership of Ed Baird, will soon fill that breach. Richmond's Legal Aid Bureau has been limping along for a number of years with grossly inadequate support. Its volume of cases is only slightly more than one-half per thousand persons in the area served. The National Legal Aid and Defender Association has deemed the minimum number of cases from 1000 people to be 7½.

But there are some good signs. I understand that applications for legal aid charters have been made in Alexandria and in Norfolk, and that active planning is underway in Newport News and Winchester. A proposal for a legal services program for Roanoke and for the surrounding counties has been submitted to the regional office of OEO. I am sure there are other activities going on in the State of which I am not aware.

The guidelines for the financing of legal services programs under the office of Economic Opportunity will be published soon.

Usually a legal services program must be funded as part of a community action program. There are some exceptions to this rule where there is no existing community action program, where it is not possible to form one or for some other reason it is infeasible, impractical, or impossible to conduct the legal services program as a part of the overall community action program. Thus, one of the first steps in planning for an OEO funded legal services program is to talk to the local community action agency, work with them, coordinate the plans with them to develop the program.

Although legal services programs are a part of a total community action program, they must have a degree of operational independence from the community action agency. An independent policy-making board or committee should be established for the legal services program. The independence of professional legal judgment is absolutely essential. It is not inconceivable that a lawyer working in one of these programs will represent a client against some other program of the

¹⁴A discussion of the operation of the Arlington organization may be found in the Q & A portion, *infra* at 263-64.

community action agency or even against that agency itself, and he must be free to do so.

Any proposal for a legal services program must describe the standards by which the eligibility of clients will be determined. There is no national standard of eligibility, no OEO standard of income and assets. We have no set figures in mind; we realize that local conditions vary. We have just 2 criteria: First, the standards should not be so low that it excludes people who, after they have paid for housing, clothing, and food as human beings, cannot afford to employ a lawyer. And second, the standards should not be so high that it makes people eligible who can pay the fee of a private attorney without jeopardizing their ability to have decent housing, clothing, and food. This is a program of legal assistance for the poverty-stricken.

A legal services program should provide a full range of legal assistance in all areas of the civil law. No type of civil case should be arbitrarily excluded except cases which are customarily taken on a contingent fee basis or cases for which, by statute or regulation, there is provision for the payment of an attorney's fee. The program may also include advice and representation in the areas of criminal law; that is, in those areas of the criminal law in which counsel are not provided for indigent defendants.

An essential ingredient of a legal services program is comprehensive education to apprise eligible persons of their legal rights and their obligations and of the assistance that lawyers can render. Here an organized bar can make a significant contribution. In Mr. McCalpin's home city of St. Louis the bar association is donating 1500 volunteer hours. Lawyers will speak to groups of poor people and to social workers, to those who work with the poor, to acquaint them with legal problems and with the availability of the legal assistance program. This kind of activity is one of the methods of fulfilling the requirements of the 10% nonfederal contributions. That nonfederal contribution need not be in money; it can be in property and in services.

Law schools and continuing legal education programs of bar associations should sponsor in-service training for the lawyers who will work in these programs and for their assistants. The lawyers are going to be dealing with problems which are sometimes novel, with problems with which they have probably not had much experience, and they and their clients would benefit from a continuing legal education program.

A legal services program funded by OEO must be conducted in complete and faithful observance of the letter and spirit of the Canons

of Professional Ethics. We have not had a single proposal which suggests conduct in violation of the rules of professional ethics. Even the most ambitious and visionary role which legal services can perform for the poor can be conducted within the honorable traditions of the bar. The devotion of each lawyer must be solely to the individual interest of his client, and it is mandatory that each program insure the professional independence of the lawyer.

The controlling board of a program will, in all likelihood, include some lay persons. For years legal aid agencies have included lay persons on their boards of directors. This should present no problem. As a matter of fact, the National Legal Aid and Defender Association has recently stated in its standards for legal aid societies the encouragement of this practice as the official policy of that association.

Legal services lawyers are expected to work closely with other community organizations, such as block clubs, farm bureaus, credit unions, and tenants' associations. Much of the lawyer's sensitivity to the problems of the poor and much of the planning of strategy may be derived from insights gained in such contacts. This kind of activity is in the tradition of the most skilled corporation lawyer who insists on knowing his client's business inside and out in order to make plans to place his client's legal interests in the most advantageous position.

This war that Congress, the President, and our Nation have declared on poverty contains the seeds of its own frustration. Coordinated planning of educational, social, and legal services for the poor is neither new nor demonstrably successful. In this respect there is nothing new about the federal program except its magnitude. But the Anti-Poverty Program also contains a seed of hopeful triumph—the maximum feasible participation of the poor in the planning and the operation of anti-poverty programs.

In this concept the Anti-Poverty Program has a potentiality of growing far beyond traditional charity programs. By mobilizing active participation of the poor we hope to instill in them a new sense of dignity, a new awareness of the processes by which their lives are determined and a new opportunity to be the masters of their own destiny.¹⁵ The principle of participation of the poor is based upon 2 very simple propositions: first, the poor know their own needs better than others; second, simple charity may do more harm than good to the recipient.

When I say that the poor know their own needs better than others,

¹⁵Mr. Bamberger explains in the Q & A portion how leaders are found among the poor, *infra* at 264-65.

I do not mean to suggest that the expert skills of sociologists, community planners, educators, and lawyers are not required for the success of the Anti-Poverty Program. On the contrary, their skills may be more greatly needed and more pointedly challenged when the definition of goals and the selection of the means must be achieved jointly with their clients. Anyone can impose a course of apparently desirable action upon a passive recipient. It takes a better man to sense the client's perception of his own needs, to assist the client in articulating and weighing these needs and to work cooperatively with the client in developing a program best designed to meet those needs. The really excellent lawyers, like the really excellent sociologists and planners and educators are needed in the War on Poverty.

OEO has no rigid preconception about what maximum feasible participation means. Certainly, to use the statutory language, "the residents of the areas and the members of the groups served" must be involved in the formulation of policy for the conduct of a legal services program. They or their representatives should be on the policy-making board or committee.

In addition, and not as a substitute for a vote where policy is made, advisory councils representing the potential clients can be effective instruments to involve the people we are committed to assist. These councils should be afforded an opportunity to make suggestions to the policy-making group and that group should be obliged to hear and act upon these suggestions.

We recognize that "maximum feasible participation" requires flexibility. As Sargent Shriver said in his address to the American Bar Association in August 1965: "Our statute requires maximum feasible participation of the poor in all aspects of the anti-poverty programs. We intend to carry out the mandate of Congress on this! But to do so does not require the imposition of inflexible and arbitrary quotas. We have already financed legal service programs approaching this requirement in a variety of ways. We believe in flexibility, but flexibility cannot become a euphemism for evasion of our statutory duty."

In all phases of our national life, this is a time of great change and a time of unprecedented opportunity.

Our purpose in OEO is not just to stimulate and implement community efforts to provide a lawyer for a poor person in a particular case. We want lawyers to be advocates for a group of people who are inarticulate and unsophisticated and who do not have advocates. Lawyers will be a voice of the poor in the community. If the poor are represented, we may begin to learn their problems, their aspirations, and the

futility of some of our ill-conceived efforts to help them. If the poor are not represented by lawyers, the voices in which they will learn to speak may sound very alien to our ears.

The bar has responded admirably to the challenge of the Economic Opportunity Act. As a matter of fact, not a single legal services program that has been backed by OEO has been opposed by any bar association, and, on the contrary, the bars have supported and endorsed many of the programs.

The American Bar Association's resolution of last February evidenced the Bar's positive response. There is a National Advisory Committee to the Legal Services Program with 21 members, of whom 6 are ABA officers: the Past President, Mr. Powell; the President, Mr. Kuhn; the President-Elect, Mr. Marden; Chairman of the Special Committee on the Availability of Legal Services, Mr. McCaig; and the Chairman of the Committee on Legal Aid, Mr. Cummins. Mr. Theodore Voorhees, the President of the National Legal Aid and Defender Association, is also a member.

The ABA resolution is, I might add, a testimonial to the statesmanship and leadership of a great Virginia lawyer, Lewis Powell. In carrying forward this adventure, I hope that I may look forward to an active partnership and cooperation with the Virginia Bar Association.

REMARKS OF MR. THEOPHILUS¹⁶

Of course, we all know that legal aid is the assistance provided any person by an attorney, but that meaning has narrowed over the years. The words "legal aid" have come to mean the legal assistance provided by an attorney or attorneys free of charge and particularly that legal assistance given by an organized legal aid society as distinguished from the legal assistance provided a client for a fee.

Legal aid is the modern, practical way of assuring the guarantees of the Magna Carta that justice shall not be sold, delayed or denied to anyone. To be equal before the law is itself a right, and the idea behind legal aid is the protection of that right.

Most lawyers recognize they have a monopoly on the practice of law and feel that the monopoly carries with it an obligation to see that no one is without legal assistance. In varying degree they give of their

¹⁶Attorney in Charge, Legal Aid Society of Pittsburgh, 200 Ross Street, Pittsburgh, Pa. Univ. of Pittsburgh, B.S. 1925; Univ. of Pittsburgh, LL.B. 1928; Member of American Bar Ass'n, Pennsylvania Bar Ass'n (Chairman, Comm. on Service to the Public), Allegheny County Bar Ass'n. Member of firm of Shoemaker, Eynon, Clasper, Rolston & Theophilus, Suite 1324 Frick Building, Pittsburgh, Pa.

time and talent to help the poor. This is true today, even where organized legal aid societies exist. Although we know this does not meet the need, we hope it will never stop. On this one point we definitely can all agree that the need is not being met.

Even though organized legal aid will continue to be necessary and does provide a real service, somehow it fosters a feeling that the poor are a class apart if the only legal service the poor can expect at any time is from a legal aid attorney. That is bad. This often comes to light somewhat amusingly when a client is being questioned to determine his eligibility for legal aid. He will tell the attorney somewhat indignantly that he would not be there asking for help if he could have afforded the services of a real lawyer.

In communities where the legal aid lawyer is permitted a practice of his own and the legal aid client finds out there are persons who come to the legal aid lawyer in his private capacity expecting to pay a fee for the service which that lawyer can provide, somehow the client feels better about it. Actually, he is not a man set apart receiving the services of a lawyer for which no one else can or will pay. Suddenly the poor man is just as good as one who can pay.

The present concept of legal aid dates back to the Legal Aid Society of New York. This organization, incorporated in 1876, grew out of the activity of Arthur von Briesen, who gave advice and legal assistance voluntarily to newly arrived immigrants from Germany. We are told that von Briesen carried on in one of the many German clubs to which these new arrivals gravitated, and his advice and assistance were so helpful that his fame grew and others in need of advice and legal counsel sought his help. Von Briesen enlisted the assistance of other lawyers, and from this came the Legal Aid Society of New York.

The work of this organization inspired the organized legal aid movement in this country. Originally the service related only to civil matters, but soon representation was provided to the indigent defendant in criminal court as well. The path of organized legal aid was not always smooth. Attorneys, not always fringe attorneys at that, looked upon such work as taking away their clients. But the leaders of the Bar saw and approved. The movement gained strength and guidance from them, and additional support was provided by the leaders of finance and industry.

The purpose of the Legal Aid Society is not to compete with the private attorney. It fills in only where the private attorney will not or cannot reasonably be expected to meet the need. The sole purpose

of organized legal aid was to assure justice to those who had no attorney and could not reasonably be expected to pay an attorney's fee. Unfortunately, no matter how good the laws governing us might be, they just are not self-enforcing. Someone has to start the legal process to assure the enjoyment of the rights granted the citizen. In our system that someone is a lawyer. Somehow a lawyer must be made available to all persons. Legal aid is the concept which provides that service.

It is interesting to note that the private practitioner has some freedom in the choice of his clients. The legal aid attorney has no choice. Once the need is established, the legal aid attorney must accept the client and give the best representation possible, regardless of how insolent, ungracious, or difficult the client be, and whatever the race, color, sex, age, or religion of the client.

Although the organized bar did have some legal aid committees, legal aid societies struggled along for a long time primarily with such assistance as their own national organization might provide;¹⁷ which organization, fortunately, had able and conscientious guidance from many leaders of the bar. Finally, the American Bar Association House of Delegates, at the suggestion of Chief Justice Arthur T. Vanderbilt of New Jersey, by resolution on 26 February 1951 asked the Chief Justice and the chairman of the state bar legal aid committee in each state to create and execute a legal aid plan through a legal aid society supported "through private sources without government aid."¹⁸

¹⁷The organization referred to was the National Association of Legal Aid Organizations, subsequently the National Legal Aid and Defender Association.

¹⁸The full text of the resolution read as follows:

"WHEREAS, the American Bar Association by resolution adopted at the 1950 Annual Meeting in Washington declared that its policy with reference to legal aid was—

"1. That it is the primary responsibility of the legal profession to assume the leadership in establishing adequate aid in conjunction with private agencies without government aid; and

"2. That the state bar associations should organize such legal aid service in the respective states;

"NOW, THEREFORE, BE IT RESOLVED that the American Bar Association, through its Committee on Legal Aid Work, recommends a procedure to the state bar association as follows:

"a. That the President of each state bar immediately request the Chief Justice and the Chairman of the state bar legal aid committee to act with him in creating and executing a statewide legal aid plan, and

"b. That legal aid societies be organized and administered in each county

There was no sudden surge of support, but legal aid was recognized everywhere and was made a respectable arm of the Bar. Since that time, organized legal aid has made great strides, although there always seems to be a greater need than there is service available to meet that need.

Legal aid in practice takes many forms, but the organization found to be the most effective is a charitable corporation organized to provide that service alone. The advantages of the corporation are many, but chiefly: (1) perpetual existence, and (2) effective supervision through the charter and by-laws. The board of directors is made up of community leaders motivated by the ideal that justice is a matter of right and determined to do everything possible to make it available to all. In smaller communities the legal aid organization is often a committee of the Bar Association, or even a division or arm of a social agency, such as a family and children's welfare association.

Operating any Legal Aid Program requires 4 essentials:

(1) There must be a definite place where the service can be found. Ordinarily this is near the courts and social service agencies. The place should be well known and accessible to those who desire to use the service. It is interesting to note that many legal aid societies had their first office in communities where they expected to find their clients. For instance, the offices for the service which later became the Legal Aid Society of Pittsburgh were set up in 1901 in 2 heavily populated districts where the service was deemed most needed. Eventually it was consolidated in a downtown office at a point where all streetcar lines converged near the social agencies and the courthouse.

(2) A definite time when the client can obtain the service. This means regular office hours which meet the convenience of the people who may need the service.

(3) A definite person who will provide the service.

(4) A supervisory body, which could be the Bar Association, a board of directors of a separate charitable organization, or a board of directors of a family agency. A good supervisory body, representative of the best the community has to offer, has—up to this time at least—been deemed best to assure a sound program.

through local bar associations and be financially supported through private sources without government aid, and

"c. That each member of the Board of Governors pledges his cooperation and assistance to the Legal Aid Committee of the American Bar Association and to the state bar associations in his circuit in organizing and implementing such plan and procedure."

The foregoing are relatively simple except when the operation is carried on by a committee of the Bar. Usually the members of the committee like to carry on the service from their own private offices. If there is a bar association with a paid staff, a staff member can direct legal aid applicants to the members of the Legal Aid Committee in rotation. If the Bar is so small that there is no definite headquarters except the office of the President, which changes from year to year, then the assistance of a public official, such as the Clerk of the Courts, is often enlisted.

How is the operation financed? Except where the service is a committee of the bar association, the usual and most satisfactory method is by funds raised by general subscription such as through the United Fund or Community Chest campaigns. Thus, the whole community is involved. There are other methods, of course. Some societies conduct their own campaigns; others are supported by membership fees; and some by an extra assessment of court costs. The Bar committee method of legal aid is usually supported by the Bar Association through dues assessments, or profits from the bar journal, although frequently it is a voluntary service provided by the members of the committee.

Operating a legal aid society has been described as the same as operating any other law office except that the office is busier and no bills are sent out. A good legal aid operation should identify itself with the local bar association and the local lawyers to the greatest possible extent.

One of the best ways to keep the local Bar actually concerned about the situation of the poor in their efforts to be assured of their legal rights is to see that the legal aid societies do not accept as a client anyone who has the assistance of a private attorney. It is not uncommon for a person who is actually being helped by a private attorney to apply to the legal aid society, claiming that he is unable to pay an attorney's fees and that he cannot conscientiously accept any further help from his attorney. Even so, we have always taken the position that we will do nothing to interfere with the charitable instincts of any lawyer.

We have found upon investigation of a number of these cases that the lawyer hopes that he will be paid but has no present expectation of collecting a fee and no expectation of dunning a client for a fee. We have found that very frequently the cases are being handled as a favor to a paying client because he is a fellow church member or for any of a number of reasons. Sometimes there is no reason except that he

wants to do something for this person and has the time to do it. I think it is fortunate for all of us when a private attorney proceeds in this way. Thus, a legal aid society will not interfere with an established attorney-client relationship, nor appraise or second-guess the way the private attorney is handling the case for the applicant.

Present Lawyer Reference Bureaus are the outgrowth of the legal aid society's determination to involve the Bar with the work. These societies had many requests for help from persons who could afford to pay or who had a case which, successfully prosecuted, would generate a fee. The Lawyer Reference Bureau developed from the practice of getting from the Bar Association a list of attorneys who would take referrals, many for reduced fees, from clients who were not eligible for legal aid.

Legal aid lawyers, even where a Lawyer Reference Service is available, make every effort to get a client to a lawyer of his choice. Many times the client has forgotten a lawyer who handled satisfactorily a case for a relative, or a fellow church or lodge member who is a lawyer to whom he would be happy to entrust his problem. If a client can recall no lawyer to whom he might go, then the Lawyer Reference Service is a wonderful substitute. The accepted practice is to send the client to this service with a note under the Legal Aid letterhead indicating the reason for the referral. *Never* may the referring attorney, if he is permitted a private practice, take the case himself or refer it to a friend. An applicant often suggests this solution, but doing it is grounds for immediate discharge.

There are other ways of keeping the Bar interested and active in legal aid. One is to seek volunteers from the Bar when a superabundance of applications bogs down the regular legal aid staff. This happens most often in programs involving the defense of the indigent in criminal court. Another is to operate a law school clinic. This often instills in a student a life-long interest in helping the poor solve their legal problems.

How do potential clients get to know about legal aid? There is no advertising and there is no one going from house to house inquiring whether anyone there might have a legal problem, but all social workers know of the availability of legal aid and have some understanding of its nature. This same is true for court attaches, the court itself, and jail officials. In addition, feature stories in the newspapers, legal aid reports, and word-of-mouth are quite effective.

The client is expected to do all that he can for himself by locating and bringing in witnesses and, of course, he must pay the court costs.

The collection of court costs serves a two-fold purpose. It prevents the Society from being flooded by nuisance cases. Second, it is somewhat akin to a surgeon's advising a patient that the operation will be painful and result in a long period of convalescence. If the patient says go ahead and operate, the surgeon has a pretty good idea that the patient is not a malingerer. The same is true of a legal case. If the client is willing to pay the costs, then he is really in earnest about proceeding with the case. Of course, if the client cannot raise the costs and he is really in jeopardy of losing his rights, most societies have a cost fund available for an emergency. The costs are usually paid in the expectation that they will be returned when the client is in a position to do so.

Of equal importance to providing representation for the poor person is the work of legal aid in doing what it can to make such changes in the law or procedure as will make unnecessary the assistance of an attorney and still obtain for the client the protection or assistance which the client must have. One example will suffice: legal aid may be called upon to draft pleadings and represent the client in many cases involving only a small amount of money. A small claims court, where no formal pleadings are required, will give the client the relief that he needs without the assistance of an attorney.

Many years ago the Legal Aid Society of Pittsburgh used to handle many appeals from the Magistrate's Courts—which were not courts of record—to the court of record where the case was heard *de novo*. It took most of the time of one legal aid attorney to draft pleadings and appear in court on these cases. Now, the transcript prepared by the Magistrate in all cases under a certain amount serve both the plaintiff and the defendant in the court of record, and that court hears the case, usually without counsel on either side. However, counsel can appear for either party, and where a difficult problem is to be decided a lawyer may be necessary. In such a case the matter will be referred to the Legal Aid Society if one of the parties has no attorney and is a poor person.

Now, having heard something of the general procedure of legal aid in practice, just what kinds of cases are handled? By far the largest number of cases fall into the category of family problems. The person consulting the legal aid society is usually the wife. It is in this category that most often both parties come into the office and the society is faced with the quandary of what to do since the society cannot represent both sides of the case.

As persons make application for legal aid, the receptionist checks the

files to see whether the applicant or the named defendant has ever before been in the office. Should the other party have been in the office on the same case before the current applicant is accepted, the lawyer will apprise the applicant of that fact and will go no further with the case unless the first applicant is willing to try to mediate the matter and the current applicant wishes to tell his story with the understanding that if it should come to court action, then legal aid could not represent him. If the case gets into court, the attorney for the society will enlist the assistance of another attorney not connected with the society in handling the case for the other party if the applicant cannot himself get an attorney.

Usually the domestic problems do not concern divorce, but rather support, the right of one party or the other to require the spouse to leave the home, custody of the children, and similar matters. Usually divorce is cited as an example of a situation in which, it is alleged, the poor person cannot get the same representation through legal aid as he could from a private attorney. In the beginning most legal aid societies addressed themselves to what were felt to be actions necessary to protect the client's rights; divorce was not usually considered a right but a privilege. It was thought this principle applied to all, rich and poor. However, it soon became apparent that there were cases when a divorce was actually a necessity, and where counsel fees can not be paid legal aid usually does step in and take care of the matter, although some organizations, my own included, for a long time insisted that a divorce could not be handled by legal aid without a written recommendation and report from a social agency that a divorce in the particular case would serve some useful purpose. Now, however, the policy is that the attorney should decide whether a divorce should be sought using the same criteria as for a private client. It is expected that if a social agency is involved, the attorney will consult a social worker to assist him in arriving at a decision as to whether he should handle the case.

The criticism directed toward the policy of divorce often gives the impression that a person ought to be able to step into a legal aid society or any lawyer's office and order a divorce just as he would order a hamburger in a restaurant. I do not think that this is the way most attorneys handle the matter. Even though court proceedings are adversary in nature and it is up to the other party to present a defense if he has one, I think most attorneys take into consideration that it is to the benefit of all to preserve marriages where possible. The first step is to try to work out a reconciliation, particularly if children are

involved. Only after considering the matter from all angles and advising his client of his obligations and responsibilities does he go ahead with the case even when the client can pay a fee.

Another phase of family problems is the question of adoption. Legal aid societies ordinarily limit themselves to family adoption; that is to say, the case must entail the adoption of a child born prior to the present marriage to either the husband or the wife. At times, the adoption is by a grandparent, aunt, or uncle. For the most part legal aid societies will not handle an adoption of a child placed with the client by an adoption agency. There may be exceptions, of course, but it is the feeling that we are not promoting the welfare of the child by encouraging an adoption into a family that could not even pay the court costs to make that child a true member of the family.

The clients that legal aid societies never handle are those with a fee-generating case, such as a personal injury matter, unless it is minor and directed only to recovering out-of-pocket expenses, such as a small medical bill or damaged clothing. No attorney would be interested in such a case because of the smallness of the amount involved. Generally, if the client feels that he has pain and suffering for which he must receive compensation the case is not for legal aid. In such cases as legal aid does handle the client is always made to understand that a settlement for out-of-pocket expenses only will preclude him from any further recovery. As a result, tort cases are handled very cautiously and represent only a small part of legal aid work.

As a matter of course, no legal aid societies undertake libel and slander actions. The reasons for this should be obvious.

Next to family problems, contracts are the biggest category of cases handled. This includes wages, landlord and tenant, small loans, installment contracts and the like. Landlord and tenant problems usually form the largest share of this category, and of course the society always represents the tenant. Even here, however, there may be circumstances which could justify an exception.

Small loans do not present the problem they did at one time, at least in Pittsburgh. Ordinarily small loan companies are very careful of their public image and can be reasoned with so that such matters are frequently resolved without recourse to the courts.

Wage claims do not present the problem they once did. In most states, the Department of Labor provides a very effective procedure for collecting them. It is usually the policy of legal aid, perhaps born of necessity, that it will not undertake anything unless there is no adequate remedy elsewhere.

Legal aid will represent clients who have had their relief status questioned. This is becoming a somewhat larger field. Usually these matters can be resolved without formal action being taken against the Relief Board. At least, that has been our experience.

Legal aid does not handle patent and copyright matters. I know of no legal aid with a patent expert on its staff. Usually such assistance is not required, since patent attorneys are almost always willing to gamble their fee for a piece of any patent which appears to have any merit. We consider this a fee-generating case.

Legal aid societies do not handle real estate transactions or examine titles to real estate. Any person buying property certainly should have enough money to pay for an attorney's services to assure him that he will have good title.

Estate matters are not handled unless they are very small. In Pennsylvania, this usually means the Family Exemption Procedure.¹⁹ In past years this presented a very real problem to our Legal Aid Society, but the Legislature has since made it possible for many claims which could have been paid only through Family Exemption Procedure to be paid directly to the family.

It has been the practice in most legal aid programs to represent only the individual. If a number of persons come into the office, who individually may qualify for legal aid but wish to collectively undertake some single action affecting all of them, every effort is made to direct this group to a private attorney. Even a small sum equivalent to a week's cigarette money from each of them can provide a fee which will interest a lawyer, often not because of the fee but because it provides the lawyer with multiple contacts which can be helpful to him as his practice develops. Generally, legal aid does everything possible to supply a proper client with the same aid as that supplied by the private attorney for a fee-paying client.

I hope I have made it clear that legal aid provides a real service, which, properly run, can help assure to all the preservation of their legal rights, the preservation to the private lawyer of his practice, and foster the feeling that we are truly a classless society as far as equality before the law is concerned.

QUESTIONS FROM THE FLOOR

Q: Mr. McCalpin referred several times to the English subsidy system and also to the fact that Durham, North Carolina, I believe, has

¹⁹Pa. Stat. Ann. tit. 20, §§ 320.211-320.216 (Supp. 1965).

a proposal to adopt that system. Could you explain what the English subsidy system is?

MR. McCALPIN: I can attempt to explain it at secondhand. One of the things I am looking for is the opportunity to go through it at firsthand. So far that opportunity hasn't arisen.

The English pride themselves on advertising that every English citizen may be represented by the lawyer of his choice, and I am told that there are even billboards lining the highways of England proclaiming this fact.

The way the system works is that an individual goes to a lawyer with his problem. If he proclaims himself unable to pay the lawyer's customary fee, the lawyer hands him a form. The lawyer proceeds to handle the case without any delay. The man takes the form to the National Assistance Board of England, which determines what portion of the fee shall be paid by the client, and at the conclusion of the matter the client pays that portion of the fee. The difference between what the client pays and what the lawyer receives is paid to the lawyer by the Law Society out of funds provided by appropriation by the Government to the Law Society.

As I understand it, the lawyers involved in the program—and this involves more than 90% of all the solicitors in the Law Society, at least—have agreed in advance that they will accept from clients of this sort 90% of the customary fee rather than 100%. What it amounts to is a subsidy inversely to the clients' ability to pay, the subsidy being paid by the government but being administered by the Law Society.

Now, Clint Bamberger can tell you better than I how the Durham and Wisconsin proposals approach this program.

MR. BAMBERGER: The Wisconsin proposal originally was to cover the whole State of Wisconsin, except Milwaukee County, where there is an existing Legal Aid Society which has applied for a grant from OEO to expand its program. But, now the Wisconsin State Bar Association is the applicant as well as delegate agency funded by the Office of Economic Opportunity for the purpose of conducting a program for legal services in 27 sparsely populated, predominantly rural counties in northern Wisconsin, embracing approximately 50,000 underprivileged residents. A person in need of legal services, upon establishing eligibility, will be given a "judicare" card, enabling him to select the lawyer (cooperating with the plan) of his choice. The State Bar Association, upon rendition of a bill, will then compensate the attorney from OEO funds at a rate not to exceed 80% of the minimum fee schedule established by the Bar Association, subject to

a maximum fee of \$300 on any one particular matter. This is not to be considered as a statewide plan, but only as a demonstration program for the purpose of evaluating the effectiveness of the so-called "Judicare" plan, particularly in rural areas.²⁰

In Durham, North Carolina, I think there is a total bar of about 100 lawyers. They will have 2 full-time salaried attorneys in the office to whom all applicants will come. These attorneys will decide the eligibility of the applicant for free legal assistance, and will handle as many of the cases as they can. They will refer some cases, particularly cases that require some specialized skill and cases that will require extensive briefing and argument, to private attorneys in cooperation with the Bar Association according to an ethical referral system.

Those attorneys will be compensated, again, a percentage—I think in this case it's 75%, but some percentage—of a minimum fee schedule, and there is some kind of maximum hourly charge for services. I think it is geared to the Federal Criminal Justice Act of \$10 per hour for office time and \$15 for court time.

We are going to fund some programs like that on a purely demonstration basis to see how it works. I doubt that we will fund any more than the 2 we have, and perhaps one other, one from some other kind of an urban complex, something different from the sparsely populated area in Wisconsin and the medium-sized town of Durham.²¹

Q: Mr. Bamberger, I would like to describe briefly a type of legal aid organization which I haven't heard specifically mentioned here. It happens to be the one that exists in Arlington County, which is the third of the 3 legal aid societies in Virginia. As far as I know it has been in effect about 20 years. The members of the Arlington bar, almost all of whom belong to the County Bar Association, simply line themselves up on a list—that makes about 200 lawyers—and they take legal aid days in turn so that every lawyer has a legal aid day about every 200th day. On the day his turn comes up in strict rotation a lawyer keeps his calendar clear, he stays in his office, and he is available to take any cases that come in that day. He must handle such cases through to the end, even though it means going through an appellate case. The burden thus spread is not too heavy, and I have never heard of a lawyer's refusing to take a case that came to him on that basis. Also, I have never heard it suggested by any lawyer that

²⁰See note 11, *supra*.

²¹Population of Durham was 78,300 at the 1960 Census; it is now approximately 81,500.

he should be compensated for this; it seems to be an obligation which follows as a concomitant of the monopoly that we enjoy.

Where something like this is apparently adequate to suit the needs of the poor and is donated by the lawyers as a kind of public charity, I gathered from Mr. Bamberger's remarks that there is a certain disapproval of that type of legal aid system and a certain preference for one which is funded. I would like to inquire what objection there is to this kind of program.

MR. BAMBERGER: I am sorry if you gathered that from my remarks, because I did not mean to imply that. If your program is adequate to meet the need, we have no desire to duplicate it or supplant it. We *have* funded a program like that where none existed, in Clarksdale, Mississippi, a small town. There are, I think, 6 groups of law firms or lawyers in Clarksdale, and each of these groups will supply a lawyer to the office on a particular day. He takes any case that comes in that day and follows through on it. He will be compensated for that day at something less than you would expect him to earn in his office, *and for that compensation for that day he performs whatever work is required as a result of the business that comes in that day.* There is a staff lawyer who will administer the program and will handle some of the cases. But there is *no* effort on the part of OEO to duplicate existing adequate legal aid services.

Q: I found quite interesting that part of the Government program in which the poor themselves are to participate in the operation of the plans. Frequently there is the experience that when you are trying to get help from the so-called underprivileged classes you cannot find the leadership. I wonder if Mr. Bamberger can tell us the experience so far in successfully locating poor people who can really contribute to the program and in just what fashion they have been able to contribute.

MR. BAMBERGER: The only problem I have heard so far is finding too many leaders.

Let me repeat something else I said. You know, this is not just OEO policy, but this is the standard for legal aid societies of the National Legal Aid and Defender Association, which says that "the residents of the area and members of the group served"—they don't use exactly that statutory language, but it's darn near the same—should be on the policy-making board or on advisory committees. Now, we differ a little bit about the advisory committee. Leaders from the poor are found in a number of ways. If there is an existing community action

agency,²² it very often has advisory councils in the neighborhoods where it locates its offices. It will have on its own board residents of the area or members of the group served, and let me emphasize, you use the word "poor", and I tend to use it as shorthand for the statutory language, which is "maximum feasible participation of the residents of the area and members of the group served." "Maximum feasible participation" means that the board should include actual residents of the area served and actual members of the poor community. They are selected in a variety of ways. In some places it may be desirable to have those people choose their representatives—who need not be poor—for the board. If there is an existing community action agency it might select these people. In some cases some of the residents of the areas and members of the groups who are on the community action agency board would nominate, or themselves sit on, the board of a separate legal services program.

In some places they have actually conducted elections. In Philadelphia and Kansas City elections have been conducted among the poor for their representatives on the community action agency. You can look to church groups, civil rights groups, and other groups who have concerned themselves with the problems of these people for leadership.

Q: Mr. Theophilus, concerning the nonsupport case, you say that quite a few of the cases heard were nonsupport on behalf of the woman. Surely you don't mean where the husband is capable of paying the court costs and the fees, and the court orders him to do so, that the woman would still be able to be represented by the legal aid society.

MR. THEOPHILUS: Unfortunately, where we operate, the court will not order fees to be paid by the husband in desertion and nonsupport cases. They will in a divorce case. Automatically, on application by the wife to the court for counsel fees in a divorce case

²²A "community action agency" is a broadly-based local body designed to unite the efforts of institutions and groups concerned with the alleviation of poverty. It is incorporated under the charitable corporation statutes of its jurisdiction to operate a variety of anti-poverty programs attacking local problems in the field of health, education, housing, employment, etc. Some projects are run by the agency itself; others by local public or private organizations *under contract* to the community action agency. With regard to projects proposed by other local organizations for funding by OEO, the community action agency screens proposals in the light of community needs and availability of funds and submits endorsed proposals to OEO. The legal aid services program is one of the few exceptions to the direct supervisory control of the community action agency. See *GUIDELINES FOR LEGAL SERVICES PROGRAMS*, available from Community Action Program, Office of Economic Opportunity, Washington, D.C. 20506.

there will be a reasonable fee required of the husband. But in desertion and nonsupport cases there is no order made by the court for counsel fees, so the woman, if she is going to be represented, will have to be represented by us or some other attorney free of charge.

Q: Returning to the question of representation on the advisory committee and advisory group, I would like to ask Mr. Theophilus the extent to which, in the Pittsburgh Legal Aid Society, representation follows the guidelines which have apparently been put out heretofore by the National Legal Aid and Defender Association, and also the extent to which the Pittsburgh Legal Aid Society has had to or would have to change its make-up in order to comply with Mr. Bamberger's Office of Economic Opportunity criteria.

MR. THEOPHILUS: I don't have the copy of the conditions with me, but we do not have an advisory committee, we just have a regular board made up of persons who have been considered as leaders in the community interested in only one thing: that we do a job.

The conditions imposed by the Office of Economic Opportunity would have required us to accept on the board one person from each of the 8 poverty pockets in the City of Pittsburgh. They would be selected for us. We wouldn't know who they would be. In addition to that, the board would have had to have been constituted in proportion to the population of the community. For instance, in the city of Pittsburgh 20% of the population are Negro, and that would mean that somehow, if the members selected for us by the target areas did not give us 4 Negro members, then we would have had to rearrange our board in order to make sure that there were 4 Negro members on the board, 2 of whom we were told would have to be professionals. Should 4 or more Negroes be selected for us by the target areas and none of them be professionals, then we would have to further rearrange our regular board by providing 2 more Negroes who would be professionals. Those were the conditions which were imposed upon us.

Q: Will you give us a definition of what you mean by "poor" or "indigent"?

MR. BAMBERGER: That depends upon in what sense you are asking. You mean, who is eligible for free legal services?

Q: Yes, sir.

MR. BAMBERGER: Well, as I said, there is no national standard of eligibility for free legal services. The local community would determine the standard, based on the cost of living and the cost of legal

services in that community. We have just 2 concerns: (1) that the standard isn't so low that it excludes a considerable number of people who, after they pay for decent food and housing and clothing, cannot afford a lawyer; and (2) that it not be so high that it includes people who can afford a lawyer. Every program which has been approved has a different standard of eligibility.

Q: Mr. Bamberger, assuming that a properly constituted community action group—one with representatives of the poor on its board—has a contract with OEO, may such a group also contract with a local legal aid society that does *not* have representatives of the poor on its board?

MR. BAMBERGER: While a Community Action Program may contract with a local legal aid society (or any other acceptable group) as a delegate agency for the purpose of developing and rendering competent legal services, it is required that such a delegate agency have a separate and independent board, including representatives of "the residents of the areas and members of the groups served." Let me emphasize that this is not only the policy of the Office of Economic Opportunity, but is now the standard for legal aid societies promulgated by the National Legal Aid and Defender Association and approved by the American Bar Association. The purpose of an independent board is to preserve the attorney-client relationship inviolate, and to insure staff attorneys the freedom and discretion of handling cases in the same manner that a private practitioner would have in a matter for a fee-paying client. The attorney in a legal services program should be free to litigate in behalf of clients against public bodies and administrative agencies, including the Community Action Agency itself, if such a course is indicated. Involving the poor on the board lends dignity and a sense of pride to those who so long have been told "what is good for them" rather than ascertaining an expression from them as to their needs and problems.

Q: I would like to know approximately how you determined the need for legal aid in the communities. Did you just take a few cities and go on this average? It seems to me you are accusing the Virginia Bar of not having done all it should for the poor. Have you gone into it thoroughly enough to see exactly what systems we have before you make this accusation, to see whether we are handling the problem adequately?

MR. BAMBERGER: Well, what I said was that I thought that the evidence of only 3 legal aid societies in the State of Virginia didn't indicate to me that the organized bar had been very strong in sup-

port of the legal aid movement. Now, that may not necessarily mean that the lawyers in Virginia are not providing all of the legal needs of poor people, but I would be willing, on the basis of past experience, to make that generalization without making any investigation.

In every community in which a legal aid society has begun to operate, it has uncovered in a few months a vast need that it could not meet. The 4 gray areas projects funded by the Ford Foundation, of which Mr. McCalpin spoke, New Haven, Boston, Oakland and Washington, D. C., uncovered this tremendous need just by reaching out and making the lawyers visible and accessible to the poor.

In Washington, D. C., there has been an existing Legal Aid Society for about 50 years, with a present annual case load of about 8,400 cases. The recently established Neighborhood Legal Services Program,²³ at the end of 9 months had a case load at an annual rate of an additional 7,800 cases a year, just 600 less than the long-existing Legal Aid Society. At the same time the rate of intake in the Legal Aid Society increased and they had the highest annual rate of increase of new cases that they had ever had.

What has happened is that where anybody has really started a legal services program and reached out and identified it, made it visible and accessible, he has uncovered a need the depths of which nobody has yet determined, because every program is swamped. Our concern is that they not become so swamped that they don't really, in every case, get at the roots of the problems.

Q: I want to say something about what we have done in Norfolk. I hate to say we lawyers are ignorant, but this thing is new to us, and the organizational period, which I would say is the first couple of years, is a whale of a lot different from the operation period through the years to come. It requires me and my friends in Norfolk to adjust our philosophies, our traditions relating to charitable practice.

The Norfolk and Portsmouth Bar Association has approved the incorporation of the Tidewater Legal Aid Society, and it has a Board of Trustees which is its governing body, and an Advisory Board which is advisory only.

The Board of Trustees has 15 members and is comprised of lawyers or judges elected by the Bar Association. The Advisory Board has 10 members, and they are the community leaders, officers of the United Community Fund, the Health, Welfare and Recreation Planning Coun-

²³This program is funded jointly by the Ford Foundation and the Department of Health, Education, and Welfare.

cil, which I think is the OEO local community action agent, labor union officials, indigent residents of the neighborhood to be served, physicians, women, all sorts of people [laughter]. I got that in the wrong order.

Personally, I don't think much of the Tidewater Legal Aid Society, because I think it is a mere subsidiary of the Bar Association. I think we ought to have a majority of lawyers or judges in order to insure the operation within our county and within our traditions, but I am personally very sure that we ought to have representatives of the poor and representatives of the community on our Board of Trustees.

And I am just as sure that we have got to go out into a neighborhood and establish our office, rather than hoping to have the indigents come downtown to our office on the 19th floor of a new bank building. I don't think that's the way to operate this thing.

What I am really trying to explain is that we are making a start, and there is quite a variety of opinion on how it should be done. But just because we lawyers are ignorant about it and are trying to do something that we all agree is in the right direction, that doesn't mean it is controversial.

What I want to ask you, Clint, is the name and address of a lawyer on your staff in Washington who can come to Norfolk and spend a day or two with us just chewing the rag and helping work the thing out.

One of the great problems is that when we talk in the terms of OEO, the community action program covers Norfolk, the City of Portsmouth, the City of Virginia Beach, part of the City of Chesapeake and part of Nansemond County. I am thinking in terms of starting 1 neighborhood legal aid office, but when you have to think in terms that broad, why, shucks, I could run into 15 in my mind, that might not even scratch the surface. I am satisfied that the business is there. Who can come to each community and help us?

MR. BAMBERGER: Let me take this occasion to tell you something about how we operate and also to introduce someone to you.

We have myself and a deputy director, Earl Johnson, who is a graduate of the University of Chicago with a master's in criminal law from Northwestern and was formerly the Deputy Director of the Neighborhood Legal Services Project in Washington. He is my deputy. In addition to that, there are 3 other lawyers on the staff in the Washington headquarters. As a matter of fact, 1 of them I stole from Mr. McCalpin's firm, Chuck Edson.

OEO divides into 17 regions around the country, and there are

regional offices. Virginia is in the Mid-Atlantic Region, which has its office in Washington. There will be 1 legal services representative in each of those regional offices. The man in the regional office in the Mid-Atlantic Region is Herman Wilson, who is a graduate of the Harvard Law School, and he is the man that anybody in Virginia who wants to talk about a legal services program should contact.²⁴

And in addition to that, we have consultants. These are lawyers and law professors. We have about 20 of them scattered around the country, and when we can't take care of the problem (principally because of time) we ask them to go and meet with a program, and they will help you. I can't think of any we have in Virginia, but we have several in Washington. Dean Kenneth Pye, who is Assistant Dean at Georgetown University, is one; Jack Murphy, who is a Professor at Georgetown, is another; a young lady who was an associate in Covington & Burling, Zona Hostetler, is a third. Those are the people we send, but if you got in touch with Herman Wilson, he would either come down or send someone to talk to you.

One other resource we have is the National Legal Aid and Defender Association. We have made a grant to them to assist them by employing 1 additional field representative who will go around and help communities begin legal aid societies which may or may not want to seek federal financing.

Q: Mr. Bamberger, might a legal services program be funded without the formal approval of the local bar?

MR. BAMBERGER: It could be, and I had to say that first in my own town in the Baltimore City Bar Association when they had 500 of them there to roast me; but that's right, we look to organized bar support. It is one of the things that we want and will consider. But even if the organized bar takes action against a program, we consider it. If we think that it is a good program, we will fund it. We won't fund it just because they disapprove it, and we don't disapprove it because they disapprove it—it is an important factor to be considered.

Q: Mr. Bamberger, may I ask this question: It seems to me a great deal of our discussion this morning has been directed to the performance of legal aid duties by members of the bar on a part-time basis. Is it true that a great portion of these services, instead of being performed by the bar, would finally come into a staff system where there would be 1 or more of the staff attorneys handling the great majority of the cases, with only the remainder finding their way into the hands of the general practitioner?

²⁴Mr. Wilson's address is 1730 K Street, N.W., Washington, D.C. 20506.

MR. BAMBERGER: We have no kind of standard program. One of the things we are very interested in doing is funding different kinds of programs, some using full-time staffs, some using part-time people, some using a combination of both to find out the most effective way to provide legal aid. I think that in most large cities there should be full-time staff. I think in any city it would be well to involve other lawyers on some kind of advisory basis, perhaps on a part-time basis handling cases. One of the things I would like very much to see in a city where you had a full-time staff would be an advisory committee of lawyers to help that staff—a sort of law-firm-senior-partner concept—since the full-time people are going to be overworked, and occasionally along comes the kind of case that Mr. Theophilus talked about, one that if properly appealed will change a rule and lighten your burden in the future.

If the kind of case comes along that requires a good deal of research, preparation, briefing, and argument, the full-time lawyer servicing the clients in the legal aid office may not have the time to do the best job. It would be very good if the bar would volunteer to help in that kind of case, and the best lawyers would take that kind of case.

I think in rural communities you may not need even one full-time person to handle legal needs. It may be that what you would want to have is some kind of staff person who would administer a system which would call on the bar in several small towns or counties to represent poor people who could not afford a lawyer and had legal problems. We have also talked about the circuit-riding concept; that is, a lawyer, probably full-time, who would be available at little crossroads towns or market centers on particular days to render assistance to people.

We don't have any preconceived notions about the necessity for everybody's being full-time or volunteer help. I have only one concern about volunteer help, and that is if you tried to run a large program with just volunteer lawyers we might never solve the really big problems.

For example, Lawyer A on Tuesday has a retaliatory eviction case, Lawyer B has another one the next day, and another lawyer has one next week, and they never really get together, and they see that what is needed here is an amendment of the statute, a real challenge to the practice in courts with an appellate decision which will correct this practice thus avoiding the necessity for a good number of these cases in the future.

I worry a little bit about whether, with an entirely voluntary system that disseminated the cases that broadly, you would ever achieve a concerted attack on the problem. On the other hand, you could well argue that by spreading the work around enough lawyers would get to know about the problem and maybe they would begin to do something about it. But we want to try different ways and find the best way.

We will require record keeping not much greater than the records kept by legal aid societies under the standards of the National Legal Aid and Defender Association, and we will use these records to evaluate programs. All of them will go through at least some kind of evaluation at the community level by the community action agency when they come up for refunding. We will evaluate some sample programs to see what is the best way.

Q: Mr. Bamberger, when you are making your determination about funding a community action program with a legal component, how do you go about determining whether the services already rendered in that community are sufficient.

MR. BAMBERGER: Well, we have some guides on those. Studies have been made and articles published which have made some assessment of the number of legal problems to be expected in any group of 1000 poor people. However, we haven't really had to face the duplication of services problem yet because we haven't had any application coming in alongside a large existing legal aid society where that society said it was meeting the need. I haven't yet heard a legal aid society say that it was satisfied that it was meeting the total need in its community.

Q: Mr. Chairman, a lot of us have heard some things about the program in Gum Springs, Virginia, and I am wondering if Mr. Bamberger would like to enlighten us officially about that. Things we have heard are not very complimentary, and I wonder if he would develop it.

MR. BAMBERGER: I have not heard anything, either complimentary or uncomplimentary about it. All I know is that the Gum Springs operation is somewhat of an anomalous situation. The Director of the Community Action Program is a lawyer who agreed to render legal services as the need arose, and has enlisted a number of volunteer lawyers from the nearby Washington area to assist him. Technically, no money has been allocated for a comprehensive legal services program from our office. The United Planning Organization has allocated the funds from its grant for the Gum Springs Community Action

Program, as the incidence of poverty is very great in this area. But if there is anything that you have heard about it, I would like to know it, and you will get an answer, I assure you.²⁵

Q: Mr. Bamberger, just to determine the scope of the program, are you familiar with what the budget will be for the fiscal year 1967 for the Legal Aid Section of the OEO?

MR. BAMBERGER: That sort of changes from day to day as there are demands for other money for community action programs. You see, we are part of the total community action program, but the last figure I heard is \$20 million, and the programs which have been approved so far are spending a total of about \$3.2 million.

Q: What are you doing to increase the moral standards of people that you may be working for? I will grant you there are some of them that have very little, but my experience as an old country lawyer is that you will get men who may not be able to pay a cash fee but can bring in a half-gallon of sorghum or something like that. And over the 40-odd years that I have been trying to practice law I have seen a number of people come in with practically nothing and I have given them services. Every time I gave them some service they wanted to come back and beg more, or they wanted to ride me, and if I made them pay something, they earned it and they felt better about it and their pride was not hurt. I am not sure making "corn" affected their moral character.

MR. BAMBERGER: Well, I don't know. I think you are getting into a whole philosophical debate whether government ought to do anything for poor people. That would take a long time.

I think it helps the moral fiber of a man when he finds out that this system of justice is a system for him too, and that a lawyer is somebody other than the man who comes to evict him or comes to repossess his automobile. I think that is the picture the poor have of lawyers, and there are some good studies that show that.

As Mr. McCalpin said, among the poor in Missouri the number of people with personal injuries who go to lawyers is considerably less than any of us lawyers thought it was. I have forgotten who said it, but the poor think of the law as a night stick, and the law is occasionally an oppressive force for the poor. I think it helps a man when he finds out Mr. Lawyer in town, the judge, and the law are things that help him. I think it helps his moral character.

²⁵The attorney who asked this question later wrote to Mr. Bamberger that he had no further questions to ask and no information to pass on concerning the legal service program in Gum Springs.

THE ACQUISITION AND PRESERVATION OF OPEN LANDS

MARVIN M. MOORE*

INTRODUCTION

This article seeks to establish 3 major points: that the United States is gradually losing its heritage of open land, that this unspoiled land is worth saving, and that we have available to us legal devices with which we can preserve much of it. These devices will be individually discussed.

I. THE INCESSANT LOSS OF OPEN LANDS

At the present time developers in the United States are consuming an average of over 3000 acres of suburban and rural lands per day,¹ and the rate of consumption is gradually increasing. The principal causes of this phenomenon are the rapid rate of population growth, increasing urbanization, and developers' common practice of using land wastefully.

The population of the United States has mushroomed since World War II. In the 10-year period from 1950 to 1960 the nation's population expanded by 18.2%,² and its present population of 196 million is increasing at the rate of one person every 11 seconds.³ If this rate of growth continues unchanged, our population in 1970 will be 215 million, and in 1980, 260 million.⁴

Rapid population expansion necessitates the building of many new homes, and in the last 25 years most home construction in the United States has taken place in Metropolitan areas—especially in the suburbs surrounding our large and middle-size cities.⁵ The 1950 census revealed that the central cities experienced a population increase of 5,700,000 (13%) during the preceding decade, and that the suburbs in-

* Associate Professor of Law, University of Akron College of Law; B.A., 1955, Wayne State University; LL.B., 1957, LL.M., 1960, Duke University.

¹Moore, *Legal Action to Stop Our Population Explosion*, 12 Clev.-Mar. L. Rev. 314, 323 (1963).

²Fairfax County, Virginia Planning Division, *The Vanishing Land* 16 (1962).

³Akron Beacon Journal, June 23, 1965, p. 2A, col. 7.

⁴Hauser, *Our Population Crisis Is Here and Now*, Reader's Digest, Feb., 1962, p. 147.

⁵Haar, *Land-Use Planning* 347 (1959).

creased by 9 million (35%).⁶ The trend toward urbanization became even more pronounced during the 5-year span following 1950. During that period rural areas gained only 300,000 people (0.05%), but the central cities added 2 million persons (4%).⁷ As a result of this influx into metropolitan areas, by 1963 the population of the United States had become 63% urban, as compared to only 45.7% urban in 1910.⁸

Although our municipalities have been growing rapidly for the past 2 decades, they are expected to balloon even more during the next 25 years. Demographers believe that 95% of our anticipated additional population will dwell in areas where a city or town now exists.⁹ A writer in the American Bar Association Journal says:

[T]he projected metropolitan growth for the next 25 years is roughly equal to the 1950 populations of the metropolitan areas (not central cities alone) of New York-Northeastern New Jersey, Chicago, Los Angeles, Philadelphia, Detroit, Boston, San Francisco, Oakland, Pittsburgh, St. Louis, Cleveland, Washington, Baltimore, Minneapolis-St. Paul and Buffalo plus 15 million more persons. If this pattern of growth follows the 6 years, 1950-56, 41.5 per cent of this urban explosion will occur in the fringe areas.¹⁰

One gets an inkling of the impact that this expansion will have on the countryside surrounding these cities from the prediction that in the area surrounding Chicago alone one million acres of land will shift from rural to urban in the next 30 years.¹¹

The already difficult problem of finding room for the bulk of an expanding population on the periphery of our metropolitan areas has been aggravated by the wasteful practices of developers. Subdivision and shopping center developments typically proceed with little regard for the preservation of open spaces and aesthetic features and with even less regard for the question whether the specific project under construction is consistent with any rational plan for the region's development. Subdividers typically leapfrog over parcels of open land lying just outside the city in order to obtain land at cheaper prices farther out. The result is that many acres of undeveloped land are left behind in the form of isolated chunks and strips that are too small or grotesquely shaped or poorly situated for development and too

⁶*Ibid.*

⁷Haar, *op. cit. supra* note 5, at 347.

⁸Moore, *People Make the Land*, Lawyers Title News, May, 1963, p. 2.

⁹Fairfax County, Virginia Planning Division, *op. cit. supra* note 2, at 15.

¹⁰Book Review, 46 A.B.A.J. 80 (1960).

¹¹*Ibid.*

dispersed or poorly located to constitute effective open space.¹² A primary cause of the disappearance of usable open space is the inefficient manner in which land is being developed. "It is not the growth itself [which creates the shortage], but the pattern of growth."¹³

In summary, the 3 factors of population growth, urban immigration, and wasteful land use have combined to threaten our country's supply of open lands and to render such lands least plentiful in those regions where the population is densest.

II. THE VALUE OF OPEN LANDS

One may reasonably inquire why a shortage of open spaces should be a cause for concern. After all, most of the lands being absorbed are put to constructive use. The answer is that open spaces serve a number of very important functions. They constitute water reservoirs and flood inhibitors, timber preserves, recreational sites, agricultural areas, buffer zones between municipalities, and game preserves. The first 5 of these functions merit individual treatment.

A substantial portion of our country's open lands are stream and river valleys and coastal lowlands.¹⁴ These lands are extremely useful. Since they have not been covered with buildings and asphalt, they act like a great sponge, and this phenomenon produces double benefits: By retaining most of the rainwater in the ground, these lands constitute a huge storage tank, making water available for the future needs of those who dwell in the region, and by minimizing the amount of runoff, such lands prevent floods. Concerning the latter benefit, the writer, William H. Whyte, Jr., declares:

Quite aside from any of the other benefits produced by an open space plan, it could be justified on the basis of watershed protection. . . . [W]hen there is a heavy rainfall, the streams and the creeks that flow into a natural storm sewer system are far better accommodated than [they could be] by anything constructed by man.¹⁵

¹²Eveleth, *An Appraisal of Techniques to Preserve Open Space*, 9 Vill. L. Rev. 559, 562 (1964).

¹³*Ibid.* Even in our most heavily populated cities, such as New York and Chicago, over 10% of the land is left vacant. This land is usually unsuitable for park or recreational purposes because of its size, shape, or location, or occasionally because the title is clouded. *Id.* at 563.

¹⁴Encyclopedia Americana, United States—Hydrography 307-08 (1939).

¹⁵Whyte, *Securing Open Space for Urban America: Conservation Easements* 16-17 (1959).

Forty-three per cent of the forests in North America are in private ownership and therefore subject to commercial exploitation.¹⁶ A few states exercise some control over the forest management practices of private owners,¹⁷ and some of the corporate owners with extensive timber holdings follow exemplary conservation practices,¹⁸ but no state prohibits an owner from selling his forest land to a subdivider or shopping center builder, and there is no federal legislation dealing with this problem.¹⁹ That our forest resources are not being adequately protected is revealed by this prediction of the United States Forest Service: Assuming the continuation of current forestry practices and the present rate of consumption of private forest lands by subdividers and others, by 1975 we will be cutting annually approximately 14% more timber than we are growing.²⁰

A major value of open spaces is the fact that they provide a site for outdoor recreation. National, state, and municipal parks and forests have long served as a retreat for cooped-in urbanites, and these sanctuaries will attract much greater numbers of people in the future.

The demand for all forms of outdoor recreation will increase at an unprecedented pace during the next 25 years. . . . [T]he impact on the need for parks and other open spaces becomes a major challenge of our time.²¹

The basis for the quoted prediction is that there will be a rise in each of the factors which most affect the demand for recreation: population, per-capita income, leisure time, and ease of travel.²² An increase of any one of these would be significant. When gains in all 4 categories are combined, the result to be anticipated is obvious.

A considerable part of our country's prime agricultural land is located near metropolitan areas.²³ Hence the problem created by the constant absorption of this land is more serious than is generally realized. Admittedly, United States farmers are currently producing more food than our population is consuming, and they should be able to con-

¹⁶Encyclopedia Britannica, Forests and Forestry 618 (1964).

¹⁷*Id.* at 620. Among these jurisdictions are California, Idaho, Maryland, Massachusetts, Minnesota, Oregon, Vermont, and Washington. See Note, 1952 Wis. L. Rev. 186 (1952).

¹⁸Two such corporations are Crown Zellerbach Corporation and Weyerhaeuser Company. Akron Beacon Journal, July 7, 1965, p. 3A, col. 3.

¹⁹Encyclopedia Britannica, *op. cit. supra* note 14, at 620.

²⁰U.S. News and World Report, April 4, 1958, p. 74.

²¹Fairfax County, Virginia Planning Division, *op. cit. supra* note 2, at 16.

²²*Ibid.*

²³Whyte, *op. cit. supra* note 15, at 17.

tinue doing so throughout the foreseeable future. However, the United States has assumed the burden of feeding much of the underdeveloped world. The magnitude of this undertaking is partially revealed by the fact that 80% of the 500 million new mouths the world has acquired during the past 10 years are in the underdeveloped nations.²⁴ Since 1954 the United States has shipped \$12 billion worth of surplus foodstuffs overseas,²⁵ and at the present time our country is providing some form of daily supplementary food ration to more than 100 million persons abroad.²⁶ Even if our country's existing agricultural acreage remains intact and our population becomes stabilized, our agricultural wealth will not be inexhaustible, for not all of the nutrients in the soil are replacable by fertilization. As evidence of this, it has been estimated that the agricultural value of Iowa farmland is deteriorating at the rate of 1% a year in relation to its original inherent productivity.²⁷ It is, of course, possible that some of the foreign peoples now being fed by the United States will eventually be able to feed themselves, and it is likewise possible, though unlikely, that we may someday decide to reduce our food shipments regardless of whether the need for them decreases. But until one of these developments occurs it seems prudent for us to conserve our existing farmland, particularly acreage of prime quality.

Finally, whatever other functions may be ascribed to open lands, equally important is the role they can play in channeling the growth and improving the environment of urban areas. In many sections of the country the boom in suburban development has nearly exhausted the open spaces between cities. If the cities and towns affected wish to prevent a complete merger and preserve some semblance of individual identity, they will obviously have to find some means of curbing urban sprawl. Open spaces taking the form of greenbelts can readily serve as checks to urban sprawl and stabilizers of suburban property values.

Planners, city officials, attorneys, and interested citizens must find new ways of encouraging developers to set aside [or refrain from purchasing] more open spaces, particularly in rapidly expanding metropolitan areas. If this is not done, few natural amenities will remain in these urban complexes and many citizens may live in a

²⁴Cook, *World Food Crisis—1964*, 20 Population Bulletin 205, 222 (Dec., 1964).

²⁵*Id.* at 214.

²⁶Cook, *supra* note 24, at 213.

²⁷Cook, *supra* note 24, at 214.

suburbia characterized by all-pervasive pavement and the monotonous development of every square inch of property.²⁸

Thus it is evident that open spaces contribute some very tangible and valuable benefits to our society, and the constant consumption of these lands is something to be deplored.

III. DEVICES FOR PRESERVING OPEN LANDS

Fortunately, some effective devices are available for restraining the absorption of our open spaces. These devices, which may be used individually or in combination, are: (A) acquisition of land by right of eminent domain; (B) acquisition of conservation easements; (C) compensable regulation of land use; (D) exclusive use zoning; (E) imposition of minimum lot sizes; (F) compelling of subdividers to dedicate a percentage of their land to parks, playgrounds, or similar uses; and (G) employment of property taxes to encourage nondevelopmental land uses. Each of these approaches will be discussed individually.

A. CONDEMNATION THROUGH EMINENT DOMAIN

Although this tool is very commonly used, its usefulness is somewhat limited by two unrelated factors: the constitutional requirement that land be taken only for public purpose,²⁹ and the costliness of condemnation.

In a state with no special legislation on the subject it is not certain that the courts would regard the acquisition of land solely to preserve it as an open space or greenbelt as satisfying the "public use" requirement.³⁰ However, a number of states have legislation expressly authorizing the purchase of land for open space purposes,³¹ and even in states lacking such enactments land can unquestionably be taken for certain kinds of open space uses. For example, it has long been established that the government can take land to create a park or play-

²⁸Volpert, *Creation and Maintenance of Open Spaces in Subdivisions: Another Approach*, 12 U.C.L.A.L. Rev. 830, 845 (1965).

²⁹U.S. Const. amend. V, which reads in part: "[N]or shall private property be taken for public use, without just compensation." Although this wording does not directly forbid a taking for a non-public use, the implication is clear, and the courts have interpreted the Amendment as prohibiting such a taking. See Beuscher, *Land Use Controls—Cases and Materials* 528 (1964). The Constitutions of Alabama, Arizona, Colorado, Missouri, Oklahoma, South Carolina, Washington, and Wyoming expressly disallow the taking of property for a non-public purpose. *Ibid.*

³⁰Whyte, *op. cit. supra* note 15, at 54.

³¹*Ibid.*

ground³² or to promote irrigation³³ or flood control.³⁴ More recently it has been decided that when land is condemned to eliminate an undesirable condition such as a slum or blighted area this serves a public purpose even though the property is not subsequently devoted to a use traditionally considered public.³⁵ Many decisions have found a public purpose present where more land was condemned than was needed for a particular public project in order to protect the improvement by surrounding it with open land.³⁶ For example, the courts have ruled that bluffs above the Hudson River may be condemned to preserve the beauty along a parkway³⁷ and that land around a library may be taken to enhance the beauty of the building.³⁸ It therefore appears that while the public use requirement may be a restraining influence, it does not prevent states and municipalities from accomplishing many open space objectives through the use of the eminent domain power.

The great expense of condemnation is a more serious restraint. Because of this, it is unrealistic to suppose that communities could ever obtain enough open lands solely through purchase of the fee simple title. Three developments have rendered the expense problem somewhat less formidable than it was:

(1) in 1961 Congress passed a statute authorizing federal grants of up to 30% to help defray the cost of urban and suburban land usable for park, recreation, historical, or conservation purposes.³⁹ Several states have obtained additional money for land acquisition through the issuance of bonds.⁴⁰

(2) in recent years states and municipalities have come to realize that a surprising amount of land can be obtained by gifts. A Regional Plan Study of Connecticut, New Jersey, and New York found that about 25-30% of the total land acquired by the

³²*Village of Lloyd Harbor v. Town of Huntington*, 4 N.Y.2d 182, 149 N.E. 2d 851 (1938).

³³*Matter of Tuthill*, 36 App. Div. 492, 55 N.Y.S.2d 657 (1899).

³⁴*Gruntorad v. Hughes Bros.*, 161 Neb. 358, 73 N.W.2d 700 (1935).

³⁵*Berman v. Parker*, 348 U.S. 26, 75 Sup. Ct. 98 (1954).

³⁶Comment, *Techniques for Preserving Open Spaces*, 75 Harv. L. Rev. 1622, 1633 (1962).

³⁷*Bunyan v. Commissioners of Palisades Interstate Park*, 167 App. Div. 457, 153 N.Y. Supp. 622 (1915).

³⁸*University of Southern California v. Robbins*, 1 Cal. App. 2d 523, 37 P.2d 163 (1934).

³⁹Housing Act of 1961, §§ 701-06, 75 Stat. 183-85, 42 U.S.C.A. § 1500(e) (Supp. 1963).

⁴⁰Eveleth, *supra* note 12, at 564.

states for parks from 1942-56 was procured through gifts.⁴¹ One form of gift which is now being encouraged by a number of communities is the donation of the remainder in fee simple with the retention of the life estate. However, most gifts are in the form of devises.

(3) government land-acquisition officials have recently learned that the expense of condemnation can often be significantly reduced by first regulating the use of the property as much as is consistent with the legitimate scope of the police power and then condemning and paying for the remaining uses.⁴² Since the just compensation requirement demands only that the condemnor pay for those property rights which he is taking, the payment required to condemn land already subject to controls is normally less than that needed to take land which is free from zoning regulations. This approach must be used cautiously, however, for it has often been held that a city may not zone unreasonably in order to lower the value of property prior to condemnation.⁴³ An illustrative case is *Grand Trunk W. Ry. v. City of Detroit*.⁴⁴ There the court invalidated an attempt to zone for exclusive multiple-dwelling use property located in an industrial area in which no prudent investor would erect multiple dwellings and which the city was contemplating condemning for redevelopment purposes.

B. CONSERVATION EASEMENTS

There is an alternative to condemning the entire fee simple in the land desired for open space. This is merely to take a "conservation easement" in the property. Under this approach the government purchases a negative easement comprising the landowner's development rights in the property. Title to the land remains in private hands, and the owner may make any use of the property not inconsistent with the rights conveyed to the government agency.⁴⁵ Nondevelopmental uses such as farming and grazing normally remain available to the landowner. The deed granting the easement to the government agency typically contains provisions disallowing:

- (a) erection of structures.
- (b) removal or destruction of trees, shrubs, or other greenery.
- (c) construction of private roads or drives.

⁴¹*Id.* at 575.

⁴²Comment, *supra* note 35, at 1638.

⁴³*Ibid.*

⁴⁴326 Mich. 387, 40 N.W.2d 175 (1949).

⁴⁵Whyte, *op. cit. supra* note 15, at 31.

- (d) uses other than residential, agricultural, and those incidental to the installation and maintenance of public utilities.
- (e) display of billboards and other forms of outdoor advertising.
- (f) dumping of trash, wastes, and other unsightly materials on the land.

In addition the deed usually authorizes the grantee-agency to allow any changes requested by the owner which the agency deems consistent with the purpose of the easement.⁴⁶ The landowner's compensation is the difference between the market value of the property without the easement and its value subject to the easement.

The use of conservation easements has a number of advantages over condemnation of the entire fee simple. The easement approach:

- (1) is usually less expensive.
- (2) seldom injures the community's tax base.
- (3) permits the government to escape maintenance costs.
- (4) mitigates the pressure on farmers and others to sell to developers, since the realty taxes no longer reflect the property's value for development purposes.
- (5) increases the number of gifts of open lands. Relatively few landowners are wealthy enough or public-spirited enough to donate their land outright, but there are many who can and would give a conservation easement if this led to a reduced tax valuation on the property and enabled them to deduct the value of the easement from their income tax as a charitable gift.⁴⁷

Since there is some controversy about the actual value of items one and two, they will be given individual attention. It is sometimes asserted that a jury is likely to award a landowner almost as much money for the taking of a conservation easement as it would for the acquisition of the fee simple; hence the government might as well take the whole fee and get the full value of what it is paying for anyway. This view is probably explained by the fact that for many years the kind of easement most commonly taken by the government has been one for a highway or railroad right of way.⁴⁸ Here the owner has usually been awarded nearly as much money for the easement as he

⁴⁶Of course the agency could allow such changes even in the absence of a clause so providing, but it is good psychology to expressly mention this authority in the deed, where the landowner can see it.

⁴⁷See Whyte, *op. cit. supra* note 15, at 36.

⁴⁸*Id.* at 30.

would have obtained for the land itself.⁴⁹ In this kind of fact situation such an award is understandable, for a highway or railroad easement renders the affected strip virtually useless to the owner of the servient tenement. On the other hand, a landowner who grants the government a conservation easement retains his present uses plus the right to engage in any others that do not conflict with the stipulated restrictions against improvements. Of course, under given circumstances he may still be surrendering a lot, for his property may comprise choice building sites located in the midst of suburban developments. But in many cases the value of the property will be ascribable mainly to its usefulness for farming, grazing, commercial recreation, or some other purpose not requiring improvements, and in these circumstances the landowner gives up very little by granting a conservation easement. On the average, therefore, it should be cheaper to purchase a conservation easement than to buy the fee simple, especially if the government agency is diligent about acquiring easements before the land has become ripe for development.

Those who doubt that conservation easements are usually harmless to the community's tax base point out that in instances when the value of the land is attributable mainly to its usefulness for commercial or residential development, to subject the property to a conservation easement will substantially reduce its tax valuation. This observation is true, but it overlooks 3 significant considerations:

- (1) a lot of land derives its principal value from its usefulness for purposes not requiring development;

- (2) whatever taxes are lost through lower valuations on property subject to conservation easements are commonly recouped through increased valuations on nearby property, which is made more valuable by the assurance that neighboring tracts will not be despoiled by development. For example, in New Jersey the Union County Park Commission reported that between 1922 and 1939 there was a 631.7% increase in assessed valuations on properties adjacent to Warinanco Park.⁵⁰ This was nearly 14 times the average increase of 46.4% for the entire city during the same period.⁵¹ A similar increase was reported for land contiguous to a park in Elizabeth, New Jersey.⁵² Property located near land subject to a conservation easement may not increase in value as

⁴⁹*Ibid.*

⁵⁰Herrick, *The Effect of Parks Upon Land and Real Estate Values*, *The Planners' Journal*, Oct.-Dec., 1939, p. 89.

⁵¹*Ibid.*

⁵²*Id.* at 90.

much as does land adjacent to a park, but one may nevertheless expect the former to rise substantially in value;

(3) property restricted by a conservation easement does not burden the community with new demand for sewer and water lines, school construction, and police and fire protection. Thus any loss of tax income from such land is to a great extent offset by a concomitant absence of expenses.

A number of states have enacted enabling legislation providing for the purchase of conservation easements.⁵³ Such enactments typically state that governmental units have the power to condemn easements in land, as well as the fee simple, and declare that open lands are beneficial to society. It is not certain that such legislation is necessary, since power to purchase the fee simple should, logically, include the power to buy something less than the fee, and since many courts would doubtlessly deem open lands to be beneficial to the public even in the absence of a statute so stating.⁵⁴ Nevertheless, since these points are not entirely free from doubt, a state desiring to promote the use of conservation easements is well advised to enact such enabling legislation.

C. COMPENSABLE REGULATIONS

An approach similar to that of purchasing a conservation easement is to zone out the right to develop and then compensate the affected landowners for any losses suffered by them. This is the substance of the compensable regulation scheme devised by Professors Jan Z. Krannowicki and James C. Paul of the University of Pennsylvania.⁵⁵ Under this plan an area is selected for preservation, and then all of the parcels making up the area are evaluated. The values thus determined are guaranteed to the landowners by the government authority; then regulations are imposed limiting the uses of the properties to those of a nondevelopmental character. To the extent that these restrictions impair the value of the land for uses actually being made at the time the owner is allowed immediate compensation.⁵⁶ To the extent that the controls merely reduce the value of the property for potential development, the owner is awarded damages if and when he

⁵³E.g., Mass. Gen. Laws ch. 40, § 8(c) (Supp. 1965); N.Y. Gen. Munic. Law § 247.

⁵⁴See Whyte, *op. cit. supra* note 14, at 54 and Comment, *supra* note 35, at 1636.

⁵⁵Krannowicki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. Pa. L. Rev. 179, 180 (1961).

⁵⁶Comment, *supra* note 36, at 1639.

sells the land at an administratively supervised public sale.⁵⁷ Since the compensation allowable to a landowner cannot exceed the initially determined market value of the property, it follows that subsequent increases in development value are not compensable.

This approach appears to have 3 advantages over condemnation of the fee simple or of a conservation easement:

(1) the imposition of compensable regulations does not require the expenditure of large sums at the beginning of the program, for an affected landowner is not entitled to compensation for loss of development value until he conveys his property at a public sale;

(2) this plan is likely to be less expensive overall, for any intervening increases in the market value of the regulated land reduce the amount that the government must pay at sale time;

(3) this device can facilitate more rational planning, since flexibility can be achieved by amending the regulations.⁵⁸ A significant disadvantage of the scheme is that it is likely to get a hostile reception from some segments of the public, for notwithstanding the plan's provision for compensation, it will doubtlessly impress many as being "socialistic."

D. EXCLUSIVE USE ZONING

Since the celebrated decision in *Euclid v. Ambler Realty Company*⁵⁹ in 1926 the courts have recognized that it is a legitimate exercise of the police power to enact reasonable zoning ordinances promoting those uses for which a given area is best adapted and preventing the establishment of disharmonious uses within the area. In the years following that decision communities have employed various forms of open space zoning, including flood plain, historical, scenic, recreation, and agriculture zones.⁶⁰ Of these classifications agricultural zoning has probably received the most use. Santa Clara County in California and Lancaster County in Pennsylvania have both made extensive and effective use of agricultural zoning.⁶¹ One may wonder why communities resort to the expensive devices of condemnation and compensable regulation when exclusive use zoning is available. There are 2 reasons:

⁵⁷*Ibid.*

⁵⁸If an amendment reduces the property's development value still further, the owner will simply be awarded additional compensation when he conveys the property at public sale.

⁵⁹272 U.S. 365, 47 Sup. Ct. 114 (1926).

⁶⁰See Eveleth, *supra* note 12, at 573.

⁶¹Whyte, *op. cit. supra* note 15, at 23.

(1) unless the particular property is peculiarly adapted to a given open space use such as agriculture, outdoor recreation or service as a flood plain, the courts are likely to invalidate any attempt to zone out other uses, deeming such an ordinance unreasonable and confiscatory.⁶² Invalidation is especially likely when nearby lands have been developed and the property in question has acquired considerable value for subdivision or shopping center purposes, for the courts are understandably loath to sanction land-use legislation that causes landowners to suffer a substantial economic detriment;

(2) even if the zoning act withstands attack in court, once the local population becomes sufficiently dense and development and tax⁶³ pressures become intense, zoning laws commonly give way. This phenomenon generally begins with the granting of numerous variances and ends with an amendment of the zoning code.

E. MINIMUM-LOT-SIZE ZONING

The most commonly employed method of protecting open spaces is to impose large minimum lot sizes in suburban residential areas.⁶⁴ The courts have invalidated ordinances implementing this approach in a few instances, but these have usually been cases where the specified minimum size was clearly too large to permit the kind of development for which the area was suited or where the restricted area covered too vast a section.⁶⁵ The courts have sanctioned large-lot zoning in a distinct majority of the cases in which the question has been presented,⁶⁶ and in recent years they have manifested a disposition to approve higher minimums. In *Flora Realty & Investment Co. v. City of La Due*⁶⁷ the court supported a 3-acre minimum:

Any intrusion of smaller lots into such an area will have the effect of impairing the value of buildings already constructed. A reduction of the minimum area restrictions on appellant's property would have a materially adverse effect on the value of all property in the

⁶²See Cribbet, *Principles of the Law of Property* 322 (1962).

⁶³Land zoned for unintensified use is commonly taxed as though it were available for development, because assessors share the local public's belief that once the market demands a more intensive use, the zoning will be changed. See Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 Wis. L. Rev. 628, 631.

⁶⁴Eveleth, *supra* note 12, at 573.

⁶⁵Note, *Snob-Zoning—A Look at the Economic and Social Impact of Low Density Zoning*, 15 Syracuse L. Rev. 507, 510 (1964).

⁶⁶Whyte, *op. cit. supra* note 15, at 21. At least thirty-nine states have recorded decisions on the subject. Book Review, *supra* note 10, at 80.

⁶⁷362 Mo. 1025, 246 S.W.2d 771, 776 (1952).

general vicinity of appellant's land. The ordinance was intended to stabilize and preserve the value of the property in the several districts.

An ordinance changing the minimum from 2 to 4 acres was upheld in *Senior v. Zoning Comm. of Town of New Canaan*,⁶⁸ mainly on the grounds that the land's most appropriate use was for a "superior residential district" and that the zoned area lacked city water and sewage facilities. And in *Fischer v. Bedminster Township*⁶⁹ the court sanctioned a 5-acre minimum, stressing the desirability of large-lot zoning as a means of preserving the rural character of the community. However, ordinances specifying minimum lot sizes are not certain to withstand attack unless they in some manner promote the health, safety, morals, or general welfare of the community and are deemed reasonable in the light of the facts of the particular case.⁷⁰

Large-lot zoning has been criticized on the grounds that large minimums necessitate the consumption of even more land to house a given number of people, thereby contributing to urban sprawl; that big home sites render utilities and other public services more expensive, since sewer and water lines, roads, and school buses must travel farther; and that large lots—whether considered separately or together—do not produce an ideal kind of open space, for they are commonly fenced, cleared of all but a few trees, relatively devoid of wildlife, and inaccessible to all but their owners.

These criticisms are not without merit, but they are answerable. Although an area zoned for large minimums can accommodate comparatively few people, a community that wishes to adopt such zoning in one section can avoid creating a housing shortage by zoning some other section for duplexes and apartment houses. That large-lot zoning makes road and utilities cost more expensive is undeniable, but it is equally undeniable that a large-lot district is less costly to service with schools, public welfare, and police protection than is a high-density section.⁷¹ A recent tax-cost analysis of the residential sections of Yorktown, New York, revealed that tax revenues from Yorktown's residential property—the bulk of which is high-density—constituted 75 per cent of all revenues, but that services to this property consumed 83 per cent of the revenues;⁷² hence the owners of business and in-

⁶⁸146 Conn. 531, 153 A.2d 415 (1959).

⁶⁹11 N.J. 194, 93 A.2d 378 (1952).

⁷⁰Note, *supra* note 65, at 510.

⁷¹See *Id.* at 514.

⁷²*Id.* at 515.

dustrial property were compelled to make up the deficit by paying higher taxes than would otherwise be demanded. In response to the last criticism, it is true that minimum-lot-size zoning cannot create anything akin to a wilderness, but it can provide open lands of a less primeval character, and domesticated open space would seem to be greatly preferable to none at all. Moreover, there is a type of large-lot zoning which *can* provide open lands of a relatively natural character, although at a sacrifice of certain advantages incident to orthodox large-lot zoning. The approach referred to is "cluster-zoning," which has been enthusiastically received by many planning authorities. It merits individual discussion:

Cluster zoning limits the number of homes that can be built on a given acreage of land, just as large-lot zoning does, but permits the builder to reduce the individual lot sizes to a limited extent so long as he provides a corresponding amount of open space elsewhere within the tract.⁷³ For example, in an area zoned for one-acre lots a developer might be able to create 100 lots on 100 acres (assuming land for streets is included in the one-acre calculation). Under cluster zoning he might be allowed to place 100 homes on 75 acres if he reserved 25 acres for permanent open space.

In addition to its ability to preserve open land in a natural state—that is, in the form of large, unbroken parcels—cluster zoning has several other advantages over orthodox minimum-lot-size zoning: The former is more economical for the homeowner, since it involves lower costs for water, sewers, road-paving, natural gas, similar utilities, and landscaping. It permits more flexibility, since lots can be tailored and located to fit the topography of the tract, thereby making possible a more interesting pattern of landscaping and architecture. Finally, where sewer facilities are unavailable it provides a large open area for the leachbeds commonly needed for septic tanks.

However, cluster zoning has 2 significant disadvantages when compared to large-lot zoning:

- (1) to the extent that the individual lots are reduced in size the homeowner's privacy is likewise reduced. There are many persons who would rather have a small parcel of open land all to themselves than have access to a large tract of such land that must be shared with their neighbors;
- (2) implicit in cluster zoning is the danger that the compact open space set aside at the beginning will later be encroached

⁷³Volpert, *supra* note 28, at 843.

upon if development pressures build up and efforts are made to alter the zoning law.

F. COMPULSORY DEDICATION OF LAND

A number of states have enabling legislation authorizing communities to require developers to dedicate a portion of their land for park purposes.⁷⁴ New York has such a statute:

Before the approval by the [municipal] planning board of a plat . . . such plat shall also show in proper cases and when required by the planning board, a park or parks suitably located for playground or other recreational purposes. . . . [T]he parks shall be of reasonable size for neighborhood playgrounds or other recreational uses. . . .⁷⁵

Currently the amount of land required to be set aside in the states having such legislation varies from 3%-12% of the subdivision's gross area.⁷⁶ Some municipalities permit the subdivider to reduce his lot size below the specified minimum to a limited extent if he dedicates an equivalent amount of land to a park or similar open area.⁷⁷

Although there is a division of opinion among treatise and law review writers as to the validity of legislation authorizing the compulsory dedication of land, most recent cases have upheld such enactments.⁷⁸ However, in several instances the courts have invalidated attempts by municipalities to compel developers to dedicate property for parks or schools to be used mainly by the general public, rather than principally by the inhabitants of the development.⁷⁹

The compulsory dedication device has been criticized on 2 grounds. The first is that it is simply unfair to require a developer to provide the locality with park land or other open space at his expense. The test used by the courts in passing judgment on questions of this kind probably accords with generally accepted notions of fairness. The courts ask whether a given rule or restriction affecting property rights is a reasonable means of promoting the public health, safety, morals, or general welfare.⁸⁰ It would seem that compulsory dedication

⁷⁴Note, *Subdivision Control Requirement for Parkland*, 12 Syracuse L. Rev. 224, 225 (1960).

⁷⁵N.Y. Town Law § 277.

⁷⁶Note, *supra* note 74, at 226.

⁷⁷See *Crinko v. South Brunswick Planning Board*, 77 N.J. Super. 594, 187 A.2d 221 (1963).

⁷⁸Eveleth, *supra* note 12, at 583.

⁷⁹*Ibid.*

⁸⁰Kratovil, *Real Estate Law* § 545 (1958).

used with a modicum of restraint is as reasonable a means of preserving open space as the imposition of minimum lot sizes or the employment of exclusive agricultural or recreational zoning. The second criticism is that since this device permits the developer to determine which land is to remain open, the community has no assurance that the land set aside will be suitable for park, recreation, or other open space purposes. After all, the developer will typically set aside that property which is least suitable for development, such as swamp land or land containing rough terrain. This objection overlooks the fact that open lands (as indicated earlier)⁸¹ serve a variety of useful functions, hence the land selected for preservation is almost certain to serve some valuable purpose, regardless of its features: land characterized by rough terrain is commonly desirable for park purposes, and swamp land usually makes an ideal water basin and wildlife sanctuary.

The principal merit of compulsory dedication is that it represents a method of preserving open land in a residential area at no expense to the public.⁸²

G. THE TAXATION APPROACH

In recent years planners have manifested a growing interest in the use of taxation as a planning device. They have become aware that a community can retard the loss of its open lands by lessening the tax burden on landowners whose property is devoted to certain open space uses such as agriculture, ranching, recreation (including golfing), flood control, the provision of airport buffer strips, or the preservation of historical landmarks.

That the system of property taxation presently employed throughout most of the United States contributes to our nation's loss of open space is obvious.⁸³ As a result of the national phenomena of population growth and increasing urbanization, suburban communities have been facing mounting economic pressures for the past 20 years. To provide all of the needed new services such as schools, roads, sewers, water, and police protection these communities have had to obtain more money, and this problem has generally been "solved" by raising property taxes.⁸⁴ But the medicine has aggravated the illness,

⁸¹*Supra*, at 276-79.

⁸²The loss of tax revenue from the dedicated land might be regarded as a public expense.

⁸³See Hagman, *supra* note 63, at 637.

⁸⁴Whyte, *op. cit. supra* note 15, at 38.

for local farmers and other owners of open lands have found their tax burden so great as to render uneconomical continued unintensive use of their property, and so they have commonly sold the land to a developer or changed their use to a more intensive one, thereby creating a need for more public services.

Farmers have been particularly pressured by mounting real estate taxes, especially those whose land is located in the path of impending development. Since the tax assessor must, in theory, base his assessment on the market value of the property, not limited to its current agricultural use, taxes have often forced the farmer to subdivide prematurely.⁸⁵

The result is that the tax assessor has become in effect a master planner who has contrived to gradually rid suburban areas of their open spaces.

The undesirability of this state of affairs led Maryland in 1956 to become the first state to adopt a broad-scale tax plan calculated to encourage the preservation of open land. Since 1956 8 other jurisdictions have enacted legislation implementing comparable tax schemes.⁸⁶ The approaches adopted by these jurisdictions fall into 1 of 3 classifications: a general directive to assessors, a tax preference, or a tax deferral.⁸⁷

When the general directive is employed, tax assessors are ordered to presume that a land-use control (such as zoning) currently applied to a given parcel of land is permanent in the absence of clear evidence to the contrary.⁸⁸ It is presently common for the assessor to take into account the local market's assumption that an existing restriction on the use of land will be removed when the pressure for more intensive use becomes great enough.⁸⁹ He therefore values the parcel as if it were free of the restriction, thereby increasing the pressure on the owner to get the restriction removed and develop the property. If a general directive is issued, the owner of such land may still be tempted by attractive offers from speculators and developers, but he

⁸⁵Eveleth, *supra* note 12, at 588.

⁸⁶The nine states (including Maryland) are: California, Cal. Rev. & Tax Code § 402.5; Connecticut, Conn. Gen. Stat. Ann. §§ 12.63, 12.207 (a)-(e) (Supp. 1964); Florida, Fla. Stat. Ann. §§ 193.11 (3), 193.201 (Supp. 1961); Hawaii, Hawaii Rev. Laws §§ 98H 1-16, 187 (2-3) (Supp. 1961); Indiana, Ind. Ann. Stat. § 323 (1963); Maryland, Md. Ann. Code art. 81, § 19 (b) (Supp. 1962); Nevada, Nev. Rev. Stat. § 361-313 (1961); New Jersey, N. J. Rev. Stat. § 54:4-1 (Supp. 1962); and Oregon, Ore. Rev. Stat. §§ 215.130, 203, 213, 308, 370, 375, 380, 390, 395 (1963).

⁸⁷Hagman, *supra* note 63, at 638.

⁸⁸*Ibid.*

⁸⁹*Id.* at 631.

will no longer be subject to the additional—and more compelling—pressure of a heavy tax burden.

The preferential assessment involves assessing land being used for a specified open space purpose at its value for its present or an allowable use.⁹⁰ This approach differs from the general directive in that it does not apply only to selected land uses and in that it does not necessarily assume that the property favored is to be permanently restricted to its present uses. A preferential assessment statute is of doubtful validity under many state constitutions, for most of them require that all taxation be equal and uniform, thereby prohibiting unreasonable classifications and partial exemptions.⁹¹ In addition, a number of state constitutions require that assessments be based on "just valuation" or some similar concept.⁹² Consequently, in those jurisdictions tax statutes employing other measures of value are open to constitutional challenge.⁹³ There are at least 2 ways of coping with these constitutional barriers. The first and most obvious is to amend the state constitution, assuming that enough people can be persuaded that the preservation of open lands is of sufficient importance to warrant such action. The second is to preface the open space taxation statute with a preamble presenting legislative findings that open lands are vital to the public welfare and therefore merit distinctive tax treatment. There is no certainty that a preamble of this kind will protect the act from invalidation, but apprising the court of the legislature's land-use-planning motives will normally improve the statute's chances of being sustained.

Both the preferential assessment and the general directive have been attacked on the ground that their effect is simply to increase the tax burden on everyone other than the owners of open lands:

The process of granting exemptions feeds upon itself. As more and more exemptions are granted, the tax burden becomes higher upon the persons left to carry the load, and so demands begin to be heard for even more exemptions. . . . It seems to be part of our national psychological heritage to consider property tax exemptions as an ideal means of promoting worthwhile enter-

⁹⁰*Id.* at 639. California, Connecticut, Florida, Hawaii, Indiana, Maryland, and New Jersey, have preferential assessment statutes. The citations are given at note 86, *supra*.

⁹¹51 Am. Jur. *Taxation* § 156 (1944). A Nevada taxation statute favoring open land was held to create an unreasonable classification in *State v. Boyne*, 390 P.2d 225 (Nev., 1964).

⁹²*Id.* at § 119.

⁹³84 C.J.S. *Taxation* § 54 (1954). The majority of these constitutional provisions do not require that property be taxed at its *full* value.

prises, dispensing charitable aid, [or] furthering social reforms. . . . There is little or no recognition of the fact that many of these objectives could be more economically and more equitably achieved through a direct and visible subsidy. Instead, however, we prefer the devious, never-count-the-cost method of chiseling away at our property tax base, in true devil-take-the-hindmost fashion.⁹⁴

The short answer to this criticism is that all devices for preserving or acquiring open space impose a financial burden on someone⁹⁵ and that it is highly debatable whether the above-discussed tax approaches are less economical or equitable than other devices.

The deferral approach involves postponing the payment of taxes on that portion of the market value of the land which exceeds the value of the property for its present use until the owner subjects the land to a more intensive use.⁹⁶ Under this system the owner of open land pays a low rate as long as his property remains undeveloped, but he must pay the accumulated difference between the low taxes which he has been paying and the higher taxes which reflect the full value of the land if he ever exploits the property commercially.⁹⁷ Thus deferral eventually recovers for the public the taxes temporarily forgiven. Although many commentators favor tax deferral and although it appears to be above constitutional challenge,⁹⁸ the device is not free from objections. The record-keeping required by the system renders it expensive to administer, and the scheme does not benefit the owner of undeveloped land a great deal unless he plans to live on the property until his death. Landowners commonly fear the accumulation of taxes and prefer to keep their property liquid, even though they may not contemplate selling in the near future.

CONCLUSION

This article has sought to establish that our country is constantly losing portions of its open land, that this land is clearly worth preserving, and that much of it can be saved if we make diligent use of

⁹⁴Walker, *Loopholes in State and Local Taxes*, 30 Tax Policy 4 (Feb., 1963).

⁹⁵For example, condemnation under eminent domain is financially burdensome to the public, while exclusive use zoning and minimum-lot-size zoning impose an economic burden on the landowner, who can no longer sell his property for certain purposes or subdivide it into smaller lots.

⁹⁶Hagman, *supra* note 63, at 639. Nevada & Oregon have deferral legislation. See note 86, *supra*, for statutory citations.

⁹⁷*Id.* at 639.

⁹⁸*Id.* at 645.

the legal devices available. On the whole, compulsory dedication, cluster zoning, and the purchase of conservation easements appear to be the 3 most promising devices. The first 2 have the merit of being cost-free to the community,⁹⁹ and the last constitutes an ideal tool for protecting extensive tracts of unspoiled land at a minimum of expense. Which of the various devices should be used or emphasized by a given community depends on its political and economic climate. The longer a community waits to initiate an open spaces preservation program, the less satisfactory the ultimate results will be, for once a tract of open land has been developed, it is seldom feasible to restore the land to its natural condition.

⁹⁹Minimum-lot-size zoning is also cost-free to the public, but, unlike the two approaches referred to, it cannot preserve open spaces in the form of large, compact parcels.

LEGISLATIVE REAPPORTIONMENT AND CONGRESSIONAL REDISTRICTING IN VIRGINIA

RALPH EISENBERG*

The Commonwealth of Virginia, like other states in the United States, has been very much preoccupied during the past 5 years with problems of legislative reapportionment and redistricting. For the past 3 years, State concern with redistricting problems has been prodded by suits which sought to compensate for the earlier failures of the political process to bring about equal representation in the State legislature, congressional districts, and on municipal governing bodies. Stimulated by *Baker v. Carr*,¹ decided by the United States Supreme Court in 1962, litigation successfully challenged the apportionment of both houses of the General Assembly, the composition of the State's 10 congressional districts, and representation on the councils of 2 Virginia cities. A reapportionment or redistricting was brought about in each instance. Only county governing bodies in Virginia thus far have escaped challenge in the courts.

The Virginia experience in the national "Reapportionment Revolution" is not unique. Most other states have been deeply involved in reapportionment and redistricting activities. But Virginia faced reapportionment crises on all levels of government in a relatively short period of time. What perhaps most distinguishes Virginia in the midst of the reapportionment problems afflicting the states is its response to the judicial insistence upon one man one vote standards for legislative representation. Virginia legislated acceptable plans for redistricting both houses of the General Assembly, the State's 10 congressional districts, and at least 1 city council without the delaying tactics and bitter acrimony characteristic of some other states. Undoubtedly, part of the explanation for Virginia's compliant response to the demands of equal representation lies in the fact that deviations from that principle were not deeply rooted in the State's political traditions. In addition, the political impact of reapportionment in the Commonwealth was not so great as to produce immediate and substantial re-

* A.B. 1952, A.M. 1953, University of Illinois; M.A. 1957, Ph.D. 1961, Princeton University; Associate Professor of Government and Foreign Affairs, Assistant Director of the Institute of Government, University of Virginia.

¹369 U.S. 186 (1962).

alignments of political power in this decade. Finally, the legislative process in Virginia takes place in an environment of strong majority party control of both houses of the General Assembly which serves to reduce the probability of deadlock on reapportionment solutions.

It is appropriate to examine the Virginia involvement in reapportionment on the 2 levels of government where the reapportionment issue finally has been closed. Litigation further challenging the apportionment of city councils is still under way. This article will focus on the Virginia legislative and congressional cases and not attempt to treat the numerous other issues of reapportionment raised in cases affecting other states.

The Virginia cases did not raise the panoply of issues and questions which had to be confronted by courts sitting in other states. Malapportionment of the Virginia legislature was not a result of long-standing legislative failure to act to reapportion. The Virginia Constitution did not provide explicitly for the composition of legislative districts nor contain formulas for apportionment which produced inherent inequalities in representation. No question of a "Federal analogy" was really pertinent to the Virginia General Assembly since an area concept of representation had not been applied to either legislative chamber. The relevance of an initiative or referendum process to the selection of an apportionment system was not present.

What a population standard required when it was applied was perhaps the most vital question of apportionment. How close to population equality legislative districts must be was the primary operational problem of the one man-one vote standard for apportionment adopted by the U.S. Supreme Court. This problem was faced directly by the Federal court in the Virginia case well in advance of *Reynolds v. Sims*.² The manner in which the problem was resolved in the Virginia litigation suggested the later approach of the U.S. Supreme Court.

Peripheral issues were present in the Virginia cases. But the only issues of consequence related to the permissible disparities in the population size of legislative districts, the rationale or "proof" required to justify larger disparities, and the ingredients of population which could be used to structure districts. After *Baker*, *Gray*, and *Wesberry*,³ and the cases decided by Federal and state courts elsewhere, the inherent questions posed in applying a population standard were

²377 U.S. 533 (1964).

³*Baker v. Carr*, *supra* note 1; *Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

the only difficult issues in the Virginia litigation. The State court's resolution of the question in the congressional case, relying upon its own precedent, as well as that of the Federal courts in the legislative case, similarly was a reasonable approach to the problem, although the outcome was never seriously in doubt. Virginia's historic application of a population standard for representation made the judicial problem a little simpler, as it enabled the courts to concentrate upon the meaning of population for apportionment purposes.

I. THE GENERAL ASSEMBLY

The challenge to the apportionment of representation in the Virginia General Assembly culminated in the case being one of the famed "Reapportionment Cases" decided by the United States Supreme Court on June 15, 1964.⁴ *Davis v. Mann*, the Virginia case,⁵ was included among the cases from 5 other states for the Supreme Court to rule on standards of representation for state legislatures.⁶

The Virginia reapportionment case had roots in the results of the 1960 Federal census. Although the State's population had increased by over 19% since 1950, the rate of population increase was unevenly distributed throughout Virginia.⁷ Most of the State's increase in population occurred in a crescent shaped corridor of counties and cities extending from the Northern Virginia suburbs of Washington, D. C., southward to the Richmond metropolitan area, thence eastward to the Tidewater cities and counties of Hampton Roads.⁸ Illustrative of the uneven population growth were Fairfax County's increase of 179% in population in 10 years, Alexandria's 47% increase, and Norfolk's 40% increase. On the other hand, the populations of other counties and cities of the State either remained relatively constant or suffered decreases since the previous census.⁹

The inevitable uneven population movements in Virginia exaggerated the disparities in the population of legislative districts both for the election of State senators and members of the House of Dele-

⁴McKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION vii (1965).

⁵213 F. Supp. 577 (E.D. Va. 1962).

⁶The other states were Alabama, Delaware, Colorado, Maryland, and New York.

⁷U.S. Bureau of the Census, 1960, *Census of Population: General Population Characteristics, Virginia* (1961).

⁸Lorin A. Thompson, "Recent Population Changes In Virginia," 37 The University of Virginia News Letter 21 (Feb. 15, 1961).

⁹*Ibid.*

gates. The 2 delegates elected from the district embracing Fairfax County and the City of Falls Church each represented 142,597 persons; the City of Alexandria's delegate represented 91,023 persons. Other areas and the number of constituents per delegate were: Princess Anne County and the City of Virginia Beach, 85,218; the City of Portsmouth, 57,386; Arlington County, 54,467; and the City of Norfolk, 50,812. At the other extreme, 5 delegates were elected from individual districts ranging in size from 20,071 to 23,201. A similar situation prevailed in the State Senate. Each of the 2 senators from the City of Norfolk represented 152,435 persons, while Arlington County's single senator had 163,401 constituents, and Fairfax County and the City of Falls Church had 1 senator for a population of 285,194. However, 9 State senators were elected from districts which contained populations of less than 70,000. These extremes in the population size of districts contrasted with the 39,669 persons and 99,174 persons which each delegate and senator would ideally represent if an equal population standard for apportionment were applied.¹⁰ The discrepancies in the number of people represented by the various State senators and delegates dramatized the need for a reapportionment of the General Assembly.

The Virginia Constitution provides for decennial reapportionment of the legislature. § 43 of the Constitution asserts:

The present apportionment of the Commonwealth in the Senatorial and House Districts shall continue; but a reapportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter.¹¹

This provision in its present form was inserted in the Constitution by an amendment adopted in 1928 which did not, however, make any substantive change in the original provision of the 1902 Constitution. The 1902 Constitution continued the apportionment of the legislature enacted by the General Assembly in April 1902 but permitted a reapportionment to be made in 1906. However, the 1902 Constitution directed that a reapportionment "shall be made in the year 1912, and every tenth year thereafter."¹²

The provisions of the Virginia Constitution indicate that reapportionment of both houses of the General Assembly was obligatory upon

¹⁰See Ralph Eisenberg, "Legislative Apportionment: How Representative Is Virginia's Present System?" 37 The University of Virginia News Letter 29 (Apr. 15, 1961).

¹¹VA. CONST., § 43.

¹²*Ibid.*

the General Assembly. The Constitution is clear that a reapportionment is to be enacted at the first regular session of the legislature following the Federal decennial census, since Virginia's regular biennial legislative sessions occur in even years.¹³ However, the Virginia Constitution does not mention the standards to be used in reapportioning State legislative representation. The omission of standards for reapportioning the General Assembly is in marked contrast to the constitutional provisions concerning the redistricting of congressional districts in the State. In regard to congressional districts, the Constitution provides that:

districts shall be composed of contiguous and compact territory containing as nearly as practicable, an equal number of inhabitants.¹⁴

The absence of an explicit population standard for representation in the legislature did not suggest that the General Assembly was free to apportion representation in any manner that it deemed appropriate, although arguments to this effect have been developed in recent years as the concentrations of urban population have become more pronounced. It can be suggested that the requirement to reapportion 2 years after a decennial census was not merely coincidental. Each census presumably would demonstrate the need for a redrawing of legislative district lines to accommodate population movements over the previous decade. Linking the time to reapportion to a legislative session following the census was not new to Virginia constitutions. A brief recitation of the provisions of Virginia constitutions concerning reapportionment and standards for representation provides a useful background to the current constitutional provisions.

The original Constitution of Virginia, adopted in 1776, provided that each county would elect 2 representatives to the House of Delegates while the City of Williamsburg and the Borough of Norfolk would each elect 1 representative. But the Constitution went on to provide for a representative from each city or borough as it was created and, perhaps more significantly, when any such city or borough decreased in its number of voters for 7 successive years so that its voters totaled less than half of the voters in any 1 county of the State, that city or borough would cease to have a representative in the House of Delegates.¹⁵ In a sense, these provisions took cog-

¹³VA. CONST., § 46.

¹⁴VA. CONST., § 55.

¹⁵VA. CONST. 1776, § 5.

nizance of the relevance of population as an apportionment standard, although the principle itself was not enunciated.

The Constitution adopted in 1830 reflected concern with the representation of the western and eastern sections of the State. At that time sectional differences in the State were pronounced. The Convention which drafted the Constitution adopted a compromise to meet the demands of western Virginia for increased representation in the legislature. The Constitution apportioned representation among 4 major sections of the State and the representatives for each section were then distributed among its constituent counties and cities primarily upon the basis of white population. But the Constitution also provided that when any municipal body not entitled to separate representation grew in population size sufficiently to merit representation on its own, the General Assembly's duty was to secure representation to such a city, town, or borough even if it was necessary to reapportion the representatives in that great section of the State.¹⁶ The 1830 Constitution first declared the duty of the legislature to reapportion "in the year 1841 and every 10 years thereafter."

The 1851 Constitution did away with the allocation of representatives among the 4 great districts of the State. In its place, the Constitution described specifically the composition of legislative districts and the number of representatives to be elected from each.¹⁷ This Constitution also affirmed the duty of the legislature to reapportion every 10 years if it could agree upon a principle of representation. But if no agreement on a principle of representation occurred, the Constitution contemplated that the electorate would decide which of 4 alternative representative systems would be used: (1) a suffrage basis (number of voters in the several counties and cities), (2) the amount of all State taxes paid in the counties and cities, (3) a mixed basis combining the number of inhabitants and the amount of State taxes paid, and (4) a mixed basis in the Senate and a suffrage basis in the House of Delegates.¹⁸ The alternatives more closely approximated a population standard than did the requirements of earlier constitutions.

The 1864 Constitution again described specifically the composition of legislative districts and allocated varying numbers of legislators to districts across the State. That Constitution also stated the duty of the legislature to reapportion representation in both legislative chambers in 1870 and "every tenth year thereafter . . . from an enumeration of

¹⁶VA. CONST. 1830, art. III, §§ 4 and 5.

¹⁷VA. CONST. 1851, art. IV, § 5.

¹⁸*Ibid.*

the inhabitants of the state.”¹⁹ The 1869 Constitution did not specify the composition of legislative districts nor provide a standard for legislative apportionment. It provided for a reapportionment in 1879 and stipulated that a reapportionment “shall be made in the year 1891 and every tenth year thereafter.”²⁰ This allusion to the legislature’s reapportionment duty has remained in constitutional provisions ever since.

The Constitutional Convention of 1901-02 apparently was not concerned with the question of legislative apportionment. The Convention produced the vague statement noted above of the duty of the General Assembly to reapportion.²¹ The constitutional statement merely updated the provisions of the preceding constitution.

If the State’s constitutional concern with reapportionment implicitly connoted a population standard, Virginia’s legislative performance in reapportioning under the 1902 Constitution indicates an understanding of population as the primary guideline for structuring representative districts in both houses. Unlike other states, which were distinguished by their failure to reapportion for 60 years or more despite constitutional provisions for decennial reapportionment, Virginia has regularly reapportioned legislative representation since 1902. Except for the State Senate in 1906 and 1912, the Virginia General Assembly has reapportioned after each census in accordance with § 43 of the Constitution.²² Some legislative reluctance was evident in the delay in reapportioning the State Senate in 1934. However, the relationship of Virginia’s legislative apportionment systems throughout this period to a population standard was closer than in other states.²³ These factors indicate to many observers that Virginia’s standard for legislative apportionment was principally a population standard.²⁴

Legislative and special study commissions in Virginia considered population to be the principal basis for apportioning representation

¹⁹VA. CONST. 1864, art. IV, § 6.

²⁰VA. CONST. 1869, art. V, § 4.

²¹VA. CONST., § 43.

²²House of Delegates apportionment: 1906 Acts, c. 83; 1910 Acts, c. 7; 1922 Acts, c. 271; 1923 Acts, Ex. Sess., c. 14; 1932 Acts, c. 169; 1942 Acts, c. 387; 1948 Acts, c. 407; 1952 Acts, Ex. Sess., c. 18; 1958 Acts, c. 33.

State Senate apportionment: 1922 Acts, c. 271; 1923 Acts, Ex. Sess., c. 14; 1934 Acts, c. 169; 1942 Acts, c. 387; 1948 Acts, c. 407; 1952 Acts, Ex. Sess., c. 17; 1958 Acts, c. 333.

²³See DAVID & EISENBERG, *DEVALUATION OF THE URBAN AND SUBURBAN VOTE*, vol. I, at 1-5, 11-15, 64 (1961) and vol. II, at 164-70 (1962).

²⁴See NATIONAL MUNICIPAL LEAGUE, *COMPENDIUM ON LEGISLATIVE APPORTIONMENT* (1961 ed.); BAKER, *STATE CONSTITUTION: REAPPORTIONMENT* 70 (1960); McKay, *op. cit. supra* note 4, at 474-75.

in both houses of the General Assembly. A legislative committee in 1940 conceded that the timing of the reapportionment duty "argues an obvious intention on the part of the framers of the Constitution that the population figures should be a major consideration in redistricting." The committee, however, noted the absence of a specific statement of population as a controlling standard and concluded "that it was intended to allow the General Assembly discretion to modify the population basis in line with other factors which must be considered."²⁵ A Commission on Redistricting which reported in 1951 reached a similar conclusion but added: "Equality of population is not mandatory and the General Assembly may concede such factors as it deems appropriate. . . ." ²⁶

The increasing reluctance of the legislature to redistrict the General Assembly became evident after the 1950 Census. The first regular session of the General Assembly failed to enact redistricting legislation in 1952. Governor John S. Battle had to call a special session to reapportion both legislative chambers. In 1960 Governor J. Lindsay Almond asked the General Assembly to create a commission to study the need for legislative reapportionment and congressional redistricting, but legislation for that purpose was not enacted. Governor Almond in early 1961, therefore, appointed a Commission on Redistricting. A legislator and a citizen were appointed to the Commission²⁷ from each of the State's 10 congressional districts.

The Commission on Redistricting in its report, submitted to the Governor and the General Assembly in November 1961, proposed redistricting plans for both the State Senate and the House of Delegates.²⁸ The Commission's proposals contemplated the shift of 3 Senate seats and 8 Delegate seats from less populous to more populous areas of the State. Its plans were guided by concern for "the factors of compactness, contiguity, ease of access and communication, community of interest, and a reasonable degree of equality of representation."²⁹

The 1962 General Assembly fulfilled its reapportionment responsibility for both legislative houses, but it did not enact the apportionment plans recommended by the Commission on Redistricting. The

²⁵1940 House Document #6, *Report of the Commission on Redistricting of House and Senatorial Districts* 14.

²⁶1951 House Document #15, *Report of the Commission on Redistricting* 6-7.

²⁷Richmond Times-Dispatch, Jan. 17, 1961, pp. 1, 3.

²⁸Virginia, REPORT OF THE COMMISSION ON REDISTRICTING, Nov. 15, 1961.

²⁹*Id.* at 8.

1962 redistricting merely shifted 1 Senate seat and 3 Delegate seats to urban areas.³⁰ It appeared that the redistricting was merely a token effort in the direction of equality of representation in both houses. Table I indicates in statistical terms the limited scope of the 1962 redistricting.

TABLE I
VIRGINIA GENERAL ASSEMBLY, MEASURES OF REPRESENTATIVENESS
BEFORE AND AFTER 1962 REDISTRICTING

	STATE SENATE		HOUSE OF DELEGATES	
	Ratio of Largest District to Smallest District	Percent of Population Necessary to Elect a Majority of Members	Ratio of Largest District to Smallest District	Percent of Population Necessary to Elect a Majority of Members
Prior to 1962 Redistricting..	5.5	37.7	7.1	36.8
After 1962 Redistricting.....	2.4	41.1	4.4	40.5

Based on 1960 population figures.

The most underrepresented areas of the State, however, were not provided with the additional legislators to which their populations would have entitled them. Only 1 additional senator and 1 delegate were allocated to Fairfax County and Falls Church, while Norfolk received no increases in its representation. Thus, in the Senate, Norfolk had only 65% of the representation to which on a population basis it would have had, while Fairfax County had 70%, and Arlington County, only 61%. In the House of Delegates the situation was much the same with Fairfax County having 42%, Hampton City 44%, Arlington County 73%, and Norfolk 78% of the delegate representation a population-based apportionment would have provided. There were, in contrast, 4 Senate districts in rural areas which were overrepresented by at least 50% and 8 Delegate districts which were also overrepresented by at least 50%.

Governor Albertis S. Harrison, Jr., in signing the redistricting bills, had acknowledged "the disparity in population between some districts." The Governor expressed his view of apportionment standards in Virginia in the following terms:

Historically, population has been utilized as the principal factor in redistricting in Virginia, although population alone has never

³⁰1962 Acts, c. 635, c. 638.

been deemed the sole basis of redistricting. The General Assembly—properly, I think—has always considered not only population, but also geographical area, the number of political subdivisions within a district, terrain, and community of interest, in drawing district lines. . . .

Unless equality of population be permitted to overbalance completely all considerations of compactness, contiguity, habit, convenience of the people, and community of interest, I am convinced that the present plan is a fair reapportionment of Virginia's legislative representation.³¹

To justify the equity of the redistricting acts, the Governor cited factors of geographic diversity and geographic barriers and the need to have few political subdivisions within legislative districts. He particularly emphasized Virginia's comparatively high standing among the rest of the states in the relation of its legislative apportionment to population.

The legal attack on the 1962 redistricting acts was launched on April 9, 1962, when suit was filed in Alexandria in the U.S. District Court for the Eastern District of Virginia by 4 legislators from Northern Virginia.³² The plaintiffs contended that they were denied the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the U.S. Constitution, because the 1962 redistricting acts prevented them from casting votes as effective as those cast by voters resident in overrepresented legislative districts. The plaintiffs maintained that the 1962 acts invidiously discriminated against them and other voters in districts where effective votes were similarly diluted. They pointed out that the redistricting acts permitted a minority of the people of Virginia to control the General Assembly. The suit sought injunctive relief to prevent elections from being held under the 1962 apportionment or under the existing (1952) apportionment system. It is to be noted how soon after *Baker v. Carr*,³³ decided on March 26, 1962, the Virginia case was filed.

The 3-judge panel appointed to consider the complaint consisted of Judge Albert V. Bryan of the Court of Appeals of the 4th Circuit, Judge Oren R. Lewis of Alexandria, and Judge Walter E. Hoffman of Norfolk, both of the Eastern District of Virginia. The Court permitted plaintiffs from Norfolk, who alleged that they

³¹Statement by Governor Harrison re: HB 250 and SB 145, Apr. 7, 1962.

³²The 4 plaintiffs were Delegates Harrison Mann and Kathryn Stone of Arlington County, and Delegate John C. Webb and Senator John A. K. Donovan of Fairfax County.

³³*Supra* note 1.

suffered the same inequalities as Northern Virginia voters, to intervene in the case. After hearing the case on October 22 and 23, the District Court handed down its decision on November 28, 1962, with Judge Bryan writing the opinion for the majority and Judge Hoffman dissenting.³⁴

The Court denied the defendant's motion to dismiss the complaint, noting that *Baker v. Carr* "unequivocally declares . . . that allegations comparable to those now before us state a claim upon which the relief here prayed may be granted."³⁵ The Court also refused to grant dismissal upon other grounds claimed by the defendants. Dismissal was not justified because the Court did not see the "exceptional circumstances" present for the State remedy "to oust Federal jurisdiction."³⁶ Judge Bryan denied the defendants' contention that the suit was one against the State barred by the Eleventh Amendment and held that it ". . . was against State officials acting pursuant to State laws, a type of action universally held appropriate to vindicate a Federally protected right."³⁷ The Court, however, did sustain the motion to dismiss the Governor and Attorney General as defendants because they did not have a "special relation" to the elections.³⁸

To the contention that the Federal court should abstain from deciding the case until State courts had had an opportunity to review and interpret the redistricting acts and the relevant State constitutional provisions, Judge Bryan answered that the redistricting acts were not ambiguous and the constitutional provisions were not unclear. The acts, he noted, were specific and the Constitution alluded to no special local considerations:

Whether the acts of the Assembly are within the aim and purpose of the Constitution can, therefore, be gained only from the bare words of its clauses, fair inferences from the acts themselves

³⁴*Mann v. Davis*, 213 F. Supp. 577 (E.D. Va. 1962). For a description of early developments in the case see Eisenberg, "Reapportionment: Journey Through a Judicial Thicket," in *CASES IN AMERICAN NATIONAL GOVERNMENT AND POLITICS*, 182-94 (Tresolini & Frost ed. 1966).

³⁵*Mann v. Davis*, *supra* note 34, at 579.

³⁶*Ibid.* The court cited the following cases to support its position: *Lane v. Wilson*, 307 U.S. 268, 274 (1939); *United States v. Bureau of Revenue*, 291 F.2d 677, 679 (10th Cir. 1961); *Carson v. Warlick*, 238 F.2d 724, 729 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).

³⁷*Mann v. Davis*, *supra* note 34, at 579. Judge Bryan cited the following cases to support this view: *Ex parte Young*, 209 U.S. 123, 155-56 (1908); *Duckworth v. James*, 267 F.2d 224, 230-31 (4th Cir. 1959), *cert. denied*, 361 U.S. 835 (1959); *Kansas City So. Ry. v. Daniel*, 180 F.2d 910, 914 (5th Cir. 1950).

³⁸*Mann v. Davis*, *supra* note 34, at 579, noting *Ex parte Young*, 209 U.S. 123, 157 (1908).

and commentary evidence. This determination is thus as well within the competence of a Federal court sitting in Virginia.

Furthermore, the strong implication of *Baker v. Carr*, if not its command, is that the Federal three-judge court should retain and resolve the litigation.³⁹

As to the merits of the plaintiffs' allegations, Judge Bryan declared that the equal protection clause of the Fourteenth Amendment demanded that apportionment afford "substantially equal representation" to the State's citizens, and he then examined the disparities in the population size of districts in both legislative houses. He noted the obvious inequalities in the voting power of various legislative districts and, while asserting that population was not "the sole or definitive measure of districts when taken by the Equal Protection Clause,"⁴⁰ declared that the burden of proof to justify the disparities among the districts fell upon the defendants. Judge Bryan admitted the existence of factors other than population to be weighed in evaluating the justness of an apportionment, but he concluded that population was the predominant apportionment standard under the Fourteenth Amendment. The other relevant factors were compactness and contiguity, community of interest, observance of "natural lines," and adherence to the boundaries of political subdivisions. But there had to be evidence that such factors were actually considered in constructing legislative districts. In Virginia, his opinion concluded, no such evidence was forthcoming.

The defendants had contended that a factor explaining the variations in the districts was the number of military persons located in Arlington and Fairfax counties and in the City of Norfolk. Judge Bryan said, however, that the evidence presented was not explicit or satisfactory. The majority of the Court, speaking through the opinion, asserted "there must be a fair approach to equality unless it be shown that other acceptable factors may make up for the differences in the numbers of people."⁴¹ Two of the 3 members of the Court obviously felt that no demonstration of the application of other factors had been made in defense of the 1962 redistricting.

The Court refused to distinguish between the 2 legislative houses in the application of a population standard for apportionment. Judge Bryan commented briefly that the state Senate was not a "regional

³⁹*Mann v. Davis*, *supra* note 34, at 580.

⁴⁰*Id.* at 584.

⁴¹*Ibid.*

counterpart”⁴² of the United States, and that State Senate districts did not have State autonomy. The Court thus concluded that it could find “no rational basis for the disfavoring of Arlington, Fairfax, and Norfolk.”⁴³ Without setting any permissible tolerances in mathematical terms for the disparities in district size and without declaring that wide differences between districts cannot be tolerated “if a sound reason cannot be advanced,” the Court held “unconstitutional, invidious discrimination adverse to Arlington, Fairfax, and Norfolk has been proved.”⁴⁴

Judge Bryan’s opinion in *Mann v. Davis* was one of the better apportionment opinions in this early period of reapportionment litigation in lower Federal and state courts. The opinion is admirably concise and the reasoning is clear and to the point. The substantial issues were treated as their significance merited and they were met directly. The opinion was particularly outstanding for the reasonable approach to the concept of equal representation as reflected in the population characteristics of legislative districts. The Court perceived the difficulty of achieving mathematical exactness in the population size of districts and did not attempt to establish an exact standard for acceptable districting. Although population was declared the principal standard for legislative districts, the Court admitted the relevance of other factors in assessing the constitutionality of an apportionment system. In these respects, the Court generally anticipated the subsequent U.S. Supreme Court approach to the problem. In viewing population as the primary basis for representation and examining deviations from population equality in terms of rational use of non-population factors, the Court took a reasonable view of the difficulties and objectives of the redistricting process. The most significant feature of *Mann v. Davis* was to place the responsibility for justifying departures from population equality upon the State and to demand evidence of the rationality and relevance of the factors offered in defense of districts of disparate size. The failure to produce a rational explanation for Virginia’s redistricting acts of 1962 proved fatal.

Judge Hoffman’s dissent argued that because the U.S. Supreme Court had provided only limited guidance in the reapportionment area, the inequalities in Virginia’s 1962 redistricting acts did not conclusively constitute invidious discrimination. Judge Hoffman was impressed with the relative standing of Virginia’s apportionment in

⁴²*Ibid.*

⁴³*Id.* at 585.

⁴⁴*Ibid.*

comparison to the representative nature of other state legislatures.⁴⁵ Data furnished the Court by the State indicated that at that time, Virginia ranked 10th among the states in the minimum proportion of population that could elect majorities in both legislative houses. He also noted that even the extreme disparities in the size of Virginia districts were considerably less than in other states where apportionment systems had been invalidated and in some cases upheld in the courts. Judge Hoffman contended that there were too many unanswered questions about apportionment to justify invalidating Virginia's redistricting effort. He felt that State courts should have an opportunity to assess the apportionment system while the District Court retained jurisdiction. If the State courts invalidated the apportionment using superior knowledge of local conditions, the General Assembly could reexamine State policies and Federal interference might be unnecessary. Nevertheless, Judge Hoffman's principal difference with the majority lay in his conviction that insufficient guidelines existed to decide the case. It is significant that he did not suggest that he was impressed by the relevance of military population or other factors cited in defense of the redistricting.

The Court entered a judgment declaring the 1962 redistricting acts invalid but stayed the effect of the injunction until January 31, 1963, so that either an appeal could be taken to the U.S. Supreme Court or a special session of the General Assembly could be convened to reapportion. The Court retained jurisdiction of the case but said that further stays would have to be secured from the U.S. Supreme Court. The Attorney General of Virginia on December 10 requested a stay of the lower court order and Chief Justice Earl Warren issued the stay on December 15 to permit an appeal to the Supreme Court. The stay permitted the General Assembly to be elected in November 1963 on the basis of the 1962 redistricting acts. On June 9, 1963, the Supreme Court announced that it would review the lower court decision along with cases from 5 other states. The cases were scheduled for argument beginning November 12. The decision in *Davis v. Mann* was not handed down until June 15, 1964.

In the interim, suit was filed in State court by 2 citizens of Norfolk alleging that the 1962 redistricting acts violated § 43 of the Virginia Constitution and the Fourteenth Amendment to the U.S. Constitution. Originally filed in the Circuit Court of the City of Norfolk, the case

⁴⁵In the summer of 1962, Virginia ranked 8th among the states in comparative view of the overall representative nature of state legislatures as calculated by the Dauer-Kelsay method of assessing how representative state legislatures were. See David & Eisenberg, *op. cit.*, *supra* note 20.

was transferred to the Circuit Court of the City of Richmond which possessed exclusive jurisdiction in cases against State officials.⁴⁶ The move to the State court took cognizance of Judge Hoffman's dissent in the Federal case and sought to exhaust State court remedies. Judge Edmund W. Hening, Jr., of the Richmond court, delivered his opinion on September 19, 1963. Citing precedents of the Supreme Court of Appeals of Virginia in dealing with apportionment of congressional districts in the State,⁴⁷ Judge Hening suggested that the Virginia Court's 1932 guideline that deviations from population equality had to be grave and unreasonable to be invalidated might be a preferable standard by which to evaluate apportionment.⁴⁸ Judge Hening pointed to the responsibility of persons who assail statutes as unconstitutional to bear the burden of establishing it. He also was guided by a presumption in favor of the reasonableness of legislative action. With these premises, Judge Hening recited the small extremes of deviation in Virginia's apportionment compared to those of other states and Virginia's comparative high standing among the states in the overall representative character of the General Assembly. He concluded that the disparities in Virginia districts were not invidious in view of the accommodation of factors of compactness, contiguity, integrity of county and city boundary lines, geographic features, and community of interests. Judge Hening concluded that the 1962 acts were marked by "an honest and fair discretion" exercised in "good faith" by the General Assembly. The population disparities, he said, were "in every way reasonable and a far cry from invidious discrimination." Judge Hening also considered the effect of excluding military population from the computation of extreme district ratios, although he viewed the point unnecessary to the disposition of the case. He concluded that if military population were excluded, the 1962 acts were even more acceptable. Therefore, he upheld the 1962 acts. Although an appeal to the Virginia Supreme Court of Appeals was made, no action had occurred when the U.S. Supreme Court finally acted on the Reapportionment Cases.

The Supreme Court's reapportionment decisions revolved about the principal opinion in *Reynolds v. Sims*,⁴⁹ the case from Alabama. The

⁴⁶V.A. CODE, §§ 8-38 par. 9, 8-40.

⁴⁷*Wise v. Bigger*, 79 Va. 269 (1884), and *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932).

⁴⁸*Tyler v. Davis*, Civil No. B2908 Cir. Ct. of the City of Richmond, Va., Sept. 19, 1963.

⁴⁹377 U.S. 533 (1964).

court's opinion in *Davis v. Mann*⁵⁰ was written by Chief Justice Warren with only Justice Harlan in dissent. The Supreme Court held that both houses of the Virginia General Assembly were not apportioned sufficiently on a population basis and that they were therefore unconstitutionally apportioned, thereby sustaining the District Court decision. Chief Justice Warren noted that in *Reynolds v. Sims* the Supreme Court "held that the Equal Protection Clause requires that seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis." Against that standard, the 1962 redistricting acts were deficient in their relation to a population base. Even though Virginia had reapportioned regularly, the Court said "state legislative malapportionment, whether resulting from prolonged legislative inaction or from failure to comply sufficiently with federal constitutional requisites, although reapportionment is accomplished periodically, falls equally within the proscription of the Equal Protection Clause."⁵¹

The Supreme Court also explicitly rejected the argument that the underrepresentation of Arlington, Fairfax, and Norfolk was constitutional because of their large military-related populations. Chief Justice Warren asserted: "Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible."⁵² In addition, the Chief Justice noted that there was no evidence that the legislature had "in fact" taken military population into account in devising its apportionment system, and cited the District Court's opinion in this regard. He also took notice that Virginia statutes fostered voting by military-related personnel by waiving registration and poll tax requirements for military personnel and in applying the same residence requirements for voting to military personnel as for other citizens of the State. Even if military personnel were to be excluded from the population of legislative districts, Warren pointed out, the variations between the smallest and largest districts in each house would still be excessive. It is difficult to ascertain what the Chief Justice contemplated by implying that discrimination against a class of individuals might be sustained if enough were shown. Furthermore, in pointing out that the deviations were excessive even if such exclusions were permissible, the Chief Justice seems to suggest that somehow not counting some individuals because of employment can be supported. It seems, however, that un-

⁵⁰377 U.S. 678 (1964).

⁵¹*Id.* at 691.

⁵²*Ibid.*

less employment carries very temporary residence, perhaps less than the applicable State residence requirements, there are few instances where exclusion would be justified.

The opinion proceeded to rebut the other arguments offered in support of the 1962 redistricting. The argument that the apportionment was designed to balance urban and rural political power was met by pointing out that urban areas in Virginia were not all treated in the same fashion. The Court cited the adequacy of representation given to Richmond in contrast to that extended to Arlington, Fairfax, and Norfolk. This logical defect in the defense of the 1962 redistricting had been obvious since the passage of the legislation. Examples of other urban areas adequately represented in the 1962 statutes were Virginia Beach, Lynchburg, and Danville. Allusions to the inequities of the Electoral College in defense of the redistricting were also rejected by referring to the Court's rejection in *Reynolds* of the Federal analogy argument.

The Court did not discuss remedies at length, but noted that sufficient time remained before the next legislative elections to give the General Assembly an opportunity to devise valid apportionment statutes. The Supreme Court noted that the District Court had retained jurisdiction in the case and assumed that the lower court would take further action if the legislature failed to take constitutionally valid action.

The District Court on September 18, 1964, reaffirmed its previous order of November 28, 1962, but stayed enforcement until December 15, 1964, to give the General Assembly an opportunity to reapportion both legislative houses.⁵³ The District Court also declared that the terms of incumbent senators would end at the expiration of the terms of the delegates elected in 1963. Thus, the Court interrupted the 4-year terms of the entire Senate, who were supposed to hold office until January 1968. The Court also declared that the incumbent General Assembly could enact legislation only after it had enacted a constitutionally valid apportionment plan. Finally, the Court retained jurisdiction in the case in the event that the General Assembly failed to act or produced an unacceptable apportionment plan.

Judge Bryan justified the interruption of senators' terms in asserting that to permit to act in 1966 a legislature composed of 1 constitutionally valid house and 1 constitutionally invalid house would not be constitutionally justifiable. Both houses form a single legis-

⁵³Mann v. Davis, 238 F. Supp. 458 (E.D. Va. 1964), order on mandate 238 F. Supp. 459.

lature and to be constitutionally valid 1 house could not be permitted to lag behind the other in the equality of representation. This view took proper notice of the fact that the legislative process involves both legislative houses, and that the principle of equal representation in 1 house is effectively diluted if the 2d chamber is not apportioned equally. To be effective, equal representation is required in both houses of a legislature, when viewed, as all of the apportionment cases were, in terms of the right to vote. An individual hardly realizes an equally effective vote if he has an equal voice in 1 house but a diluted vote in the 2d.

The State responded to the District Court's order by seeking a stay to appeal again to the U.S. Supreme Court. But the petition was denied without comment⁵⁴ and Virginia faced the problem of devising a constitutionally valid apportionment plan.

Governor Harrison called a special session of the General Assembly to meet on November 30 to reapportion itself. Appropriate legislation was passed by both houses on December 2 and signed by the Governor on the next day so that the General Assembly could proceed to consider other legislative matters. The patient wait by the legislature for the Governor to affix his signature to the legislation reflected the seriousness with which the General Assembly viewed the directions of the District Court.⁵⁵ The 1964 redistricting acts extended to the areas involved in the litigation the representation to which population entitled them.⁵⁶ In addition to the 2 senators that Fairfax County and Falls Church alone were to elect, Arlington was allotted 4 delegates; Norfolk its 7 delegates and a 3d senator; Fairfax County and Falls Church were to elect 6 delegates, and together with Alexandria another delegate, and with Arlington County another senator. The 1964 redistricting reduced the extreme variations between districts in the House to 1.53-1.00 and in the Senate to 1.37-1.00. Majorities of the membership could be elected by 47.7% of the population of the State in the House and 48.2% in the Senate. The 1964 reapportionment satisfied both the original plaintiffs from Northern Virginia and the intervening plaintiffs from Norfolk: they did not return to the court to seek additional corrective action.

To this point, the Virginia apportionment cases offered little in the way of surprises in their progress or outcome. After *Baker v. Carr*

⁵⁴Davis v. Mann, 379 U.S. 694 (1965).

⁵⁵Daffron, *Assembly Speedily Passes Bills to Redistrict Virginia*, Lynchburg News, Dec. 2, 1964, p. 1.

⁵⁶1964 Special Session Acts, c. 1 and 2.

and the development of litigation elsewhere, it seemed that the Virginia apportionment was destined to be invalidated unless the U.S. Supreme Court were to permit wide variations in the size of legislative districts and thereby run the risk of committing itself to some fixed tolerable ratio of inequality. This move would not only be inconsistent with principles of equal representation but also invite difficulty in uniformity, and exploitation by state legislatures. Even if the Court had been more lax in interpreting the population requirements of equal representation, Virginia was confronted with a historic reliance upon population as the principal standard for apportioning both legislative houses, with little evidence that military population was a factor seriously considered by the General Assembly in redistricting in 1962 or even uniformly evident, and with little consistency in the manner in which some areas received overrepresentation and others underrepresentation. It was difficult, therefore, to characterize the statutes as rational in design.

The next and final stages of litigation affecting Virginia's legislative apportionment raised more difficult questions, those of gerrymandering. The 1964 reapportionment was challenged by 3 groups of voters resident in the City of Richmond, Henrico County, and Shenandoah County who alleged that because of the legislative districts in which these governmental units were placed the Equal Protection clause of the Fourteenth Amendment was violated. Three separate questions relating to the districting process and its relation to the one man-one vote principle of representation were raised. Judges Bryan, Lewis, and Hoffman heard the suits, exercising the jurisdiction which the Court had retained.⁵⁷

The Henrico County petitioners claimed that they were injured in the effectiveness of the vote which they could cast because Henrico County was combined with the City of Richmond into a single legislative district to elect 8 delegates on an at-large basis. Therefore, it was alleged that the 117,339 people of Henrico would suffer adversely because, theoretically, the 219,958 people of Richmond would dominate the district; hence, Henrico residents would not be able to elect an Henrico resident to office. The Henrico petitioners noted that Richmond alone was entitled to 5 delegates and Henrico County to almost 3 by themselves. Noting that Virginia cities and counties traditionally were allotted whole numbers of representatives when they had sufficient population to merit them, the petitioners alleged invidious discrimination to dilute the effectiveness of their votes. They

⁵⁷*Mann v. Davis*, 245 F. Supp. 241 (E.D. Va. 1965).

also pointed to the fact that the 1964 reapportionment established Richmond and Henrico as separate Senate districts.

The Court resolved the question by examining the composition of legislative districts solely in terms of the population of the respective districts. The claim of the Henrico citizens was rejected. The Court cited *Fortson v. Dorsey*⁵⁸ to note that multi-member districts and multi-county or city-county districts are constitutional. Similarly, the Court commented that because a legislator was elected from one part of a district rather than another did not invalidate the district. It also commented that Henrico had not complained of the 1962 re-districting when Henrico elected 1 delegate and shared 8 others with Richmond.

The Court asserted that the principle of the integrity of city and county boundary lines was not violated because Richmond and Henrico still were separate Senate districts. Presumably alluding to the rationale for bicameral legislatures, the Court saw no inconsistency in having House districts devised differently from Senate districts. The logic of the design was evidently to "balance off minor inequities," sanctioned in *Reynolds*. In further evaluating the rationale of the Richmond-Henrico district, the Court noted the close geographic, residential, and economic interests of the 2 units.

Central to the Court's validation of the district was the conclusion that in neither Richmond nor Henrico did the district devalue the votes of residents. The Court was clearly impressed by the fact that the 8 delegates allotted to the city and county each represented 42,164 persons, closer to the ideal of 39,669 than the alternatives suggested by Henrico. If Richmond were to elect 5 delegates, each would represent 43,992 persons, or 90% of perfectly equal representation; if Henrico elected 3 representatives each would represent 39,113 persons, or 101% of perfectly equal representation. The 42,164 persons which each of the 8 delegates represented under the 1964 reapportionment amounted to 94% of ideally equal representation. Hence the deviation from equality was only 6% under the 1964 acts but would be 10% under the alternative proposal. Because the 1964 statutes provided "representation fairly nearing the par," the Court refused to invalidate the district.⁵⁹ In addition to the other factors cited above, the population equality feature of the district seemed to determine the outcome. An allegation of racial gerrymandering was made by Richmond Negro citizens against the same Richmond-Henrico delegate districts

⁵⁸379 U.S. 433 (1965).

⁵⁹*Mann v. Davis*, *supra* note 57, at 245.

although they also leveled the same charge against the Richmond Senate district, which was elected 2 senators-at-large throughout the city. They stressed that Negroes constituted 42% of the population of Richmond but only 29% of the population of the combined Richmond-Henrico district. Thus, it was contended that by being united with predominantly-white Henrico County, Negroes in Richmond suffered a dilution of the effectiveness of their vote insofar as it would be more difficult to elect a Negro to the General Assembly. The remedy sought was twofold. First, it was suggested that Richmond and Henrico County be separated as delegate districts so that each political subdivision elected its own delegates. The proposal paralleled that of the Henrico residents in suggesting that Richmond elect 5 delegates and Henrico 3 delegates. Second, it was suggested that the 5 delegates, and the 2 senators, then elected from Richmond should be elected from single-member districts of equal population. The result, it was suggested, would make Negro votes effective so that a Negro might be elected to the legislature. This effect would follow because Negroes in Richmond lived in compact areas, and with single-member districts Negroes would elect at least 1 delegate and possibly 1 of the 2 senators. To marshal arguments in support of this position, the Negro residents suggested that the intent of the State's constitutional and statutory provisions was to elect legislators from districts without regard to county and city boundary lines. They thus alleged a deprivation of rights under both the Fourteenth and Fifteenth Amendments.

Judge Bryan disposed of these contentions rather summarily in upholding the validity of Richmond-Henrico district against this attack. First, Bryan noted the upholding of the district against the challenge of Henrico County residents. Second, he concluded that the discrimination on racial grounds was not evident in the case. The at-large system of representation, Judge Bryan emphasized, had deep historic roots in Virginia legislative elections. Single-member districting or subdistricting had never been used in Virginia cities or counties entitled to more than a single legislator. With this background, it was clearly difficult to prove that continued adherence to multi-member districts was motivated by racial considerations. Judge Bryan buttressed his conclusion by noting the at-large system for electing Richmond city councilmen, "without question by either race."⁶⁰ The consistent record of using multi-member districts in particular made the case for single-member districts difficult to sustain. Perhaps the

⁶⁰*Ibid.*

more effective argument for a dilution of the Negro vote lay in the challenge to the Richmond-Henrico district. But the general problem of proving racial discrimination in diluting voting rights is illustrated by the conflicting claims put forth by Richmond Negroes on the one hand and Henrico whites on the other. Each group claimed an attempt to dilute the votes of residents of each of the 2 components of the district. The Negro cause was undoubtedly damaged by the Henrico claim which, it should be stressed, was equally genuine.

Judge Bryan's response to the allegation of racial gerrymandering was:

The concept of "one person-one vote" we understand, neither connotes nor envisages representation according to color. Certainly it does not demand an alignment of districts to assure success at the polls of any race. No line may be drawn to prefer by race or color.⁶¹

This view of the question was in accord with the U. S. Supreme Court's decision in *Wright v. Rockefeller*⁶² and even with the principles enunciated in dissent in that case by Justice Douglas, whom Judge Bryan quoted in his opinion. The District Court's hesitancy to act on these gerrymandering questions was mirrored by subsequent judicial reluctance to enter the morass this issue involved. The virtues of relying upon population as the primary standard of the one man-one vote principle and putting the burden upon the State to explain deviations from a population standard was evident in the Court's accepting approximations of population equality in gerrymandering allegations and allocating the burden of proof to those charging a gerrymander.

The disposition by the Court of the gerrymandering allegation by Shenandoah County residents also illustrates the reliance upon the population standard in examining the validity of districts. Shenandoah County with its 21,825 population had constituted a single district to elect 1 delegate in the 1962 redistricting, and hence was one of the most overrepresented areas in the State. But the 1964 reapportionment placed Shenandoah County along with Page County, with its population of 15,572, into a legislative district with Rockingham County and the City of Harrisonburg, which made for an additional population of 52,401, to elect 1 delegate. But Rockingham and Harrisonburg alone constituted another district to elect 1 delegate, an application of Virginia's use of "floater districts." The Court focused upon the 4-

⁶¹*Ibid.*

⁶²376 U.S. 52 (1964), cited in *Mann v. Davis*, *supra* note 57, at 245.

unit district and noted that district's deviation from the ideal district population of 39,669. The injustice of the district's size was compensated for Rockingham and Harrisonburg by their additional delegate, but "Shenandoah with Page suffers from a clear underrepresentation."⁶³ Invidious discrimination against Shenandoah County thus was proved. The Court found the disparity in population figures alone sufficient to prove the discrimination, as it had when examining the 1962 statutes in the absence of any demonstration of rationale by the State. The contrast to the Court's approach in the Richmond-Henrico district is obvious and without population equality as a feature of the Shenandoah situation the district was doomed.

The Court itself acted to correct the Shenandoah situation because of the proximity of the filing dates for candidates in the primary election. The Court felt there was not enough time for the General Assembly to meet to rectify the situation. The Court set aside the 1964 act's provisions concerning the 2 districts and the 4 governmental units and ordered that Harrisonburg, Rockingham, Page, and Shenandoah counties constitute a single district to elect 2 delegates. Each of the 2 delegates, then, the Court noted, would represent 45,380 persons, "above the proper ratio" but not "an unfair approach in the circumstances."⁶⁴ The Court also expressed its approval of the 1964 act. Efforts by the Henrico and Richmond citizens to have the U. S. Supreme Court review the dismissal of their allegations were unsuccessful.⁶⁵

II. CONGRESSIONAL DISTRICTS

Congressional districts in Virginia have also been subjected to attack in court. The 1962 session of the General Assembly which reapportioned the legislature did not redistrict the State's 10 congressional districts. The 1960 Census had revealed population disparities from 356,000 to 539,000 among the congressional districts.

The Commission on Redistricting, reporting to the 1962 legislature, concluded that it was unnecessary to reapportion congressional representation.⁶⁶ The Commission's logic was that the failure of the State to lose a congressional seat as a result of the census permitted existing districts to continue to be valid. The Commission's view was that congressional districts, if valid when created, remained valid despite

⁶³Mann v. Davis, *supra* note 57, at 246.

⁶⁴*Ibid.*

⁶⁵Burnette v. Davis, 382 U.S. 42 (1965).

⁶⁶REPORT OF THE COMMISSION ON REDISTRICTING, *op. cit.*, *supra* note 28, at 6-7.

subsequent changes in their populations. The Commission conceded that there were considerable population disparities among legislative districts. To remedy such disparities, the Commission concluded, would require the abandonment of a consistent Virginia practice, the principle of the integrity of county and city boundary lines in constructing congressional districts. The Commission also suggested that to alter overpopulated districts would violate other relevant districting criteria, such as contiguity, compactness, and community of interest. For these reasons, and acknowledging the extensive continuity of service by Virginia Congressmen, which the Commission noted might be upset by rearranging districts, no congressional redistricting plans were offered. This conclusion was postulated despite the citation of the requirements of § 55 of the Constitution.

The first constitutional reference to a principle of equality in congressional district apportionment was found in the 1830 Constitution⁶⁷ which required congressional representation to be "apportioned as nearly as may be amongst the several counties, cities, boroughs and towns of the State, according to their respective numbers." The numbers of course included only 3/5 of slaves and excluded "Indians not taxed."

The origins of the provisions of § 55, requiring congressional districts to be composed of "contiguous and compact territory containing as nearly as practicable, an equal number of inhabitants," are found in the 1851 Constitution.⁶⁸ That Constitution provided that the State was to be divided into districts of "contiguous counties, cities and towns, be compact, and include, as nearly as may be, an equal number of the population." Similar provisions were found in the 1864 and 1869 Constitutions.⁶⁹ The modifications of this language in the 1902 Constitution, which now are effective, appear not to have been a matter of discussion at the 1901-02 Convention.

The suit by Norfolk residents attacking congressional districts in Virginia, styled *Wilkins v. Davis*,⁷⁰ was initiated in State courts, and, since a violation of the State Constitution was alleged, the Supreme Court of Appeals of Virginia heard the case in the first instance.⁷¹ Behind the litigation in 1963 lay a direct precedent in Virginia on the very question of congressional districts: *Brown v. Saunders* in

⁶⁷VA. CONST. 1830, art. III, § 6.

⁶⁸VA. CONST. 1851, art. IV, §§ 13-14.

⁶⁹VA. CONST. 1864, art. IV, §§ 13-14; VA. CONST. 1869, art. V, §§ 12-15.

⁷⁰*Wilkins v. Davis*, 205 Va. 803, 139 S.E. 2d 849 (1965).

⁷¹VA. CONST., art. VI, § 88.

1932⁷² had invalidated the congressional districts enacted by the General Assembly in that year. The Virginia Supreme Court had decided *Brown* strictly on State constitutional grounds in matching the 1932 redistricting against § 55 of the Constitution. The Court in *Brown* conceded the impossibility of achieving mathematical equality of districts and the inevitability of some variation from the ideal size, particularly when in Virginia there was an "unbroken custom to refrain from dividing any county or city into separate districts."⁷³ The Court traced the use of population as the standard for congressional districts in Virginia for over 100 years and declared:

Mathematical exactness, either in compactness of territory or in equality of population, cannot be attained, nor was it contemplated in the provisions of section 55. The discretion to be exercised should be an honest and fair discretion, the result revealing an attempt, in good faith, to be governed by the limitations enumerated in the fundamental law of the land. No small or trivial deviation from equality of population would justify or warrant an application to a court for redress. It must be a grave, palpable and unreasonable deviation from the principles fixed by the Constitution. No exact dividing line can be drawn.⁷⁴

Moving on to the merits of the case, the Court asserted:

Applying these principles to the facts, there can be no uncertainty in the conclusion to be reached in the case under consideration. The inequality is obvious, indisputable and excessive. No argument is needed. It is demonstrated by the statement of facts.⁷⁵

Hence, the Court invalidated the 1932 redistricting and ordered the State's 9 congressmen elected at large.

Table II, which is set forth on page 320, illustrates the variations in the populations of the 9 districts in 1932 and of the 10 districts in 1964. It is clear that the 1964 districts had greater disparities in their absolute population size than those in 1932. The extent of underrepresentation of the Second and Tenth districts in 1964 was significant. However, the ratio of the largest to the smallest district in 1964 was 1.69 to 1 compared to 1.83 to 1 in 1932.

A petition for a writ of mandamus was filed in the Supreme Court of Appeals of Virginia on April 10, 1964, by a resident of Norfolk

⁷²159 Va. 28.

⁷³*Id.* at 37.

⁷⁴*Id.* at 43-44.

⁷⁵*Id.* at 45.

TABLE II

POPULATION OF VIRGINIA CONGRESSIONAL DISTRICTS, 1932 AND 1964

DISTRICT	1932			DISTRICT	1964		
	Popula- tion	Variation from Ideal Size	Percent Vari- ation from Ideal Size		Popula- tion	Variation from Ideal Size	Percent Vari- ation from Ideal Size
1.....	239,835	-29,257	-10.9	1.....	422,624	+ 27,182	+ 6.9
2.....	302,715	+33,623	+12.5	2.....	494,292	+ 98,850	+25.0
3.....	288,939	+19,847	+ 7.4	3.....	418,081	+ 22,639	+ 5.7
4.....	212,952	-56,140	-20.9	4.....	352,157	- 43,285	-10.9
5.....	251,090	-18,002	- 6.7	5.....	325,989	- 69,453	-17.6
6.....	280,708	+11,616	+ 4.3	6.....	378,864	- 16,578	- 4.2
7.....	336,654	+67,562	+25.1	7.....	312,890	- 82,552	-20.9
8.....	183,934	-85,158	-31.6	8.....	357,461	- 37,469	- 9.6
9.....	325,024	+55,932	+20.8	9.....	364,973	- 30,469	- 7.7
.....	10.....	527,098	+131,656	+33.3

269,092 = Ideal population per district 395,442 = Ideal population per district

to compel the State Board of Elections to certify only candidates at large for election to Congress because the existing districts violated § 55 of the Virginia Constitution and rights guaranteed by the U.S. Constitution. The decision in *Wilkins v. Davis* was handed down on January 18, 1965, in an opinion written by Justice Buchanan.⁷⁶ The Court invalidated the 1952 redistricting acts and ordered that until the General Assembly enacted constitutionally valid congressional districts, only elections at large for Congress could be held.

The Court rejected the defendant's arguments that military population could properly be excluded in determining the number of inhabitants in congressional districts. Justice Buchanan reported that the Court was "not convinced that the military personnel constitute a permissible exclusion."⁷⁷ He noted that military population were included in the determination that Virginia was entitled to 10 congressmen. The Court also cited *Davis v. Mann*⁷⁸ in rejecting the military personnel deductibility argument.

Justice Buchanan then proceeded to determine whether the variations in the district populations were excessive. He noted the difficulties of drawing district lines to achieve mathematical equality and to achieve effective community of interest, remarked that "from the standpoint of community of interest alone this record would show

⁷⁶*Supra* note 70.⁷⁷*Supra* note 70, at 808.⁷⁸*Supra* note 57, cited in *Wilkins v. Davis*, *supra* note 70, at 809.

little reason for disturbing the boundaries of the present districts," and continued:

But community of interest is not the only requirement, or even one of the requirements spelled out in the Constitution. There must be, as nearly as practicable, an equal number of inhabitants in the districts.⁷⁹

The Court then proceeded to note the inequalities in the districts, particularly those in the Second and Tenth districts. The Court concluded that the record did not disclose that the districts as composed were as nearly equal as practicable, or that alternative districts could not be constructed that were as equal as practicable as well as compact and contiguous. Because the requirements of § 55 were violated, the districts were invalid.

Justice Buchanan also pointed out that the congressional districts were invalid when pitted against the U.S. Constitution. He cited the U.S. Supreme Court holding in *Wesberry v. Sanders*⁸⁰ that Article I required members of the House of Representatives to be chosen by the people. *Wesberry* had held that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," and that "it was population which was to be the basis of the House of Representatives." After reviewing the U.S. Supreme Court's actions and opinions in *Baker v. Carr*⁸¹ and *Reynolds v. Sims*,⁸² the Virginia Court concluded that the congressional districts could not be upheld because they violated the Federal Constitution "as construed and applied" by the U.S. Supreme Court.

Justice Buchanan affirmed the duty of the General Assembly to reapportion the congressional districts so that the constitutional requirements of equality of population and compactness and contiguity were realized. In addition, the General Assembly could "so far as can be done without impairing the essential requirement of substantial equality in the number of inhabitants among the districts, give effect to the community of interests within the districts."⁸³ But clearly, to the Court, substantial equality of population was the most vital ingredient of a constitutionally valid apportionment plan. The remedy the Court offered was at-large elections if the General Assembly failed to reapportion congressional districts.

⁷⁹*Wilkins v. Davis*, *supra* note 70, at 810.

⁸⁰376 U.S. 1 (1964).

⁸¹369 U.S. 186 (1962).

⁸²377 U.S. 533 (1964).

⁸³*Supra* note 70, at 813.

Once again, Governor Harrison called the General Assembly into special session for reapportionment purposes. The special session convened on August 31 and met for only 4 days. New congressional districts were enacted which were based on substantial equality of population and preserved what seemed feasible of the compactness and contiguity requirements.⁸⁴ Even community of interest considerations seemed to be accommodated. No challenge to the 1965 congressional districts was forthcoming and the first elections under that districting scheme were held in the primary election on July 12, 1966. The populations of the 10 districts and the disparities among them are contained in Table III. The ratio of the largest district to the smallest is now merely 1.11 to 1.

TABLE III
POPULATION OF 1965 VIRGINIA CONGRESSIONAL DISTRICTS

DISTRICT	Population	Variation from Ideal Size	Percent Variation from Ideal Size
1.....	401,052	+ 5,610	+1.4
2.....	419,642	+24,200	+6.1
3.....	408,494	+13,052	+3.3
4.....	386,712	- 8,730	-2.2
5.....	386,179	- 9,283	-2.4
6.....	381,611	-13,831	-3.5
7.....	377,511	-17,931	-4.5
8.....	398,951	+ 3,509	+0.9
9.....	386,965	- 8,477	-2.1
10.....	407,312	+11,870	+3.0

395,442 = Ideal population per district

* * * *

The litigation which produced reapportionments of Virginia legislative and congressional districts has not yet produced any revolutions in the constitutional, legal, or political systems of Virginia. The implications of *Wesberry*⁸⁵ and *Reynolds*⁸⁶ require the use of population as the standard for future apportionment, but this standard is clearly not new to Virginia. The primary effect of the decisions is to return Virginia to the apportionment standard to which in its own Constitution the State committed itself many years ago. It also marked a return to the legislative standard the State itself applied until the 1950 Census

⁸⁴1965 Special Session Acts, c. 1.

⁸⁵*Supra* note 80.

⁸⁶*Supra* note 82.

demonstrated the increasing urbanization, and its concentration, in the Commonwealth. Attempts to dilute the population standard since 1950 have been arrested and reversed by the litigation, and future efforts to amend the standard prevented.

The ultimate political effects of these cases in Virginia are unclear. Efforts to prevent urban populations from wielding political weight equivalent to their numbers has failed, hence the urban character of the State will be reflected in legislative as well as executive institutions. Policy-making in the State, therefore, will take place in the context of equal voting power for all of the State's people. This return to the traditional Virginia view of representation offers the State the opportunity to reassert its vital governmental role in responding to the needs of the Commonwealth as perceived by its people. Political realities under a one man-one vote standard will insure this response.

It is preferable to retain the democratic principles of Virginia government even through involvement in the "Reapportionment Revolution" than to have distorted them through legislative action.

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NOTE

AUTOMOBILE SAFETY: A DIAGNOSIS OF AN EPIDEMIC

Our country is currently faced with a major epidemic on its highways. The severity and magnitude of this problem are such that it demands intensive and immediate action, yet our current efforts in curtailing the number of deaths and injuries caused by automobiles have been ineffective and misdirected. The problem has reached such grave proportions and poses such a serious threat to the safety of every individual in our society that there is an immediate need for the formulation of a national policy on automobile safety.¹ From 1900 through 1964 motor vehicles have accounted for 1,510,000 deaths in the United States, while war deaths from 1775 through 1964 totaled only 605,000.² We have well-established military and foreign policies, yet there has been no manifestation of a national policy on automobile safety. We must act now to launch an effective attack against this carnage on our highways. This action should be directed primarily toward producing safer automobiles, for *it is the vehicle not the driver* that is the major factor in producing injury and death in automobile accidents.³

To realize the danger and magnitude of this threat to our national safety, it is perhaps best to examine some statistics concerning automobile accidents. In 1965 49,000 Americans died in automobile accidents.⁴ The annual death toll remained at about 37,500 for over a generation⁵ until 1962 when deaths from automobile accidents exceeded 40,000 for the first time.⁶ Despite the increase in fatalities caused by automobile accidents, the number of deaths per miles of travel had been constantly decreasing⁷ until 1962 when that figure

¹In a recent message to a meeting of the American Trial Lawyers Association, President Johnson said, "You and I know . . . that the gravest problem before this nation—next to the war in Vietnam—is the death and destruction, the shocking and senseless carnage, that strikes daily on our highways and that takes a higher and more terrible toll each year." *The National Observer*, Feb. 7, 1966, p. 15, col. 1.

²112 Cong. Rec. 1841 (daily ed. Feb. 2, 1966).

³*Infra* note 39.

⁴*The National Observer*, Feb. 7, 1966, p. 1, col.

⁵Moynihan, *Public Health and Traffic Safety*, 51 J. Crim. L., C. & P.S. 93 (1960).

⁶O'Connell, *Taming the Automobile*, 58 Nw. U.L. Rev. 299 (1963).

⁷Moynihan, *supra* note 5.

also started to rise.⁸ As grim as these figures may be, they do not tell the entire story. They are somewhat misleading because the majority of accidents result in injuries rather than death. "For every fatal injury there are upwards of 125 non-fatal injuries."⁹ Thus a better measure of the magnitude of the problem is the number of non-fatal injuries, yet these statistics are much harder to ascertain and are much less reliable than the death figures.¹⁰ According to the National Health Survey, there are about 4,500,000 people injured in vehicular accidents annually, and of these, approximately 200,000 suffer some permanent disability.¹¹ In addition to the tremendous loss of health and life, traffic accidents result in great economic loss. They result in "wage losses of \$1,550,000,000, property damage of \$1,850,000,000, medical expenses of \$150,000,000, and overhead insurance costs of \$1,750,000,000,"¹² a total of \$5.3 billion.

These figures indicate the enormity of the problem and the threat it poses to our health and economy; yet the problem continues to grow, and there has been little effective effort directed at its correction. When we consider how long the problem has existed and contrast it with the progress made in other fields of public health,¹³ "it has become something of a national scandal, one of the series of problems that seem to defy solution by a democratic free-enterprise society."¹⁴

There are several reasons why the problem continues to grow. The indifference of the automobile manufacturers to the problem and their refusal to initiate effective voluntary improvements is certainly one of the reasons.

Automobile manufacturers utilize their tremendous resources and their brilliant array of engineering talent to enhance the appear-

⁸ Deaths per 100,000,000 miles:		Total Fatalities
1961	5.2	38,091
1962	5.3	40,804
1963	5.5	43,564
1964	5.7	47,700

Kennedy, "Why Can't We Make Cars Safer?," *Popular Science*, Nov. 1965, pp. 63, 64.

⁹Moynihan, *supra* note 5, at 94.

¹⁰*Hearings on S. Res. 56 Before the Subcommittee on Executive Reorganization of the Senate Committee on Government Operations*, 89th Cong., 1st Sess., pt. 1, at 260-61 (1965) [hereafter cited as 1965 Hearings pt. 1].

¹¹O'Connell, *supra* note 6, at 302.

¹²*Id.* at 303.

¹³Moynihan, *supra* note 5, at 93.

¹⁴Moynihan, *The Legal Regulation of Automobile Design, Passenger Car Design and Highway Safety*, 265, 276 (1961).

ance of their product, to boost the horsepower and improve the compression ratio of the engines, and to make driving effortless by power equipment. They do everything except apply the intelligence of the average school boy to protecting the lives of the peoples who ride in their automobiles.¹⁵

Another major factor in the continuing epidemic is the futility of the present approaches to traffic safety.¹⁶

The present approaches to correcting the automobile safety problem are constantly directed toward the human element—the driver. This is due primarily to the fact that the overwhelming number of automobile *accidents* are the result of human error.¹⁷ Thus the tendency has been to direct all efforts at reducing death and injury toward the cause of the *accident* rather than toward the design of the vehicle which is the main factor in causing *injury*.¹⁸ Drivers have generally been regarded as law observers who follow legal regulations regardless of any tendency that might arise from the design of their vehicles.¹⁹ The current approaches to the problem are directed toward *accident prevention* and can be divided into 3 main groups: (1) exhortation, (2) civil liability, and (3) criminal punishment.²⁰

(1) The most striking example of exhortation directed toward the driver is the ever-present highway sign proclaiming “speed kills” and warning “slow down and live.” These signs are designed to frighten the motorist into safe driving, but probably they are completely disregarded. The average American motorist considers himself a superior driver, and refuses to associate himself with the death and destruction portrayed in such grizzly advertising. His basic optimism makes him unable to comprehend that such terrible things will happen to him.²¹

¹⁵Katz, *The Liability in Tort or Warranty of Automobile Manufacturers for the Inherently Dangerous Design of Passenger Automobiles*, 37 Chi. B. Record 363, 364 (1955).

¹⁶A general lack of knowledge in the field has also been an important factor in our lack of success with the problem. 1965 Hearings pt. 1, at 282.

¹⁷O'Connell, *supra* note 6, at 318.

¹⁸*Id.* at 334.

¹⁹Moynihan, *supra* note 14, at 273.

²⁰O'Connell, *supra* note 6, at 306.

²¹The National Safety Council's much-publicized predictions of holiday death tolls reflect the unreal aspect of such campaigns. “Over the years these pre-holiday pronouncements have lost their necromantic quality and become rather like the posting of odds before a big race: a sure sign that exciting moments and good times are on the way. The deaths, when they come, seem no more real than the weekly television toll of the hired guns.” Moynihan, “Epidemic on the Highways,” *The Reporter*, Apr. 30, 1959, p. 16.

In fact, the odds that he will escape death are in his favor: there are only 5.7 fatalities for every 100,000,000 miles traveled.²²

In addition to providing no specific advice except "slow down" and "speed kills," the signs—advocating a lesser rate of speed—even if they are heeded—are of no practical value in reducing the number of accidents, for speed is *not* a major factor in causing accidents.²³ A survey conducted by the Bureau of Public Roads revealed "that for speeds from 35 mph to 65 mph the faster you drive, the fewer accidents you have."²⁴ Although higher speed is not a factor in causing accidents, it would seem that higher speeds should increase the risk of injury to the driver, but it appears that greater speed does not correlate with more serious injury or death.²⁵ These risks are influenced more by the design of the vehicle than by raw speed.²⁶

(2) Imposing civil liability on the errant driver is no more effective in improving the traffic safety problem than exhortation. It is generally agreed that the 3 basic purposes of tort law are compensation, prophylaxis, and punishment for fault. How effective are these principles in improving automobile safety? In the first place, the compensatory purpose of tort law is directed toward repaying the loss *after* the harm has resulted and is of no value in preventing the accident from occurring. The second purpose, prophylaxis, seldom enters into the problem because few accidents are intentional, and most occur without forethought of any legal consequences.²⁷ Certainly, since the development time of the average accident is less than 10 seconds, the average driver is probably not thinking of his insurance coverage during that period. It is also true that those at fault in automobile accidents seldom pay, because of the availability, and in some jurisdictions the mandatory nature, of at least marginally adequate insurance coverage.²⁸

²²Kennedy, *supra* note 8.

²³An attempt to solve the problem by cracking down on speeders was undertaken by Senator Abraham Ribicoff when he was governor of Connecticut. The result was that the number of deaths decreased slightly but the *rate* of accidents and injuries increased. After 4 years of intensive enforcement of speeding laws and suspension of licenses the chance of injury increased 8% for every mile traveled. Moynihan, *supra* note 5, at 94.

²⁴Moynihan, *supra* note 5, at 94.

²⁵The increase in fatal injuries is relatively small in the range from 0-60 mph, but in speeds over 60 the danger of serious or fatal injuries increases 3 times. O'Connell, *supra* note 6, at 309.

²⁶*Id.* at 309.

²⁷See Conrad, *Automobile Accident Costs and Payments*, 88-90 (Mich. Legal Studies).

²⁸Only New York, Massachusetts, and North Carolina have compulsory

(3) In addition to involvement with civil law, the automobile safety problem is necessarily related to criminal law. In fact, the American people probably have more contact with their government through the legal regulation of their automobiles than through any other source.²⁹ Naturally, the application of criminal law to automobile accidents involves no element of compensation for its primary purpose is the *deterrence* of offenses.

The threat of fines and loss of licenses may act as a more effective deterrent to the average motorist than the threat of death or injury, primarily because the threat of criminal punishment is not so remote as the threat of death. However, here again too much emphasis is placed on the driver's ability to prevent accidents rather than on the inherent shortcomings of the vehicle.³⁰ The result of the criminal law regulation of traffic has been to make us a nation of law violators,³¹ and there is not much evidence indicating that such regulation has been effective in reducing accidents. Even more important is the effect criminal regulation has had on the individual's regard for the law and the legal process. The criminal law should have the support of society and should be premised upon having a reasonable opportunity to conform one's conduct to the standard required by the law. "Manifestly, a good criminal law should be clear and comprehensible; else how is the citizen to conform and thereby be deterred?"³² Most traffic laws are in direct conflict with this basic principle of criminal law because they are essentially vague and uncertain.³³

Another obvious fault with the criminal law regulating traffic violations is that sanctions are imposed without regard to whether the driver's conduct was conscious or unconscious, voluntary or involun-

automobile liability insurance. Statement by State Senator Simon J. Liebowitz (N.Y.), Chairman of the Joint Legislative Committee on Motor Vehicles, Traffic and Highway Safety, before the Senate Subcommittee on Executive Reorganization, Feb. 3, 1966, p. 4. It has been estimated that 85% of automobile drivers have liability insurance. *Supra* note 27, at 90.

²⁹Moynihan, *supra* note 14, at 271.

³⁰This is not to suggest that driver error is not an important factor in traffic accidents for it is a significant factor in causing accidents. O'Connell, *supra* note 6, at 322-31. It is suggested, however, that this overemphasis on driver responsibility has thus far done little to reduce effectively the great number of automobile accidents.

³¹Moynihan, *supra* note 14, at 272.

³²O'Connell, *supra* note 6, at 314.

³³*Id.* at 315. A recent study by the American Trial Lawyers Association, *Stop Murder by Motor*, indicates that even when the law is a clear one, such as a speed-limit law, the "driver puts too much faith in the protective power of traffic regulations. He feels that if he obeys the traffic regulations he is safe." 112 Cong. Rec. 1841 (daily ed. Feb. 2, 1966).

tary.³⁴ Motor vehicle laws are governed by the principle of *malum prohibitum*, which may mean that the defendant is convicted regardless of any knowledge that his act was wrongful.³⁵ Thus a driver who checks his tail lights before leaving home and finds them to be functioning properly is guilty of a violation if they later go out through no fault of his own. His guilt thus depends upon chance and not upon his own carelessness. How effective are such laws in promoting safety if the driver is found guilty regardless of the fact that he has made every effort to comply with such laws?

The punishments established for traffic violations are seldom arrived at rationally or scientifically, and if the sanctions are designed to serve a specific purpose, it is usually to provide revenue rather than to deter improper driving and accidents.³⁶ The average citizen knows this and it is certainly not conducive to respect for the law; in fact, this arbitrary application of law may encourage drivers to do all they can to escape punishment rather than convincing them to observe traffic laws.

No doubt there are valid arguments for the present approaches to the automobile accident problem, but the fact remains that "the number of violations and accidents continue to rise."³⁷

Rather than allowing the increasing number of deaths and injuries on our highways to continue to mock our futile approaches to the curtailment of traffic accidents, should we not seek some new approach to the problem? The logical answer would appear to be to approach the problem at its crux, the vehicle itself. Rather than continuing to direct our effort toward the driver and the multitude of human factors involved, it seems more probable that the real progress will be made by improving the crash-resistant features of the vehicle.³⁸ For

³⁴Mueller, *How To Increase Traffic Fatalities: A Useful Guide for Modern Legislators and Traffic Courts*, 60 Colum. L. Rev. 944, 957 (1960).

³⁵*Ibid.*

³⁶O'Connell, *supra* note 6, at 316.

³⁷Moynihan, *supra* note 14, at 272.

³⁸Moynihan, "Epidemic on the Highways," *The Reporter*, Apr. 30, 1959, p. 16. Moynihan has suggested that efforts directed toward emphasis on driver responsibility are a "most serious disservice to traffic safety" and that it "seems a little bit like trying to stop a typhoid epidemic by urging each family to boil its own drinking water and not eat oysters. . . ." *Id.* at p. 17. Our attention should be directed toward factors we can reasonably hope to control rather than "to factors such as the temperament and behavior of 80 million drivers, which are not susceptible to any form of consistent, over-all control. . . ." *Ibid.* "Individuals are not perfect, and individuals will make mistakes, and individuals will drive carelessly. We should do everything we can to have good drivers and good roads. . . . However, we must take into account that since millions of people drive automobiles, and many of them are careless, at least the car they

it is the vehicle—not the driver—that is the major factor in producing injury and death.³⁹ “[T]raffic accidents should come to be looked upon as the *inevitable* result of putting the power of hundreds of horses [sic] into frail human hands for use in a crowded and intractable world of snow or darkness or glare.”⁴⁰ By concentrating on the vehicle one can ignore the enormous number of variables inevitable in dealing with individual drivers. In addition, the improvements can be effected by a handful of automobile manufacturers rather than by the 110 million drivers expected by 1970.⁴¹

For the purpose of this discussion we will assume that there do exist adequate changes that can be made in the vehicle which will effectively reduce the deaths and injuries resulting from automobile accidents.⁴² The General Services Administration, purchasing agent for the federal government, regards the following design improvements as important enough to require them on all 1967 automobiles the Government will buy:

[P]added dash and vents, recessed instruments and controls on the instrument panel, impact-absorbing steering wheel and steering column, safety door latches and hinges, anchorage for seat belt assemblies, anchorage of seats, dual-brake system, standard gear quadrant (P-R-N-D-L), safety glass, glare reduction surfaces on the instrument panel and windshield wipers, tires and safety rims, exhaust emission control system to limit the amount of air-polluting elements from the tailpipe, windshield wipers and washers, standard bumper heights, four-way flasher that will flash all signal

drive should give them as much protection as they [sic] possibly can, not only the careless driver but the innocent victim of a careless driver.” *Hearings on S. Res. 56 Before the Subcommittee on Executive Reorganization of the Senate Committee on Governmental Operations*, 89th Cong., 1st Sess., pt. 2, at 849 (1965) [hereafter cited as 1965 *Hearings* pt. 2].

³⁹O’Connell, *supra* note 6, at 334. Moynihan quotes Dr. C. Hunter Shelden writing in 159 A.M.A.J. 981 (1955): “The accidents may occur as the result of speed, inadequate highways, poor judgment, or mechanical failure, but none of these actually causes the passenger injury. The injury occurs primarily as a result of faulty interior design of the automobile.” Moynihan, *supra* note 38, at 20.

⁴⁰O’Connell, *supra* note 6, at 323.

⁴¹1965 *Hearings* pt. 1, at 434.

⁴²Elmer Paul of the United States Public Health Service Accident Prevention Bureau estimates that if our cars were built differently and certain safety devices were used, 43% of those killed in autos might be alive today.” Kennedy, *supra* note 8. Ralph Nader in his book, *Unsafe at Any Speed*, has said that 42% of those killed in automobile accidents have died under survivable conditions. 112 Cong. Rec. 1986 (daily ed. Feb. 3, 1966).

lights together to warn of hazard, backup lights, outside rear-view mirror.⁴³

An example of the value of incorporating new safety devices in automobiles and of what can be done to improve the safety of the vehicle is a feasibility study prepared by Republic Aviation Division of Fairchild-Hiller Corporation under the auspices of the New York State Motor Vehicle Department. This study shows that it is feasible to build a prototype safety car that will result in the virtual elimination of injuries and deaths up to impact speeds of 50 mph even in head-on collisions with another vehicle traveling at the same speed.⁴⁴ Assuming that automobiles can be made safer, how should these changes be made? There seem to be 2 ways to achieve the desired result: voluntary reform by the manufacturers or mandatory reform through government regulation.

In the past, it has been the general opinion of the American people that the automobile manufacturers are responsible firms which are producing the safest product possible.⁴⁵ However, in the light of recent publicity and the moderate concern over traffic safety, it appears that the manufacturers are not using their resources to improve effectively the safety of their product, and that a safer vehicle *can* be manufactured.⁴⁶ Senator Abraham A. Ribicoff has said, "I think

⁴³1965 *Hearings* pt. 1, at 242. The General Services Administration has just recently added 9 new safety devices to this list and will require them on all 1968 models purchased: window and door controls placed either in out-of-the-way locations or of types that would break away upon impact, recessed or break away ashtrays, arm rests without sharp corners, padding on backs of the front seats, electric or reflective side markers that show the outline of stopped cars at night, rear window defrosters, roll bars for soft-top vehicles, and fuel tanks and lines that will not burst upon impact. Richmond Times-Dispatch, Feb. 17, 1966, p. 22.

⁴⁴Statement of State Senator Edward J. Speno (N.Y.) before Senate Subcommittee on Executive Reorganization, Feb. 3, 1966, p. 4.

⁴⁵Moynihan, *supra* note 14, at 273.

⁴⁶This view has been expounded by Ralph Nader in *Unsafe at Any Speed*, a book that has been described as "likely to be the *Silent Spring* of traffic safety." 150 Science 1136 (1965). Mr. Nader sums up the attitude of the automobile industry towards the proposition that their cars could be made safer with this quotation from a 1961 statement of General Motors President John F. Gordon: "The traffic safety field . . . has in recent years been particularly beset by self-styled experts with radical and ill-conceived proposals. . . . The general thesis of these amateur engineers is that cars could be made virtually foolproof and crashproof, that this is the only practical route to greater safety and that federal regulation of vehicle design is needed. This thesis is, of course, wholly unrealistic. . . . The suggestion that we abandon hope of teaching drivers to avoid traffic accidents and concentrate on designing cars that will make col-

the automobile industry is dragging its feet. I think the automobile industry has a big responsibility to the American people that they are not fulfilling."⁴⁷ Why the relative indifference of the automobile manufacturers?

The highly competitive nature of the automobile industry is perhaps the largest single factor in the reluctance of the manufacturers to emphasize safety in their product. "No feature of our economy, other than defense, so dominates the national economy."⁴⁸ These safety innovations would necessarily increase production costs because they would necessitate rechanneling of resources into extensive research programs, but a company like General Motors which had a *profit* of \$1.7 billion last year⁴⁹ could certainly absorb the initial rechanneling cost. The production cost would then decrease as features were engineered into the vehicle.

Because of the tremendous race for sale, consumer demand is all-important to the manufacturers; and to the consumer, styling and appearance, not safety, are the most important factors in the choice of a new car.⁵⁰ The automobile industry spends millions of dollars every year in advertising its product. If this advertising is a valid projection of consumer demand, a random sampling of the medium shows that the consumer is *not* interested in safety:

A howitzer with windshield wipers. The new Buick Skylark Gran Sport . . . is almost like having your own, personal-type nuclear deterrent.⁵¹

New package of instant action: Olds 442 . . . the sweetest piece of live action on wheels!⁵²

The Riviera with muscles on its muscles. New Riviera Gran Sport. We have discovered . . . a cluster of hotbloods . . . yearning for a little more heat.⁵³

What sets Pontiac apart? . . . a tigerish 389-cubic inch V-8 engine . . . and a look that others can't seem to capture . . .⁵⁴

lisions harmless is a perplexing combination of defeatism and wishful thinking," *Id.* at 1136-37. See book review of *Unsafe at Any Speed*, this issue Wash. and Lee L. Rev. at 445.

⁴⁷1965 *Hearings* pt. 1, at 242.

⁴⁸O'Connell, *supra* note 6, at 357.

⁴⁹1965 *Hearings* pt. 2, at 780.

⁵⁰O'Connell, *supra* note 6, at 357.

⁵¹*Time*, Feb. 12, 1965, p. 56.

⁵²*Time*, Jan. 5, 1965, p. 1.

⁵³*Time*, Apr. 23, 1965, p. 5.

⁵⁴*Esquire*, Apr. 1965, p. 41.

If you're in search of . . . size and luxury in your next car, you should drive a 1965 Cadillac soon.⁵⁵

Buick Electra 225: . . . eloquent, long, graceful, infinitely luxurious. Make the merest turn . . . like a cruise to Nassau.⁵⁶

But there is no doubt that in addition to measuring public tastes, advertising is also instrumental in creating them.⁵⁷ Speed, styling, and luxury are preeminent in the public mind. As a result the industry, forever fearful of its future prosperity, continues to meet the buying public's demands which the industry itself has probably created.

There are instances which illustrate the manufacturer's willingness to undertake safety innovations voluntarily, but the ineffectiveness of such isolated instances is further evidence of the public's lack of concern over safety and the industry's desire to preserve its solvency. In 1956 Ford introduced various safety devices (padded dash, "deep dished" steering wheel, safety door latches, and seat belts) and stressed them in its advertising, while other manufacturers continued their frenzied preoccupation with speed and power.⁵⁸ The result of such advertising and features was that Ford's sales dropped sharply and that by August no further mention of the newly introduced safety features was to be found in its advertising. Sales increased almost immediately, but nevertheless 1956 was a poor year for Ford, and the safety advertising was blamed.⁵⁹ Ford had learned its lesson—the public was not interested in safety.

Since the Ford fiasco of 1956, the industry has remained firm in its stand against safety.⁶⁰ It was not until the New York legislature threatened compulsory installation that the manufacturers voluntarily installed seat belts in their automobiles.⁶¹ Congress, in spite of quiet

⁵⁵*Time*, Feb. 12, 1965, p. 33.

⁵⁶*Esquire*, Apr. 1965, p. 57.

⁵⁷O'Connell, *supra* note 6, at 358. Mr. Roy Abernathy, President of American Motors recognizes the effect of advertising on buyers: "I think there may be some indication, Senator, that there are some people, particularly young people, who are romanced by it [emphasis on speed and power] and might purchase cars on that account. We are not against horsepower. We are against the glamorizing of it." 1965 *Hearings* pt. 2, at 874.

⁵⁸Moynihan, *supra* note 38, p. 20.

⁵⁹*Ibid.*

⁶⁰"We have found that obsolete concepts of salability based on styling still reign in Detroit, despite recent assurances to the contrary. As an indication, there is no one in the automobile industry in charge of safety design who has vice-presidential status, but each of the Big Three has a vice-president for styling." Statement of Assemblyman Alexander Chanavau (N.Y.) before the Senate Subcommittee on Executive Reorganization, Feb. 3, 1966.

⁶¹O'Connell, *supra* note 6, at 365.

lobbying by the automobile manufacturers, recently passed a bill requiring 17 additional safety devices in the automobiles purchased by the General Services Administration for federal use.⁶² The federal government purchases 10,000 cars a year, and the manufacturers have recently announced that they are voluntarily including these devices (for example, safety door latches, anchorage of seats, dual brake system, impact absorbing steering wheel and column) on all 1967 models produced.⁶³ Thus it appears that manufacturers have been less than anxious to place the much-needed safety devices on their automobiles; when they eventually do, it has been after considerable pressure from the state and federal governments.

There are those who feel that the best method of encouraging the manufacturers to undertake the task of reforming the design of their vehicles voluntarily is fear of tort liability,⁶⁴ but the present application of the law of products liability seems sadly unable to provide the needed impetus. Prior obstacles to placing liability on manufacturers for harm caused by defective products, such as privity of contract, have been steadily reduced in recent years,⁶⁵ and the expansion of the principles of products liability to include liability for negligent design has provided a basis for imposing liability on automobile manufacturers for the unsafe design of their vehicle.⁶⁶ The Restatement of Torts provides relatively adequate substantive law for holding a manufacturer liable:

A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.⁶⁷

This enabling principle makes it clear that a manufacturer may be held liable for unsafe design as well as for unsafe construction of a vehicle, and 3 relatively recent cases have imposed liability for unsafe

⁶²Washington Post, Apr. 1, 1965, § A, p. 39. See generally note 43 *supra* and accompanying text.

⁶³The National Observer, Feb. 14, 1966, p. , col. .

⁶⁴Katz, *supra* note 15, at 366.

⁶⁵The landmark cases are *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (negligence); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358 161 A.2d 69 (1960) (implied warranty); *Greenman v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 377 P.2d 897 (1962) (strict liability).

⁶⁶Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 Harv. L. Rev. 863 (1956).

⁶⁷RESTATEMENT (Second), TORTS § 398, at 336 (1965).

vehicle design.⁶⁸ However, while courts are willing to hold the manufacturer liable for injuries caused by various defects in construction,⁶⁹ they are usually reluctant to impose liability when the defect is one of design.⁷⁰ As long as the vehicle is properly constructed and it or its components function properly and do not break down due to some defect in construction, there is generally no liability.⁷¹

An excellent example of the willingness of courts to impose liability on manufacturers for defects in construction and their reluctance to hold them liable for defects in design is *Zahn v. Ford Motor Co.*⁷² There the passenger in the automobile was thrown against the dashboard when the driver was forced to come to a sudden stop. His head struck the jagged edge of a defectively made ashtray and his eye was put out. He was allowed recovery from the manufacturer *only* because of the defective construction of the ashtray, not because of its negligent location or design. In so holding the court said: "If the ashtray was properly prepared for anticipated use by owner or guest there could be no liability on the part of Ford."⁷³

*Thomas v. Jerominek*⁷⁴ is another example of the lengths to which courts will go in refusing to impose liability for defective design. In a suit for personal injuries the plaintiff alleged that her automobile was constructed in an unsafe manner in that the door and window knobs were indistinguishable. The court held that as a matter of law the plaintiff had failed to state a claim upon which relief could be granted because she complained "of nothing which relates to the

⁶⁸*Carpini v. Pittsburgh & Weirton Bus Co.*, 216 F.2d 404 (3d Cir. 1954); *Hyatt v. Hyster Co.*, 106 F. Supp. 676 (S.D.N.Y. 1952), *rev'd on stipulation of the parties*; 205 F.2d 521 (2d Cir. 1953); *Clark v. Zuzich Truck Lines*, 344 S.W.2d 304 (Mo. Kans. City Ct. App. 1961).

⁶⁹See e.g., *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U. S. 921 (1953); *Hupp Motor Car Corp. v. Wadsworth*, 113 F.2d 827 (6th Cir. 1940); *Goullon v. Ford Motor Co.*, 44 F.2d 310 (6th Cir. 1930) (tractor); *Zahn v. Ford Motor Co.*, 164 F. Supp. 936 (D. Minn. 1958); *Bird v. Ford Motor Co.*, 15 F. Supp. 590 (W.D.N.Y. 1936).

⁷⁰See e.g., *Amason v. Ford Motor Co.*, 80 F.2d 265 (5th Cir. 1935); *Ford Motor Co. v. Wolber*, 32 F.2d 18 (7th Cir. 1929) (tractor); *Davlin v. Henry Ford & Son, Inc.*, 20 F.2d 317 (6th Cir. 1927) (tractor); *Thomas v. Jerominek*, 8 Misc. 2d 517, 170 N.Y.S.2d 388 (Sup. Ct. 1957); *Reusch v. Ford Motor Co.*, 196 Wash. 213, 82 P.2d 556 (1938); *Foster v. Ford Motor Co.*, 139 Wash. 341, 246 Pac. 945 (1926) (tractor).

⁷¹*Zahn v. Ford Motor Co.*, *supra* note 65; *Reusch v. Ford Motor Co.*, *supra* note 70. *Contra* *Carpini v. Pittsburgh & Weirton Bus Co.*, *supra* note 67; *Hyatt v. Hyster*, *supra* note 67.

⁷²164 F. Supp. 936 (D. Minn. 1958).

⁷³*Id.* at 941.

⁷⁴8 Misc. 2d 517, 170 N.Y.S. 2d 388 (Sup. Ct. 1957).

existence of a latent defect”⁷⁵ It would certainly seem that a jury of reasonable men might have found that the manufacturer had failed to “exercise reasonable care in the adoption of a safe plan or design,”⁷⁶ but the court did not allow the case to progress beyond the pleading stage.⁷⁷

Thus it is clear that the current attitude of the courts toward the liability of automobile manufacturers for unsafe design of their product is far from adequate. It has been suggested that

nothing in law or fact insulates the automobile manufacturer from liability not only for defects in construction, which we have long recognized, but . . . [also] for the creation of unnecessary risk by the marketing of an automobile not reasonably designed to protect the safety of its occupants.⁷⁸

The idea of imposing liability on a manufacturer for a negligently designed vehicle is simply an application of the existing law of products liability to include, as it properly should, all aspects of the manufacturing process from the drawing board through the actual construction and sale of the vehicle or component part. A negligently *designed* vehicle can create just as great a risk of harm as can one which is negligently *constructed*. The test of liability should be not only whether the manufacturer installed faulty door latches or ashtrays, but also whether he has created an unreasonable risk to others by placing a negligently designed vehicle on the market. The factors which should determine the manufacturer's liability are those stated in *United States v. Carroll Towing Co.*⁷⁹ by Judge Learned Hand: the probability and magnitude of the risk weighed against the burden of taking adequate precautions. Thus viewed it seems obvious that by placing millions of automobiles on the road without using their tremendous engineering potential to increase the safety of their products, the manufacturers have created perhaps the greatest risk and have effected the most extensive neglect of duty in modern times.⁸⁰

There is little doubt that the courts have failed to provide the necessary incentive to force the manufacturers into voluntary reform of

⁷⁵*Id.* at 389-90.

⁷⁶RESTATEMENT (Second), TORTS § 398, at 336 (1965).

⁷⁷Accord, *Amason v. Ford Motor Co.*, *supra* note 70. This case also involved a suit based upon defective design of rear-hinged doors. The court emphasized that plaintiff had “not charged that any defective material was used in constructing the car or that any part of it broke.” *Id.* at 266.

⁷⁸Katz, *supra* note 15, at 365.

⁷⁹159 F.2d 169 (2d Cir. 1947).

⁸⁰Katz, *supra* note 15, at 365-66.

their vehicle designs. Even though the manufacturers could be held liable under present concepts of products liability, the real question is whether the courts are equipped to obtain the necessary expert knowledge to be sufficiently familiar with what in fact constitutes a dangerous design. They would necessarily rely more upon expert testimony than independent research, but this may be inadequately presented or misunderstood. Moreover the necessary reforms dependent upon individual lawsuits could result in episodic reform.⁸¹

One writer has suggested that the problem of the court's inadequate research machinery and knowledge in the field of design has been caused in part by trial attorneys who have failed to realize the role played by the automobile in accidents and injuries.⁸² Attorneys should direct their attention to vehicle design as a primary cause of many of the injuries stemming from automobile accidents. It is fundamental to our adversary system that courts generally act only upon issues raised by the litigants through their attorneys, thus issues of negligent design will not be considered unless the attorney takes this initial step. By effective investigation at the site of the accident and by making use of available external engineering information,⁸³ attorneys will be able to impart to the court the necessary knowledge in the field of automobile design. As more scientific knowledge of what constitutes safe design becomes available and as the leading instrumentalities of injury in a vehicle are made known, the manufacturer's liability for faulty design will develop with more precision;⁸⁴ and as courts develop a sense of confidence in their knowledge of the field perhaps their reluctance to impose liability will gradually disappear. *This* solution to the problem might be sound if the problem were not one that demanded *immediate* action. The traffic safety problem has reached such proportions that it is imperative that the fastest possible and most effective measures be instituted to bring about the needed reforms. The solution can most probably "be achieved better by a consistent application of regulatory standards drawn up by experts and kept current by research, rather than by *ad hoc* decisions of inexperienced judges and juries."⁸⁵

It is apparent that the manufacturers have been reluctant to make safer automobiles without some compulsion, and the courts have been

⁸¹O'Connell, *supra* note 6, at 375.

⁸²Nader, *Automobile Design: Evidence Catching Up With the Law*, 42 Den. Law Cent. Jour. 32 (1965).

⁸³*Id.* at 33.

⁸⁴*Id.* at 39.

⁸⁵O'Connell, *supra* note 6, at 375.

reluctant to compel design improvements by imposing liability for unsafe design features. Even if the courts were to begin to impose such liability on the manufacturers, this approach is not adequate to achieve automotive safety in the near future or under a uniform plan.

Moreover, the law of products liability probably will refuse to compel a manufacturer "to so design a product that it can be used carelessly with impunity,"⁸⁶ thus the aim of preventing deaths and injuries which occur as a result of driver negligence and frailties would not be achieved. In addition, the judicial process is necessarily slow, and it would be some time before the results of liability for negligent design would be manifested in the vehicle itself.

The preceding discussion has demonstrated that the only realistic approach to the automobile safety problem is some sort of government regulation of vehicle design. But should this regulation be on the state or federal level?

The effectiveness of state regulation would be impeded by several important factors. Any regulation would be far from uniform⁸⁷ unless the states enacted some type of uniform act, but such legislation is seldom accepted by every state, and if and when it is, it is only after years of debate and trial and error.⁸⁸ The lack of uniformity would hardly be advantageous to the manufacturer who could conceivably be placed in a position of manufacturing over 50 different varieties of automobiles.⁸⁹ Also, the effect such regulation might have on interstate commerce is significant. A state would probably be constitutionally unable to prohibit out-of-state vehicles which did

⁸⁶Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 874 (1962).

⁸⁷Moynihan, *supra* note 14, at 274.

⁸⁸"[T]he passing of motor vehicle equipment safety laws by individual States is the long way toward reaching our ultimate goal of safer automobiles Motor vehicle equipment safety laws have become effective by the "trickle down" method. After one State passes a law it is picked up by another and another until finally the manufacturers capitulate" Statement by State Senator Simon J. Liebowitz (N.Y.), Chairman of the Joint Legislative Committee on Motor Vehicles, Traffic and Highway Safety before the Senate Subcommittee on Executive Reorganization, Feb. 3, 1966, p. 1.

⁸⁹An exchange between Senator Ribicoff and Frederick G. Donner, Chairman of the Board of General Motors indicates the effect this would have on the automobile industry:

"Senator Ribicoff. Well, can the automobile industry really produce on a mass-production basis the manufacture and sale of automobiles if you have a different standard in 50 different states?

Mr. Donner. No, we recognize that problem."

1965 Hearings pt. 2, at 792.

not comply with its design standards from traveling on its highways.⁹⁰ Thus the states would have to exclude such interstate vehicles from its regulations, and the regulations would become that much less effective in promoting safety on the highways.⁹¹ Another obstacle would be the cost of each state's establishing the various research facilities needed to arrive at its own minimum standards.⁹² Of course, state cooperation in research could reduce this cost.

Even if these obstacles could be overcome, the process of establishing effective state regulation of vehicle design would take considerable time, and time is of the essence in solving a problem of this magnitude.

Everything involved in the traffic safety problem seems to point to the advisability of federal regulation. The problem is unquestionably a national one and can best be handled by a central government rather than by over fifty separate governments.⁹³ The automobile industry is the only major element of our transportation system that is not required to conform to federal safety standards,⁹⁴ and the fact that automobiles are necessarily involved in interstate commerce certainly permits active federal involvement.⁹⁵

There is no question that the federal government is already involved in the automobile safety problem;⁹⁶ however, there is a question as to the effectiveness of this involvement. Sixteen separate federal agencies have some role in the federal automobile safety program.⁹⁷ The

⁹⁰Any state regulation that prohibited the use of its highways to interstate vehicles which did not comply with its design would probably be held unconstitutional if it imposed a substantial burden on interstate commerce. Brenner, *Legal Requirements for the Equipment and Design of Private Motor Vehicles: State Action and National Problems*, 23 GEO. WASH. L. REV. 429, 448 (1955).

⁹¹O'Connell, *supra* note 6, at 378.

⁹²*Id.* at 379.

⁹³Brenner, *supra* note 90, at 448-49.

⁹⁴Moynihan, *supra* note 14, at 276. "It should first be kept in mind that automobiles are but one of several common forms of transportation and that, although design regulation is somewhat the exception with specific regard to automobiles, it is the norm with regard to means of transportation in general. Furthermore, the regulation of other means of transportation is, on the whole, carried out at the federal level." *Id.* at 265.

⁹⁵In 1915 the United States Supreme Court implied that federal control of motor vehicles for safety purposes was proper and that the states were enabled to exercise such authority only because of the absence of federal preemptive legislation. *Henrick v. Maryland*, 235 U.S. 610 (1915). Safety regulations have usually been looked upon with favor and "have but rarely raised either constitutional or philosophical issues . . ." Moynihan, *supra* note 14, at 265.

⁹⁶The most recent Federal involvement in the automobile safety problem has taken the form of the newly signed Federal Highway Safety Act which gives the Secretary of Commerce certain regulatory powers.

⁹⁷1965 *Hearings* pt. 1, at 1.

Division of Accident Prevention of the United States Public Health Service, one of the agencies involved, administered a \$2,700,000 study into why accidents occur, but only \$134,000 was spent for research in vehicle safety design.⁹⁸ The most curious of the government programs is the President's Committee for Traffic Safety, which has an annual budget of \$200,000, of which \$150,000 comes from federal funds and \$50,000 from insurance and automobile industry grants.⁹⁹ Although this Committee enjoys the prestige of the President's name, it seems to be controlled by an advisory council composed of representatives of private organizations.¹⁰⁰ In fact, "the Committee is Detroit's public relations annex at the White House."¹⁰¹ There might be some advantage to this diversity if the findings of the various research programs could be coordinated and exchanged, but there is no single agency that has the responsibility for coordinating the findings of the various agencies or for prescribing policy.¹⁰² Thus the present federal involvement in traffic safety consists of 16 separate agencies each working separately and lacking any single agency or individual vested with the responsibility of coordinating all of the efforts into a uniform system.¹⁰³

There have been several proposals for bringing about efficient federal involvement in the automobile safety problem. Perhaps the most valid is the suggestion of former Assistant Secretary of Labor Daniel Moynihan that the proper means of formulating safety standards and enforcing regulations would be to establish a Federal Automobile Agency.¹⁰⁴ This agency would unite all intramural and extramural research activities of the federal government in the field of highway safety in one agency. Rather than concentrating only upon design research, it should also have responsibility for research and development of highway and driver safety programs. Such an agency would provide a centralizing element for all the independent research that is conducted by various organizations throughout the country and could eliminate considerable duplication of effort.

⁹⁸Ridgeway, "Car Design and Public Safety," *The New Republic*, Sept. 19, 1964, pp. 9, 11.

⁹⁹*Ibid.*

¹⁰⁰*Ibid.*

¹⁰¹*Ibid.*

¹⁰²1965 *Hearings*, pt. 1, at 209, 233, 282.

¹⁰³One agency has had an employee working for months gathering information to determine how much money the federal government spends for highway safety work and the head of that agency indicated that it would take another three months to get it. 1965 *Hearings* pt. 1, at 231, 233.

¹⁰⁴Moynihan, *supra* note 14, at 279.

Moynihan's proposal for a Federal Automobile Agency is certainly valid as far as it goes. Centrally controlled research is necessary in determining what can be done to prevent the growing slaughter on our highways, but research itself is of little value unless the agency has the *authority* to set minimum safety standards for the automobiles. The legislation which would establish a central research agency should also authorize that agency to set minimum standards and to impose sanctions on manufacturers for failure to meet those standards.

The success of any federal regulatory agency in the field of automobile safety will necessarily depend upon 2 things: (1) It is imperative that those who are chosen to serve in research capacities in this proposed agency be the most highly qualified men available, and those in administrative capacities should be capable of understanding the viewpoints of both government and industry. (2) The agency should not be looked upon as a means of forcing the manufacturers to submit to arbitrary government regulation.¹⁰⁵ Of course the purpose of the agency is some regulation, but the basic precepts of our private enterprise system should also be preserved. If the agency were founded upon the proposition of *mutual cooperation* between the automobile industry and the central government with the common goal of reducing the carnage on our highways, the results of such a program could be extremely rewarding.

Whatever form regulation may take, there will be opposition. It is a psychological fact that human beings would prefer not to think about the dangers of living, and this is particularly true of the eternally optimistic American public. As a result we tend to resent those who force us to face the unpleasant. This resentment would most certainly be quite intense when the public is forced to recognize the danger inherent in its most revered symbol of pleasure, status, and release. Notwithstanding our aversion to facing the unpleasant, we are capable of reasonable and practical reflection upon problems that endanger our society as a whole. The public will gradually accept the innovations and welcome the regulation when they become fully aware of the magnitude and severity of the problem, and when they realize how much good that regulation can produce.

There is no simple means of determining the proportions a problem must assume before a decision is made to impose preventive measures, but certainly if any contemporary problem deserves national publicity and national action, it is the epidemic rampant on our highways.

JON A. KERR

¹⁰⁵*Id.* at 279-80.

CASE COMMENTS

ADMIRALTY JURISDICTION IN TORT ACTIONS

"[F]rom the very inception of the federal judiciary to the present, federal courts have taken jurisdiction (without reference to amount in controversy, diversity of citizenship, or the presence of any other 'federal question') of all causes of action arising under maritime law."¹ Admiralty has developed its own criteria for jurisdiction: in contracts jurisdiction depends on subject matter; in tort jurisdiction depends on locality.² *The Plymouth*³ set forth the locality test in the broadest terms: "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."⁴ But the precise scope of admiralty jurisdiction is not a matter of "obvious principle or of very accurate history,"⁵ and it has frequently been questioned whether locality is the *exclusive* test of jurisdiction in tort actions or whether the tort must also be of a maritime character.⁶ The exclusiveness of the locality test has never been determined by the Supreme Court,⁷ and the test continues to be questioned and attacked.

The locality test is frequently criticized in cases in which the tort occurs upon navigable waters but does not involve a vessel and has no relation to the maritime industry.⁸ Such a situation was presented in *Thomson v. Chesapeake Yacht Club, Inc.*⁹ when libellant fell into navigable waters through a hole in respondent's pier. The court held that the locality test controlled but denied admiralty jurisdiction because the negligent act or omission became operative on libellant while

¹Slaughter, *Basic Principles of Admiralty*, 19 Ark. L. Rev. 93, 95 (1965).

²"The general doctrine that in contract matters, admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled." *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479, 480 (1923).

³*Hough v. The Western Transp. Co. (The Plymouth)*, 70 U.S. (3 Wall.) 20 (1865).

⁴*Id.* at 36.

⁵*The Blackheath*, 195 U.S. 361, 365 (1904).

⁶E.g., *Atlantic Transp. Co. v. Imbroke*, 234 U.S. 52 (1914).

⁷"No definitive judicial determination was ever made as to whether locality was the sole and exclusive test, or whether the maritime character of the particular tortious act was likewise a relevant jurisdictional consideration." Note, 60 Mich. L. Rev. 208, 209 (1961).

⁸E.g., *McGuire v. City of New York*, 192 F. Supp. 866 (S.D.N.Y. 1961).

⁹*Admiralty No. 4820*, D. Md., Oct. 26, 1965. It should be noted that under the saving to suitors clause, § 9 of the Judiciary Act of 1789, 1 Stat. 76, 79 (1789), as codified in 28 U.S.C. § 1333 (1948), libellant could have proceeded as an ordinary tort plaintiff in the Maryland court system.

he was still on land even though libelant suffered no injury until he struck the navigable waters. The court stated that the tort was complete before libelant touched the water and the subsequent injury related only to the extent of damages and was not significant in determining whether this action was of a maritime nature.¹⁰ If locality is the exclusive test of admiralty jurisdiction in tort actions, *Thomson* was within the admiralty jurisdiction.

The fact that the tort in *Thomson* did not involve a vessel has no bearing on the locality test.¹¹ Admiralty jurisdiction has been upheld in cases involving water skiers,¹² bathers,¹³ and aircraft passengers¹⁴ despite the fact that no vessel was involved.¹⁵

The crucial requirement of the locality test is that "the wrong and injury . . . or at least, the substance and consummation of the same must have taken place wholly upon . . . [navigable] waters."¹⁶ Admiralty has long held that when the necessary elements of the tort¹⁷ occur partly on land and partly on navigable waters, the place of the injury constitutes the "substance and consummation" of the tort.¹⁸

In *McDonald v. Cape Cod Trawling Corp.*¹⁹ a lamppost fell from the wharf and struck a seaman aboard a vessel. The court upheld admiralty jurisdiction stating that "this is a commonplace illustration of the familiar general conflict of laws rule that the place of wrong is the place where the last event necessary to make an actor liable for

¹⁰*Thomson* was quoting directly from *Wiper v. Great Lakes Eng'r Works*, 340 F.2d 727, 730 (6th Cir. 1965).

¹¹"The jurisdiction of admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel . . ." *Supra* note 3, at 35.

¹²*King v. Testerman*, 214 F. Supp. 335 (E.D. Tenn. 1963).

¹³*Reinhardt v. Newport Flying Serv. Corp.*, 232 N.Y. 115, 133 N.E. 371 (1921). It should be noted that in *Reinhardt* the court was primarily concerned with whether a seaplane was a vessel and did not question the status of the bather. But cf. *McGuire v. City of New York*, *supra* note 8.

¹⁴*Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963); *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Cal. 1959).

¹⁵Admiralty jurisdiction has also been upheld in cases which involve "things" not technically considered "vessels," e.g., drydocks, *United States v. Bruce Dry Dock Co.*, 65 F.2d 938 (5th Cir. 1933); and incomplete vessels, *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922); Note, 4 Texas L. Rev. 306, 310 (1926).

¹⁶*Supra* note 3, at 35.

¹⁷The necessary elements of the tort of negligence are: (1) duty violation; (2) causal connection between duty-violating conduct and the resulting injury; (3) actual loss or damage. Proof of damages is thus an essential part of plaintiff's case. *Prosser, Torts* § 30 (3d ed. 1964).

¹⁸*Rundall v. La Campagne Generale Transatlantique*, 100 Fed. 655, 657 (7th Cir. 1900).

¹⁹71 F. Supp. 888 (D. Mass. 1947).

an alleged tort occurs.”²⁰ Without injury there is no tort of negligence but only “damnum absque injuria,”²¹ and it is “clear that the locality of the thing to be considered is that of the thing injured, and not of the agent causing the injury”²²

In *The City of Lincoln*²³ and in *Fireman's Fund Ins. Co. v. City of Monterey*²⁴ respondents' wharves collapsed and libelants' goods were thrown into navigable waters. The courts held, directly contrary to *Thomson*, that “the injury to libelant's steel-booms was effected wholly in the water, into which they were thrown through the breaking down of the wharf. The whole ‘substance and consummation of the injury’ were . . . in the water. It was the water that did the damage. That was the *place* of the damage and consequently the place of the tort, for the purpose of jurisdiction.”²⁵ Admiralty jurisdiction has also been upheld when faulty repairs or maintenance on land caused an aircraft to crash at sea. If there is no impact upon the person or property before striking the water “it is recognized that the tort occurs upon the water within the admiralty jurisdiction.”²⁶

The language of *The Plymouth* in establishing the locality test was certainly broad, yet it provided a single and precise criterion for determining admiralty jurisdiction in tort actions.²⁷ The majority of courts have maintained that locality is still the exclusive test for determining admiralty jurisdiction in tort actions²⁸ and that jurisdiction is not affected by the character or extent of the tort, or by the relations of the persons injured.²⁹ Thus *Thomson* should be within admiralty jurisdiction because it meets the *sole* requirement of the locality test that the tort be consummated on navigable waters.

But there has always been some doubt whether locality was merely

²⁰*Id.* at 890.

²¹*Hermann v. Port Blakely Mill Co.*, 69 Fed. 646, 651 (N.D. Cal. 1895).

²²*Smith v. Lampe*, 64 F.2d 201, 202 (6th Cir. 1933); *Dorrington v. City of Detroit*, 223 Fed. 232, 242 (6th Cir. 1915). “It has long been established law that, if a person on the high seas is killed by a shot fired by a person on shore, the offense is committed on the high seas.” *Fireman's Fund Ins. Co. v. City of Monterey*, 6 F.2d 893, 894-95 (N.D. Cal. 1925).

²³25 Fed. 835 (S.D.N.Y. 1885).

²⁴6 F.2d 893 (N.D. Cal. 1925).

²⁵*Supra* note 23, at 837 (Emphasis added.)

²⁶*Wilson v. Transocean Airlines*, *supra* note 14, at 92.

²⁷When the locality test “was announced, it was believed both by the courts and by the profession that a single test for tort jurisdiction had been established.” Note, 75 U. Pa. L. Rev. 655 (1927).

²⁸“[T]he weight of authority is clearly to the effect that locality alone determines whether or not a tort claim is within admiralty jurisdiction.” *Weinstein v. Eastern Airlines, Inc.*, *supra* note 14, at 763.

²⁹*The Highland Light*, 12 Fed. Cas. 138 (No. 6477) (C.C.D. Md. 1867).

one of the tests for determining admiralty jurisdiction or the *sole* test. The most famous of these is "Mr. Benedict's celebrated doubt" which questions whether admiralty jurisdiction would extend to an assault between two bathers, which obviously does not involve a vessel and has no relation to the maritime industry.³⁰

The doubts about the locality test were created, not by any ambiguity in *The Plymouth*, but by the terminology and holdings of subsequent cases. The first cases to cast doubt on the locality test involved ship-to-shore injuries, termed "amphibious torts."³¹ For 40 years after *The Plymouth* "admiralty denied jurisdiction where damage was done by a ship to any object fixed to land."³² Then *The Blackheath*³³ extended admiralty jurisdiction to cover a collision between a vessel and a beacon surrounded by navigable waters but attached to land.³⁴ *The Blackheath* held that although the beacon was attached to land its *purpose* was to serve as an "aid to navigation"; therefore it was within admiralty jurisdiction. Justice Brown, concurring, stated that this extension of admiralty jurisdiction to cover structures affixed to land overruled *The Plymouth* and the locality test and that "to attempt to draw the line of jurisdiction between different kinds of fixed structures, as, for instance, between beacons and wharves, would lead to great confusion and much further litigation."³⁵ In subsequent cases *The Blackheath* was held not to overrule the locality test but to create a minor exception to it. Locality was still the test for admiralty jurisdiction in tort actions with the exception that if the structure was an "aid to navigation" admiralty had jurisdiction regardless of the fact that the structure was attached to land.³⁶ However, Justice Brown's prediction of confusion and unnecessary litigation was borne out,³⁷ and the courts became involved in a long line of cases which

³⁰1Benedict, Admiralty 351 (6th ed. 1940).

³¹Jurisdiction over ship-to-shore injuries was regulated by the Extension of Admiralty Act, which extended admiralty jurisdiction to all torts "caused by a vessel on navigable waters." 62 Stat. 496, 46 U.S.C. § 740 (1948). However, since the Act was concerned only with vessel-caused injury, it did not affect the situation in *Thomson*, which involved a shore-to-water injury in no way related to any vessel.

³²*Supra* note 27.

³³*Supra* note 5.

³⁴The beacon "was built on piles driven firmly into the bottom. There is no question that it was . . . part of [the realty] . . ." *Supra* note 5, at 364. But see *Doullut & Williams, Inc. v. United States*, 268 U.S. 33, 34 (1925).

³⁵*Supra* note 5, at 369.

³⁶*Gilmore & Black, Admiralty* 432 (1957); 1 Benedict § 129 (6th ed. 1940); Note, 60 Mich. L. Rev. 208 (1962). See *The Barbara Cates*, 8 F. Supp. 470 (E.D. Pa. 1934); *The Senator*, 54 F.2d 420 (D. Del. 1931).

³⁷There has been much confusion and litigation over the difficulty of differ-

attempted to distinguish a land structure from an "aid to navigation." The questionableness of some of these distinctions is exemplified by the cable cases in which submarine cables used for communication were deemed "aids to navigation" and held to be within admiralty jurisdiction³⁸ while cables used solely to carry electric current were deemed land structures and not within admiralty jurisdiction.³⁹

In all of the cases involving an "aid to navigation" attached to land, the court looked beyond the locality of the structure and sought to ascertain the *purpose* of the structure. Such consideration of *purpose*, aside from locality, led to direct attacks on the exclusiveness of the locality test. *Atlantic Transp. Co. v. Imbrovek*⁴⁰ questioned whether locality was the *sole* test of admiralty jurisdiction in tort actions or whether the basis for "all admiralty jurisdiction, whether in contract or in tort, is the maritime nature of the transaction or event" ⁴¹ The petitioner contended that the locality test is not exclusive and "that in every adjudicated case in this country in which the jurisdiction of admiralty with respect to torts has been sustained, the tort apart from the mere place of its occurrence, has been of a maritime character." ⁴² *Imbrovek* gave no decision on the locality test because "in the present case the wrong which was the subject of the suit was, we think, of a maritime nature, and hence the District Court, from any point of view, had jurisdiction." ⁴³

Imbrovek furnished impetus to those attacking the locality test as arbitrary, wholly irrational, bearing no relation to the purpose of admiralty jurisdiction, and a blind following of history.⁴⁴ The "reasoning" behind the locality test is said to be exemplified by the quaint statement of the respondent in *The Plymouth* that once "we broke the Constitution by discarding the limit of tidewater and the sovereign arbitrament of the moon" we must now hold to the his-

entiating between objects or structures which take their character from the land to which they are in some way connected and those which are deemed so related to navigation as to become subjects of maritime jurisdiction. Farnum, Admiralty Jurisdiction and Amphibious Torts, 43 Yale L.J. 34, 39 (1934).

³⁸*Postal Tel. Cable Co. v. P. Sanford Ross, Inc.*, 221 Fed. 105 (E.D.N.Y. 1915).

³⁹*Nippon Yusen Kabushiki Kaisha v. Great W. Power Co.*, 17 F.2d 239 (9th Cir. 1927).

⁴⁰*Supra* note 6.

⁴¹*Id.* at 61.

⁴²*Id.* at 60.

⁴³*Id.* at 61.

⁴⁴Black, Admiralty Jurisdiction: Critique And Suggestions, 50 Colum. L. Rev. 259, 264 (1950); Ryan, The Amphibious Tort Problems, 13 Brooklyn L. Rev. 129 (1947); Bruncken, Tradition And Commonsense In Admiralty, 14 Marq. L. Rev. 16, 17 (1929).

torically established locality test.⁴⁵ Those objecting to the locality test offer as additional or alternative tests (1) that a vessel be involved or (2) that the incident be of a *maritime nature*.

Vessels are felt to be necessary because "admiralty was the result of commerce on the high seas, the commerce made possible by sailing vessels. Just as vessels were the source of admiralty, they remain the focal point of admiralty jurisdiction."⁴⁶ This view contends that the locality test does not mean that "a tort or injury in no way connected with any vessel, or its owner, officers, or crew, although occurring in . . . [navigable waters] is for that reason within the jurisdiction of the admiralty."⁴⁷ "Merely because events occur upon navigable waters does not put them within the admiralty and maritime jurisdiction. Transactions are 'maritime' only when in some way connected with a 'vessel'."⁴⁸

Nevertheless it has frequently been contended that pleasure boating, which involves vessels, should not be within the admiralty jurisdiction.⁴⁹ The word "vessel" is highly ambiguous and might include a raft⁵⁰ but not an ocean liner afloat but unfinished.⁵¹ There is nothing magic about the word "vessel" which assures that it is a proper subject of maritime concern. There seems little reason why a collision between two rafts should be in admiralty (under the maritime nature test) any more than a collision between two bathers (under the locality test), or why admiralty should concern itself with nonmaritime events which take place on vessels, for example, dog bites⁵² and thefts.⁵³

A broader alternative to the locality test than vessel-involvement is that of the maritime nature of the incident. "The fundamental principle underlying all cases of tort, as well as contract, is that, to bring a case within the jurisdiction of a court of admiralty, maritime relations of some sort must exist" ⁵⁴ Thus viewed, admiralty would extend to all torts arising out of maritime matters, whether

⁴⁵Bruncken, *supra* note 44, at 17.

⁴⁶McGuire v. City of New York, *supra* note 8, at 871.

⁴⁷Campbell v. H. Hackfeld & Co., 125 Fed. 696, 700 (9th Cir. 1903).

⁴⁸Robinson, Admiralty § 8 at 42 (1939).

⁴⁹Comment, 23 Wash. & Lee L. Rev. 169 (1966).

⁵⁰"The word 'vessel' includes every description of water craft or other artificial contrivance used, or *capable of being used*, as a means of transportation on water." Pleason v. Gulfport Shipbldg. Corp., 221 F.2d 621, 623 (5th Cir. 1955).

⁵¹Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922); The Francis McDonald, 254 U.S. 242 (1920).

⁵²The Lord Derby, 17 Fed. 265 (E.D. La. 1883).

⁵³The Minnetonka, 146 Fed. 509 (2d Cir. 1906).

⁵⁴Campbell v. H. Hackfeld & Co., *supra* note 47, at 697.

occurring on sea or land.⁵⁵ England and France apply the maritime nature test to determine admiralty jurisdiction and it has been contended that this is the most realistic test.⁵⁶

The maritime nature test, however, creates the difficulty of a case-by-case determination of what is of a "maritime nature."⁵⁷ The difficulty of applying this test is well known in contract cases⁵⁸ and is evidenced by the long established arbitrary principle that construction of a vessel is not maritime in nature while repairing a vessel is maritime.⁵⁹ "[M]aritime transactions are inseparably connected with and shade into the non-maritime"⁶⁰ and no satisfactory basis for distinguishing the 2 has been developed. If tort locality is no longer to be considered, it is questionable how far inland the maritime nature test should extend.⁶¹ Thus while the locality test has been criticized, there are also grounds for criticizing the suggested alternative tests.

Proper evaluation of these proposed tests or any test for admiralty jurisdiction necessitates making a choice as to the purpose of an admiralty jurisdiction. The logical validity of any test for admiralty jurisdiction depends largely upon one's view of the purpose of admiralty. Even the supposedly irrational locality test can be justified under at least 1 view of admiralty's purpose. Such a view contends that admiralty developed to handle the peculiar needs of the maritime industry,⁶² and, taking a purely analytical approach, an obvious peculiarity of the maritime industry is that it is the only 1 involving transportation on water.⁶³ "There can be nothing more maritime than the sea"⁶⁴ and "the guide to admiralty jurisdiction must be the needs of the sea or the needs of seagoing commerce."⁶⁵ Thus if admiralty is based on the peculiar needs and hazards of the sea, admiralty jurisdiction should extend to all actions arising from occurrences on the sea, and locality seems a logical test. Under the local-

⁵⁵"[A] tort, arising as it does out of a maritime 'status' or 'relation', is cognizable by the maritime law whether it arises on sea or on land." *Strika v. Netherlands Ministry Of Traffic*, 185 F.2d 555, 558 (2d Cir. 1950).

⁵⁶*McGuire v. City of New York*, *supra* note 8, at 867. See 25 Harv. L. Rev. 381 (1912).

⁵⁷Note, 16 Harv. L. Rev. 210, 211 (1903).

⁵⁸*Ibid.*; 25 Harv. L. Rev. 381, 382-83 (1912).

⁵⁹*The Francis McDonald*, *supra* note 51.

⁶⁰*Gilmore & Black*, *supra* note 36, at 27.

⁶¹Note, 75 U. Pa. L. Rev. 655, 658-59 (1927).

⁶²*Gilmore & Black*, *supra* note 36, at 11.

⁶³Another obvious peculiarity of the maritime industry before the 19th century was that it was the only major means of bulk transportation.

⁶⁴*Weinstein v. Eastern Airlines, Inc.*, *supra* note 14, at 763.

⁶⁵*McGuire v. City of New York*, *supra* note 8, at 871.

ity test an action arising from an aircraft crash in the sea, though not involving a vessel or the maritime industry, would be within admiralty jurisdiction because "when an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels."⁶⁶

Thus the locality test is logically sound under the view that admiralty's purpose is to deal with actions involving the peculiar needs and hazards of the sea. The locality test is also simple and easy to apply,⁶⁷ and "the fact that in a few unusual instances the results reached may be . . . [seemingly technical] is counterbalanced by the fact that strict application of the test makes it possible to predict with accuracy the results to be reached in a given case."⁶⁸ The only difficult aspect of the locality test is determining where the tort was consummated, and a careful analysis of the facts will eliminate that difficulty.⁶⁹ Careful analysis of the facts in *Thomson* reveals that the injury, therefore the consummation of the tort, occurred on navigable waters. Thus under a pure locality test *Thomson* was within admiralty jurisdiction.

Though the locality test is not so irrational as some critics have contended, its logical validity does hinge upon acceptance of the view that the purpose of admiralty is to handle actions involving the peculiar needs and hazards of navigable waters. However, such a purpose for admiralty seems too narrow in view of the present highly developed and complex maritime industry. A preferable purpose for admiralty is to provide "orderly and uniform judicial governance of the concerns of the maritime industry."⁷⁰ Such judicial governance should be furnished by a separate system of admiralty courts⁷¹ with

⁶⁶Weinstein v. Eastern Airlines, Inc., *supra* note 14, at 763.

⁶⁷Note, 4 Texas L. Rev. 306, 315 (1926); Hough, Admiralty Jurisdiction—Of Late Years, 37 Harv. L. Rev. 529, 533 (1924); Note, 54 Nw. U.L. Rev. 508, 510 (1959).

⁶⁸Note, 4 Texas L. Rev. 306, 315 (1926). "If the Court . . . [had] left the locality test intact and without qualifications there would be little doubt as to when maritime law should be applied" Note, 54 Nw. U.L. Rev. 508, 510 (1959).

⁶⁹Note, 4 Texas L. Rev. 306, 315 (1926).

⁷⁰Black, *supra* note 44, at 262.

⁷¹Since the adoption of the Constitution, instance (non-prize) admiralty actions in the United States have not been heard by a special court. Admiralty actions are placed on a separate admiralty docket in 31 federal judicial districts; the other 57 maintain no separate admiralty docket. Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. Chi. L. Rev. 1, 7 (1959). However, it frequently develops that almost all admiralty actions are heard by one judge within the district and considerable expertise may already exist under the

special expertise to deal "with the major concerns of the shipping industry—with all of them, and not just with a few of them selected on antiquarian criteria."⁷² Thus the test for admiralty jurisdiction in all matters should be whether the subject is one of the "major concerns" of the maritime industry. Such a test and purpose for admiralty would arm it with

the responsibility . . . jurisdiction and remedial power needed to keep watch over the concerns of the shipping industry in their commercial and property aspects. It would be a sort of one-industry Tribunal of Commerce. As such it would be in a position to give vigorous articulation to the federal interest in shipping, and at the same time would implement a valuable experiment in the use of the industrial court.⁷³

RONALD J. BACIGAL

CLAYTON ACT TOLLING PROVISION— A NEW INTERPRETATION

Section 5 of the Clayton Act, which was included to encourage the private litigant to seek recovery for antitrust violations¹ in addition to the treble measure of damages provided for in the preceding section of the Act,² provides:

(a) A final judgment or decree . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has

present system. In 1960, 5655 admiralty actions constituting 94% of all admiralty actions in the United States were distributed among 19 admiralty districts, the top 6 of which had the following admiralty caseloads: S.D.N.Y., 2294; E.D. La., 869; E.D. Pa., 485; S.D. Tex., 361; N.D. Cal., 261; E.D. Va., 229. Fiddler, *The Admiralty Practice in Montana and All That*, 17 Me. L. Rev. 15, 17 (1965).

⁷²Gilmore & Black, *supra* note 36, at 27.

⁷³Black, *supra* note 44, at 276-77.

the offense is committed on the high seas." *Firemen's Fund Ins. Co. v. City of*

¹"Section 5 . . . was passed in response to the plea of President Wilson. In a speech to the Congress on January 20, 1914, he urged that a law be enacted which would permit victims of antitrust violations to have 'redress upon the facts and judgments proved and entered in suits by the Government' and that 'the statute of limitations . . . be suffered to run against such litigants only from the date of the conclusion of the Government's action.'" *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965).

²Clayton Act 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1914), 15 U.S.C. § 15 (1914).

violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under . . . [§ 4 of the Clayton Act] as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto

(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter³

This section affords 2 advantages to the private litigants: "It may help them with any limitations problems they have," and "it also helps them with their proof by giving them permission to use the government action as evidence."⁴

Section 5(b) (hereafter referred to as the tolling provision) has been judicially interpreted as being related to and dependent on § 5(a) (hereafter referred to as the prima facie evidence provision) for its meaning. As a result, the collateral estoppel language of the prima facie evidence provision has been held to apply to the requirement of the tolling provision that the private suit be "based in whole or in part on any matter complained of" in the Government suit. This means that private litigants have found it necessary to show perfect identity between the private and Government suits to bring the tolling provision into play, thereby depriving private antitrust litigants of many possible advantages of the tolling provision.

Emich Motors Corp. v. General Motors Corp.,⁵ decided in 1951, is generally recognized⁶ as stating the scope and purpose of the prima

³Clayton Act, *supra* note 2, § 16 as amended 69 Stat. 283 (1955) 15 U.S.C. § 16 (1955).

⁴Simon, *The Private Litigant and Prior Government Judgments or Decrees*, 7 Antitrust Bull. 27 (1962).

⁵340 U.S. 558 (1951).

⁶*Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317 (1965); *Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 102 (1954); *Buckhead Theatre Co. v. Atlanta Enterprises, Inc.*, 327 F.2d 365, 367 (5th Cir. 1964); *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346, 357 (3d Cir. 1964); *Twentieth Century-Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 225 (9th Cir. 1964); *International Shoe Mach. Corp. v. United Shoe Mach. Corp.*, 315 F.2d 449, 454 (1st Cir. 1963); *Hyslop v. United States*, 261 F.2d 786, 790 (8th Cir. 1958); *Eagle Lion Studios, Inc. v. Loew's, Inc.*, 248 F.2d 438, 444 (2d Cir. 1957); *Loew's, Inc. v. Cinema Amusements, Inc.*, 210 F.2d 86, 90 (10th Cir. 1954); *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 213 F.2d 284, 290 (7th Cir. 1954).

facie evidence provision. That provision must be analyzed before any interpretation of the tolling provision can be attempted.

Emich held that the prima facie evidence provision makes available to the private litigant only those "matters previously established by the Government in antitrust actions."⁷ The Supreme Court stated that "Congress intended to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit."⁸ It was further held that the collateral estoppel doctrine must be referred to in order to determine the evidentiary use which may be made of prior judgments or decrees.⁹ This means that "final judgments or decrees . . . are admissible under § 5 of the Clayton Act as prima facie evidence only of issues actually determined in the prior adjudication" ¹⁰ The prima facie evidence provision, then, focuses "on the narrow issue of the use by private parties of judgments or decrees as prima facie evidence."¹¹

In *Steiner v. 20th Century-Fox Film Corp.*¹² the Supreme Court established the principles to be followed in applying the tolling provision, holding that the prima facie evidence and tolling provisions are to be read together. This means that the identity necessary between the private action and the Government action must be perfect in order to satisfy the requirement in the tolling provision that the private suit be "based in whole or in part on any matter complained of" in the Government suit. Thus, as the Court puts it, "the same means must be used to achieve the same objectives of the same conspiracies by the same defendants"¹³ to make the tolling provision operative.

The *Steiner* interpretation is based on the argument that (1) the legislative history of § 5 supports the interpretation of the words "any matter complained of" to mean the *exact acts* of the defendant complained of by the Government, not just the same conspiracy;¹⁴ (2) private civil antitrust actions are not founded upon the conspiracy itself, but upon the overt injury-causing acts done in furtherance of

⁷*Emich Motor Corp. v. General Motors Corp.*, *supra* note 5, at 568.

⁸*Ibid.*

⁹*Ibid.*

¹⁰*Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 102 (1954), citing *Emich Motors Corp. v. General Motors Corp.*, *supra* note 5.

¹¹*Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317 (1965).

¹²232 F.2d 190 (9th Cir. 1956).

¹³*Id.*, at 196.

¹⁴*Ibid.*

the conspiracy;¹⁵ thus (3) the tolling provision cannot be extended to matters (acts) which might have been but were not complained of by the United States.¹⁶

Thus under *Steiner*, claims which the private litigant cannot establish as perfectly identical to those complained of by the Government must be brought within the statute of limitations. If there are also perfectly identical claims, they would fall under the tolling provision, thus leaving 2 different limitation periods governing the same lawsuit, a classic trap for the unknowing.

Application of the collateral estoppel rules to the tolling provision, thus requiring perfect identity between the Government and private claims, would be logical if Congress had intended the scope of the tolling provision to be as limited as the scope of the prima facie evidence provision.¹⁷ The courts accepted this assumption of identical scope until it was questioned in *Union Carbide & Carbon Corp. v. Nisley*¹⁸ decided by the 10th Circuit in 1961. Prior to *Union Carbide*, the problem had seldom arisen as to what constituted the necessary identity between the matters complained of in the private and the

¹⁵*Ibid.* It is interesting to note here that the Circuit Court in *Leh*, *infra* note 20, although following *Steiner*, *supra* note 12, said that the 9th Circuit had gone further than other circuits, by holding that the words "any matter complained of" referred to overt acts of the defendants in the Government proceeding and not just the conspiracy behind those acts. *Leh v. General Petroleum Corp.*, 330 F.2d 288, 301 n.15 (9th Cir. 1964). One commentator expressed a concern whether *Steiner* meant that virtually identical overt acts had to be alleged. Wiprud, *Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles*, 57 Nw. U.L. Rev. 29, 45 (1962). A 1964 Ninth Circuit decision, *Twentieth Century-Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 219 (9th Cir. 1964), held that "the tolling statute does not require, and the *Steiner* test does not provide, that all matters complained of in the private action must find a counterpart in the Government action." While this holding appears to weaken the *Steiner* test, it is significant that before making the above statement the court in *Goldwyn* went to some length to point out that there were, in fact, the same means, objectives, defendants, and conspiracies alleged in both actions. *Id.* at 217-19.

¹⁶*Steiner v. Twentieth Century-Fox Film Corp.*, *supra* note 12.

¹⁷In addition to *Steiner*, support for this proposition can be found in the following: *Sun Theatre Corp. v. RKO Radio Pictures*, 213 F.2d 284 (7th Cir. 1954); *Momand v. Universal Film Exchanges, Inc.*, 172 F.2d 37 (1st Cir. 1948); *United Banana Co. v. United Fruit Co.*, 172 F. Supp. 580, 586 (D. Conn. 1959); *Cardinal Films, Inc. v. Republic Pictures Corp.*, 148 F. Supp. 156, 159 (S.D.N.Y. 1957). See also *Court DeGraw Theatre, Inc. v. Loew's, Inc.*, 172 F. Supp. 198, 200 (E.D.N.Y. 1959); *Rubenstein, Inc. v. Columbia Pictures Corp.*, 154 F. Supp. 216, 218 (D. Minn. 1957); *Schreiber v. Loew's Inc.*, 147 F. Supp. 319, 323 (W.D. Mich. 1957); *Levy v. Paramount Pictures, Inc.*, 104 F. Supp. 787, 789 (N.D. Cal. 1952).

¹⁸300 F.2d 561 (10th Cir. 1961).

Government suits to make the tolling provision operative.¹⁹ The courts had merely compared the 2 complaints to determine whether the matters complained of by the private litigant were matters as to which a judgment or decree in the Government suit would be an estoppel as between the parties in the Government suit.

The result reached in 1964 by the 9th Circuit in *Leh v. General Petroleum Corp.*²⁰ created a conflict between this and the 10th Circuit decision in *Union Carbide*. To resolve this conflict the Supreme Court granted certiorari to determine the degree of identity necessary to satisfy the tolling provision requirement that the private suit be based "in whole or in part on any matter complained of" in the Government suit.²¹ *Leh* involved a private treble damage action against 7 companies engaged in producing, refining, and marketing gasoline and other hydrocarbon substances in interstate commerce. The defendants were charged with violating §§ 1 and 2 of the Sherman Act²² by conspiring to restrain and to monopolize the wholesale and retail distribution of refined gasoline throughout Southern California. The restraint was allegedly accomplished by excluding independent jobbers from distribution and by eliminating such jobbers' retail outlets, thereby preventing them from competing with the retail outlets owned and operated by defendants. Although a problem arose as to which of 2 statutes of limitations was applicable to the action,²³ the plaintiffs were not concerned with that aspect of the case, but contended that any applicable statute of limitations was suspended under the tolling provision of the Clayton Act because a 1950 United States

¹⁹"Controversy raised by the limitations portion of Section 5 has dealt mainly with the question of during what period of time the government action was pending and when did it cease to pend." Simon, *supra* note 4, at 28. A typical statement of the applicable rule regarding pendency is found in *Leonia Amusement Corp. v. Loew's Inc.*, 117 F. Supp. 747, 758 (S.D.N.Y. 1953): "It is clear . . . that antitrust suits should be considered 'pending' until the entry of a judgment or decree which finally disposes of all the allegations of antitrust violations." See generally Wiprud, *supra* note 15, at 43-44.

²⁰330 F.2d 288 (9th Cir. 1964).

²¹*Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965).

²²26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1955).

²³The defendants argued that plaintiffs' action was barred by the California 1-year statute of limitations applicable to suits for statutory penalties. Plaintiffs contended that the governing provision was the 3-year statute respecting suits for a statutory liability other than a penalty. The plaintiffs conceded that the 4-year limitations period added to the Clayton Act in 1955, *supra* note 3, was not applicable to their cause of action accruing in 1954.

On this matter, the 9th Circuit held that a private treble damage action was of a penal rather than remedial nature and therefore, the applicable provision was the 1-year statute. For a discussion concerning this aspect of *Leh*, see 40 Wash. L. Rev. 222 (1966).

antitrust proceeding arising from the same conspiracy was still pending at the time the plaintiffs filed their complaint.

The 9th Circuit, in affirming the decision of the District Court,²⁴ upheld the defendant's statute of limitations defense by interpreting the tolling provision in the light of *Steiner*, thus requiring perfect identity between the Government and private suits to make the tolling provision operative. The Court said the 2 claims lacked perfect identity because:

1) The dates of the conspiracies differed—the Government alleging a conspiracy running from 1936 until 1950 and plaintiffs alleging a conspiracy from 1948 until 1951.

2) The defendants were not the same in both actions—Shell Oil Co. and the Conservation Committee of California Oil Producers being joined in the Government suit, but not in the private suit, and the Olympic Refining Co., though later dropped, being originally joined by the private claimants but not by the Government.

3) The conspiracies differed—the Government charging that the defendants had conspired to eliminate the competition of independent marketers, and plaintiffs charging a conspiracy to eliminate independent jobbers and retailers.

4) The areas of the conspiracies differed—plaintiffs alleging a conspiracy involving Southern California, which was only a part of the Pacific States area with which the Government was concerned.

In reversing the 9th Circuit the Supreme Court relied primarily upon *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*,²⁵ decided between the granting of certiorari and oral argument in *Leh*. *New Jersey Wood Finishing* established certain basic principles for the interpretation of the tolling provision and swept away much of the foundation for the perfect identity required in *Steiner*. The Court held that the prima facie evidence provision and the tolling provision are not necessarily coextensive, being governed by different considerations as well as different Congressional policy objectives, thus making the 2 provisions readily severable.²⁶ *Leh*, in following up and establishing the new approach to be taken to these 2 sections, held that "substantial identity"²⁷ of subject matter in the 2 suits is all

²⁴*Leh v. General Petroleum Corp.*, 208 F. Supp. 289 (S.D. Cal. 1962), *aff'd*, 330 F.2d 288 (9th Cir. 1964).

²⁵381 U.S. 311 (1965).

²⁶*Id.* at 318.

²⁷*Leh v. General Petroleum Corp.*, *supra* note 21, at 63.

that is required to make the tolling provision operative, applying the same test used earlier by the 10th Circuit in *Union Carbide*.

As to the tolling provision itself, "the textual distinctions as well as to the policy basis of . . . [the tolling provision] indicate that it was to serve a more comprehensive function in the congressional scheme of things"²⁸ than that allowed by the perfect identity interpretation. The purpose in adopting the tolling provision was not as limited as that behind the prima facie evidence provision, because when enacting the tolling provision Congress "was not then dealing with the delicate area in which a judgment secured in an action between two parties may be used by a third" and because it was plain that with the tolling provision "Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions."²⁹ Thus, the tolling provision can operate to make available to the private litigant the Government's earlier pleadings, transcripts of testimony, and exhibits, all of which are potentially of great value in the investigation of this case. Moreover, involved and difficult legal questions may be resolved to the private litigant's advantage before he initiates proceedings. These are reasonably expectable advantages of the tolling provision if the "more comprehensive function" envisaged by Congress³⁰ for that provision is to have any meaning. *New Jersey Wood Finishing* went so far as to say that it was of crucial significance that the potential advantages available to litigants because of the tolling provision reach far beyond the specific and limited benefits accruing to them under the prima facie evidence provision.³¹

²⁸*Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, *supra* note 11, at 319.

²⁹*Id.* at 317.

³⁰The Supreme Court admitted that there is almost a complete absence of Congressional discussion on the extent of the coverage of the tolling provision. *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, *supra* note 11, at 320. The Court referred, however, to its decision in *Burnett v. New York Cent. R.R.*, 380 U.S. 424 (1965), an FELA case, where the question involved effecting Congressional purpose by tolling the statute of limitations in given circumstances. *Burnett* said that to determine that intent "the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act" must be examined. *Burnett v. N.Y. Cent. R.R.*, *supra* at 427. Since the whole idea of the Clayton Act was "intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws," H.R. Rep. No. 627, 63d Cong., 2d Sess. 14 (1914), it is logical that Congress meant to offer the private litigants as many advantages as a reasonable interpretation of the tolling provision allows.

³¹*Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, *supra* note 11, at 320.

Two major textual distinctions between the tolling and prima facie evidence provisions lend further support to the conclusion that they are not dependent upon each other for their application: (1) A "final judgment or decree" is a condition precedent to the application of the prima facie evidence provision. However, the tolling provision suspends the statute of limitations from the time the Government institutes suit regardless of whether a final judgment or decree is ultimately entered. (2) The applicability of the tolling provision in no way turns on the success of the Government's case, while the prima facie evidence provision turns on raising an estoppel against the unsuccessful defendant in the Government suit through use of the pro-Government judgment or decree.

It is clear, then, that the tolling provision is not—and should not be—limited in its applicability to the rules of collateral estoppel which govern the prima facie evidence provision. However, a question remains: the decree of identity required between the private and Government suits to permit the private litigant the benefits of the tolling provision.

The "substantial identity of subject matter" test, originally established by the 10th Circuit in *Union Carbide* and now accepted by the Supreme Court in *Leh*, will cause some difficulty because of the vagueness of the phrase "substantial identity." The Supreme Court did warn that "care must be exercised to insure . . . that the matters complained of . . . bear a real relation to the private plaintiff's claim for relief."³² The Court continued, however, that "the courts must not allow a legitimate concern that invocation of . . . [the tolling provision] be made in good faith to lead them into a niggardly construction of the statutory language . . ."³³ Thus the Court has indicated that its desire to give the private litigant the advantages of this tolling provision greatly outweighs the increased difficulty in determining what are "matters complained of" in both private and Government suits.

³²*Leh v. General Petroleum Corp.*, *supra* note 21, at 59.

³³*Ibid.* *Union Carbide* points out the ultimate inequity of the collateral estoppel approach to the tolling provision:

If we accept the . . . [collateral estoppel] interpretation of . . . [the tolling provision], a Section 4 [treble damage action provision] plaintiff would be put to the necessity of bringing suit on the same conspiracy alleged in the government suit, or suffer the bar of the statute as to every overt act not complained of in the government suit. This interpretation would lead to a multiplicity of suits with duplication of proof. It would add to the burdens of the private suitor to the harassment of the defendants.

Union Carbide & Carbon Corp. v. Nisley, *supra* note 18, at 570.

Yet some guideline is necessary to the application of the tolling provision. *Leh* establishes that in applying the "substantial identity" test "effect must be given to the broad terms of the statute itself—'based in whole or in part on any matter complained of.'"³⁴ Thus the private plaintiff need not allege that the identical defendants used the identical means to achieve the identical objectives of the identical conspiracies.

As to identity of parties, the Court explained why absence of complete identity of defendants is unrelated to whether the private claimant's suit is based on matters of which the Government complained:

In the interim between the filing of the two actions it may have become apparent that a party named as a defendant by the Government was in fact not a party to the antitrust violation alleged. Or the private plaintiff may prefer to limit his suit to the defendants named by the Government whose activities contributed most directly to the injury of which he complains. On the other hand, some of the conspirators whose activities injured the private claimant may have been too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net.³⁵

The disparity in time periods is equally insignificant:

That plaintiffs alleged a conspiracy corresponding in time to the period during which they were in business obviously does not mean that this conspiracy is not based in part on matters complained of by the Government.³⁶

Also, differences in the scope and effect of the conspiracies have likewise no effect on the operation of the tolling provision.

Leh, therefore, significantly changes the degree of identity required in the private and Government suits. The statute of limitations can now be suspended even against those defendants not named by the Government. Of course, it is still necessary that the matters complained of in the private suit against that defendant be in some way a part of the conspiracy alleged by the Government. However, if the private plaintiff can show that a particular defendant was involved in the larger conspiracy alleged by the Government, even so remotely as to be unnamed as a defendant in the Government suit, he may take advantage of the tolling provision against that defendant and

³⁴*Leh v. General Petroleum Corp.*, *supra* note 21, at 59.

³⁵*Id.* at 64.

³⁶*Ibid.*

prove the particular effect of that defendant's localized conspiracy on him as private plaintiff.³⁷

Leh is authority for this proposition, but one should note that the defendant named by the private plaintiff and not by the Government was dismissed from the case prior to the ruling on the statute of limitations defense. The Court's statement that some conspirators' activities "may have been too low in the conspiracy to be selected as named defendants . . . in the Government's necessarily broader net"³⁸ indicates that absence of complete identity of defendants is unrelated to whether the private suit is based on "matters complained of" by the Government and indicates that courts should no longer hesitate to apply the tolling provision to even those defendants not named in the Government suit.

The *Leh* interpretation of the tolling provision is certainly the proper one and makes the provision one of the most effective devices available to private antitrust litigants. This approach to the tolling provision by the Supreme Court now fits the intent of Congress to afford the private litigant as many advantages as possible in its scheme to provide impetus to the whole field of antitrust litigation.

One may question the propriety of tolling the statute of limitations at all during the pendency of Government proceedings. Doing so seems to avoid the whole policy behind statutes of limitations,³⁹ since the private plaintiff working under the advantages of the tolling provision is not required to pursue his cause of action until 1 year after the Government action has ended. Consequently, defendants may

³⁷Since the statute of limitations against private antitrust actions is tolled by the institution of any civil or criminal proceeding by the United States, the private litigant is spared certain problems. Normally, under Fed. R. Civ. P. 4, a plaintiff is required to serve process within a reasonable time after the complaint has been filed. This would mean that, as to private antitrust litigants, the suit would probably come to trial before the Government proceeding had ended and the private litigant would not have the intended benefits of that Government action. With the tolling provision, however, the private litigant does not even have to file his complaint until 1 year after the Government suit has ended. Therefore, there will be no problem of the suit in trial before the private litigant desires. Of course, even this situation could be handled by obtaining a continuance when the suit did reach trial.

³⁸*Leh v. General Petroleum Corp.*, *supra* note 21, at 64.

³⁹Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944).

be confronted by the private litigant with matters that were not litigated by the Government and, because of the passage of perhaps 10 to 15 years the defendant may find it impossible to obtain evidence to defend against the claim. Also, since under *Leh* the statute is probably tolled even against defendants not named in the Government suit, some defendants in private suits may be faced with a wholly unanticipated suit with all of the resultant evidence-acquisition problems, years after the occurrence of the matters complained of.

A much more just and less confusing procedure would be for the private plaintiff to file a timely claim, then have a right to continuance until the Government suit has been completed. This procedure would still enable the private litigant to make full use of the Government suit, but would be more equitable, since defendants would have notice of the pending suit against them and could within the time which the statute of limitations indicates is the outermost limit of fairness begin obtaining evidence.

HOWARD J. BECK, JR.

UNEMPLOYMENT COMPENSATION UPON MANDATORY RETIREMENT

The purpose of unemployment compensation is to provide for the systematic accumulation of funds during periods of employment from which temporary benefits may be paid during periods of unemployment. Unemployment compensation thus helps the employee to obtain another job by temporarily maintaining his purchasing power. With this assistance a claimant can remain in the labor market until he finds work comparable to his previous job.¹ The unemployment compensation system is tied into a nationwide system of publicly run employment offices which help to reduce the volume of unemployment.²

¹Fla. Stat. Ann. § 443.02 (1952).

²The Wagner-Peyser Act, 29 U.S.C.A. §§ 49-49(l) establishes the United States Employment Service. 26 U.S.C.A. § 3301 (Supp. 1966) provides for a maximum tax on the employer of 3.13% of each covered employee's total wages, as defined in 26 U.S.C.A. § 3306(b), as the means of financing this service. Various credits are available to employers to reduce this tax liability, among them the allowance of a credit of up to 90% of the tax otherwise due. The employer must thus pay at least 10% of the tax (.31% of the taxable wages), and this amount is used to defray the administrative expenses of the entire system. 26 U.S.C.A. § 3302. Each state unemployment compensation system receives necessary appropriations from the .31% and the remaining amount is paid into the individual state benefit fund.

To qualify for appropriations a state unemployment compensation agency

Eligibility for unemployment compensation requires that the claimant be unemployed through other than his own fault or design, that he be capable of work, and that he be actively seeking suitable employment. If such a claimant is unable to obtain employment and the required waiting period, usually a week, has elapsed since his application for unemployment compensation, he is entitled to receive monetary benefits. Of course, a claimant cannot refuse to accept an offer of suitable work without good cause and still receive monetary benefits.

Unemployment compensation is available to the claimant only for a limited period after termination of his previous employment³ and may not be waived or assigned and is exempt from execution and attachment by creditors.⁴ Since unemployment compensation is premised upon the employee's leaving his employment through some fault of his employer,⁵ it is paid to a claimant entirely from money

must be vested with all powers necessary to cooperate with the United States Employment Service and to adopt certain provisions of the Act, 29 U.S.C.A. § 49(c), certified by the Secretary of Labor as conforming to the Act. 26 U.S.C.A. § 3304. Individual state acts provide that an application for unemployment compensation benefits is also an application for suitable employment, and the state agencies serve as job clearing houses for employer and employee.

³Fla. Stat. Ann. § 443.04(4) (1952); Ohio Rev. Code Ann. § 4141.30 (Baldwin 1964).

⁴ No agreement by an employee to waive his right to benefits is valid, nor shall benefits be assigned, released, or commuted. Such benefits are exempt from all claims of creditors and from levy, execution, garnishment, attachment, and all other process or remedy for recovery or collection of a debt, which exemption may not be waived. Ohio Rev. Code Ann. § 4141.32 (Baldwin 1964). See also Fla. Stat. Ann. § 443.16 (1952).

⁵The dismissal of an employee pursuant to the terms of a collective bargaining agreement has been held a voluntary leaving without good cause attributable to the employer; thus the employee is not within the statutory terms under which unemployment compensation is payable. For example:

(a) refusal to join labor organizations with which the employer had a closed or union-shop agreement, *In Re Malaspina*, 285 App. Div. 564, 139 N.Y.S.2d 521 (1955), *aff'd*, 309 N.Y. 413, 131 N.E.2d 709 (1956);

(b) refusal to pay union dues and thus remain in good standing with the union as required under the contract, *O'Donnell v. Unemployment Comp. Bd.*, 173 Pa. Super. 263, 98 A.2d 406 (1953);

(c) marriage, after which the contract requires discharge, *Means v. Unemployment Comp. Bd.*, 177 Pa. Super. 410, 110 A.2d 886 (1955);

(d) pregnancy, requiring discharge under terms of the contract, *Rzepski v. Unemployment Comp. Bd.*, 182 Pa. Super. 16, 124 A.2d 651 (1956);

(e) refusal of a contract-permitted transfer or downgrading which involves lower pay or less favorable hours (with retention of seniority), *In re Gerdano*, 2 App. Div. 2d 88, 153 N.Y.S.2d 924 (1956); *Roberts v. Chain Belt Co.*, 2 Wis. 2d 399, 86 N.W.2d 406 (1957). See Annot., 90 A.L.R.2d 835 (1963) where "termination of employment as a result of union action or pursuant to union contract as 'voluntary' for purposes of unemployment compensation benefits" is dealt with.

the discharging employer has paid into a general fund.⁶ The contribution rates for the employer are therefore based upon his past experience in causing employees to be eligible for benefits.⁷

The requirement of employer-fault raises the question whether an employee who, pursuant to his employment contract, is mandatorily retired with a pension paid in part or exclusively by his employer may also receive unemployment compensation. It is probable that in the negotiation of such an employment contract, frequently a collective bargaining agreement, a claim for unemployment compensation upon mandatory retirement is not contemplated by either party. Payment of both the pension and unemployment compensation introduces a double financial burden upon the employer. Nonpayment of unemployment compensation introduces the possibility of a mandatorily retired employee's loss of his anticipated right to unemployment compensation with the consequential hardship of being placed at a disadvantage in the search for employment. Equitable resolution of this problem requires considering the interaction of unemployment compensation, pensions, social security, and the welfare role of the state and federal governments.

In determining whether such an employee may receive both benefits, courts have reached opposite conclusions. Florida⁸ has held that the mandatorily retired employee who, pursuant to his employment contract, is receiving a pension may also receive unemployment compensation; but Ohio⁹ has reached the opposite result.

*Marcum v. Ohio Match Co.*¹⁰ denied unemployment compensation to an employee retired pursuant to a collective bargaining agreement providing for a pension upon mandatory retirement. To deny the claimant compensation, the court had to find, in the words of the applicable statute, that the claimant had "quit his work without just cause or . . . been discharged for just cause in connection with his work. . . ." ¹¹ *Marcum*, in upholding the result reached by the Ohio Bureau of Unemployment Compensation, differed with the Bureau's

⁶"[C]ontributions become due and shall be paid by each employer to the bureau of unemployment compensation for the unemployment compensation fund in accordance with such regulations as the administrator of the bureau of unemployment compensation prescribes, and shall not be deducted, in whole or in part, from the remuneration of individuals in his employ." Ohio Rev. Code Ann. § 4141.23 (Baldwin 1964); See also Fla. Stat. Ann. § 443.08 (1952).

⁷Fla. Stat. Ann. § 443.08(3) (1952).

⁸St. Joe Paper Co. v. Gautreaux, 180 So. 2d 668 (Dist. Ct. App. Fla. 1965).

⁹Marcum v. Ohio Match Co., 4 Ohio App. 2d 95, 212 N.E.2d 425 (1965).

¹⁰*Ibid.*

¹¹Ohio Rev. Code Ann. § 4141.29(D) (2) (a) (Baldwin 1964).

holding that this was a quit without cause¹² and held that the employee's mandatory retirement was a discharge for just cause in connection with his work.¹³ The court used claimant's compulsory union membership and consequent representation by the bargaining agent as a novel basis for holding that acceptance of a pension as a benefit of the employment contract required acceptance of mandatory retirement as a burden of the contract. The court therefore held that mandatory retirement is a discharge for just cause.¹⁴

From the employer's viewpoint, this result is satisfactory since it leaves him with only the burden of the pension which he had contracted to bear. Since unemployment compensation is not due, the employer does not bear the additional burden of a rise in unemployment compensation rates. From the employee's viewpoint, this decision is inequitable and violates the spirit of unemployment compensation to the extent that pension payments are less than unemployment compensation benefits. To the extent of this deficit, the employee is deprived of the opportunity to compete in the labor market on a relatively equal footing with other unemployed workers.¹⁵ There is little reason to exclude a covered employee from unemployment compensation solely on the ground that he is old¹⁶ or that his employment contract implies that he wishes to be retired when actually he is an able worker who desires to continue his employment.¹⁷ To hold that a mandatory retirement is a voluntary leaving can be done only by holding that the making of the contract of employment providing for mandatory retirement is itself voluntary. However, this

¹²*Marcum v. Ohio Match Co.*, *supra* note 9, at 426.

¹³*Id.* at 427-28.

¹⁴*Ibid.* The statutory reduction in unemployment compensation benefits in the event that retirement pay is received, Ohio Rev. Code Ann. § 4141.31 (Baldwin 1964), was not construed by the court as implying a right to unemployment benefits when retirement pay is received. The court further held that there was no statute-violating waiver of benefits. "Before one can waive benefits under a statute, it must first be determined that one is entitled to those rights." *Id.* at 427.

¹⁵Fla. Stat. Ann. § 443.02 (1952).

¹⁶Age may be "just cause" for dismissal if one is incapacitated by age. That view leaves to relief the problem of the superannuated employee who is attempting to find work which he is still able to perform.

¹⁷The failure of the claimant to find employment is presumed to arise either from claimant's age or the fact that his union which had contracted for his retirement pervaded the field, thus tending automatically excluding him from future work. It is possible that the claimant knew he could not get future employment and was applying only to receive unemployment compensation. However, to assume this would impute a dishonest intent to the claimant and not allow a rational investigation of the problem.

holding is not valid because the real choice of an employee when faced with such a contract is not whether he wishes to comply with the retirement provision but whether he prefers to work under such terms or not at all. That is a Hobson's choice.

The Florida decision in *St. Joe Paper Co. v. Gautreaux*¹⁸ permitted the former employee mandatorily retired by the terms of a collective bargaining agreement to receive unemployment compensation in addition to his pension. It is interesting to note that although *St. Joe Paper Co.* concluded that "an unemployment compensation statute is remedial and is to be liberally construed to effect its beneficent purpose, and that the disqualifying provisions therein are to be narrowly construed,"¹⁹ the court may have been forced into its result by the wording of the Florida statute. To have reached the opposite result and denied unemployment compensation, *St. Joe Paper Co.* would have had to hold that mandatory retirement was a quit without just cause or a discharge for *misconduct* in connection with the claimant's work.²⁰ It is difficult to rationalize how mandatory retirement could be put under either of these categories. The court, "in the interest of relieving the economic insecurity of a person unemployed through no fault of his own . . . [and] in order to attain the Legislature's goal of lightening the burden of unemployment . . .,"²¹ held that the claimant had *not voluntarily* left his employment.²² Legislative intent for this result was also derived from other Florida statutes which make a waiver of any right of unemployment compensation void²³ and from statutes guaranteeing that employees have the right of self-organization.²⁴ But, in accordance with a Florida Industrial Commission policy,

¹⁸180 So. 2d 668 (Dist. Ct. App. Fla. 1965).

¹⁹*Id.* at 674.

²⁰Fla. Stat. Ann. § 443.06 (1) (1952).

²¹*St. Joe Paper Co. v. Gautreaux*, *supra* note 18, at 671.

²²*Ibid.*

²³Fla. Stat. Ann. § 443.16 (1) (1952) provides in part:

"Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this chapter shall be void."

Cf. Ohio Rev. Code Ann. § 4141.32 (Baldwin 1964), which was dismissed by *Marcum* as inapplicable. *Marcum v. Ohio Match Co.*, *supra* note 9, at 427.

²⁴Fla. Stat. Ann. § 447.03 (1952):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

the holding was limited to cases in which the claimant's weekly pension payments are less than the weekly unemployment compensation.²⁵

In *Marcum*, on the other hand, the court had different statutory language to interpret. Only with considerable difficulty could mandatory retirement be called a "quit without just cause," but it could, without doing violence to the language involved, be called a "discharge for just cause in connection with . . . [claimant's] work."²⁶ Thus the variance in the 2 holdings may have resulted from the fact that *Marcum* found the "discharge for just cause" phrase of the Ohio statute could reasonably be interpreted to permit discharge of an employee pursuant to a mandatory retirement agreement or discharge because one has reached a certain age.

St. Joe Paper Co. required benefits to be paid to the claimant only if weekly pension payments are less than weekly unemployment compensation. A decision that both pension and unemployment compensation were fully payable would have imposed upon the employer possible double liability²⁷ for the amount of the unemployment compensation. The employer would thus have been misled by his reliance upon the unemployment contract with the employee or representative of the employee. Such an unexpected financial burden would place the employer at a disadvantage compared to competitors who do not have pension plans in effect or with competitors in other jurisdictions where only a single liability is imposed.

In any attempt to solve this problem, one must consider the entire scope of social legislation. If it is decided that an employee retired under a mandatory retirement agreement which includes a pension at least equal to the benefits under unemployment compensation is

²⁵In *St. Joe Paper Co. v. Gautreaux*, *supra* note 18, at 670, the court refers to Rule 185U-2.07 of the Florida Industrial Commission:

[W]here an employee is retired—pursuant to the terms of a retirement plan financed in whole or in part by the employer, under which he had no option to continue in his employment, he shall be disqualified for unemployment compensation benefits on the ground that he has voluntarily left his employment without good cause attributable to the employer "only if the Commission finds" that the payments to the employee under the plan, when pro-rated by weeks, "equal or exceed the maximum weekly benefit amount allowable under the Florida Unemployment Compensation Law."

²⁶Ohio Rev. Code Ann. § 4141.29 (Baldwin 1964).

²⁷*St. Joe Paper Co. v. Gautreaux*, *supra* note 18, at 674 recognizes this inequity, stating that to allow the claimant to receive unemployment benefits "would penalize the employer who has instituted a pension plan for his employees, as compared to an employer who has not, for the former would be required to bear the double financial burden of contributing to both the pension plan and the unemployment compensation fund."

eligible for benefits which would raise his income above the level of unemployment compensation, it must then be decided who is to pay for such compensation. The employer is wholly responsible for unemployment compensation²⁸ and for the pension he contracted to provide the employee. Moreover, the employee will probably be receiving social security to which the employee and all his employers combined have contributed equally.²⁹ The employee who collects a pension, unemployment compensation, and social security places a tremendous financial burden upon the employer. The excess of the pension, social security, and unemployment compensation combined over unemployment compensation alone might then be said to be a welfare payment made largely by the retirement employer. That employer would thus bear a burden which has traditionally been spread throughout the entire population by means of a general tax. If the net sum³⁰ of weekly social security and pension payments at least equals the weekly unemployment compensation benefits, which is the legislative determination of the income necessary to allow one to stay in the labor market, the purpose of unemployment compensation is accomplished without resort to unemployment compensation itself.

When the pension income is less than the unemployment compensation, the employer should be liable for the net difference between the pension and the unemployment compensation otherwise due. If, as in *Marcum*, the employer is not to be liable for that difference, a possible solution is to hold the union liable since the union has a duty to represent adequately all employees for which it is the collective bargaining agent. The liability of the union could be based upon a theory of inadequate representation of the employee. A union fund to cover the difference could be financed from union dues and the retired employee would thus be enabled to search for another job without undue economic hardship.

Another possible solution would be a statute requiring that a contract

²⁸Fla. Stat. Ann. § 443.08 (1952); Ohio Rev. Code Ann. § 4141.23 (Baldwin 1964).

²⁹Int. Rev. Code of 1954 § 3111; Int. Rev. Code of 1954 § 3101.

³⁰Neither unemployment compensation nor Social Security payments is taxable. IT 3230, 1938-2 Cum. Bull. 136-37; 3 P-H 1966 Fed. Tax Serv. ¶ 7032(5); IT 3447, 1941-1 Cum. Bull. 191. However, by virtue of Int. Rev. Code of 1954 § 106, all of a pension paid wholly from employer contributions, none of which contributions was considered taxable income of the employee when made, is, when received, taxable income of the employee. Thus the net amount a retired employee receives when a pension is a substitute for any portion of unemployment compensation may be less than if full unemployment compensation is received. The net difference would usually be small, but small amounts of money can be significant at the income levels typically involved here.

between a union and an employer providing for mandatory retirement with a pension be construed as not providing for pension payments while the employer is also liable for unemployment compensation. Of course an employer could probably provide effectively for this as a term of the employment contract.

Yet another solution would be a judicial ruling, whether or not pursuant to a statute, which would allow substitution of benefits already being received by the employee in lieu of payment of unemployment compensation. Possible substitutions are the pension and either the half of the social security paid by employers for the employee's benefits or the entire amount of social security receivable by the employee. The problem of the waiver section of the applicable unemployment compensation statute would have to be solved and might, as in *Marcum*, be accomplished by holding that the employee has no right to unemployment compensation.

The foregoing propositions are not ultimate answers; they are, however, an attempt to balance the equities of the situation and are submitted as a guide for jurisdictions considering the problem. But an answer should be sought, preferably by the legislatures, which would allow employers and the employees to know in advance how the provisions of employment contracts providing for mandatory retirement with a pension for a retiring employee will be construed. With such prior knowledge, employers could protect themselves from a double financial burden, and employees would know how their retirement would affect the assumed right to apply for unemployment compensation when there is inability to find immediate employment after mandatory retirement.

JAMES F. DOUTHAT

FEDERAL TAX LIENS IN BANKRUPTCY

An important policy of the Bankruptcy Act is to achieve pro rata distribution among all creditors of the bankrupt.¹ The general order of distribution of the bankrupt estate is:

I. Secured claims.² Claims of creditors who have security for their debts upon property of the bankrupt.³

¹See 3 Collier, Bankruptcy § 64.02, at 2058 (14th ed. 1964) [hereafter cited as Collier].

²The right of a secured creditor is technically a property right rather than a claim against the bankrupt estate. MacLachlan, Bankruptcy § 150 (1956) [hereafter cited as MacLachlan].

³Bankruptcy Act § 1 (28), 52 Stat. 840 (1938), 11 U.S.C. § 2 (28) (1964).

II. The General Bankrupt Estate.

A. Unsecured priority claims. Claims given priority by the Bankruptcy Act.⁴

These in order of priority are:

1. General expenses of administering the bankrupt estate.
2. Wages and commissions of employees of the bankrupt earned within 3 months before bankruptcy not to exceed \$600 per claimant.
3. Expenses of creditors incurred in the successful opposition to a discharge or in adducing evidence resulting in the conviction of any person of a bankruptcy offense.
4. *Unsecured* federal, state, and local tax claims.
5. Debts owing to any person including the United States, entitled to priority under any federal statute and rent within certain limitations entitled to priority under applicable state law.

B. Unsecured general claims. Dividends to general unsecured creditors.⁵ [Bracketed numerals and letters used hereafter refer to this outline.]

The Internal Revenue Code provides that the federal government acquires a lien for taxes on all property of any taxpayer liable for such taxes when it makes a demand for payment and the taxpayer neglects or refuses to pay.⁶ There is no practical way to discover the existence of this secret lien, but to alleviate some of its harshness Congress has provided in § 6323 of the Internal Revenue Code that the lien is not valid against a "mortgagee, pledgee, purchaser, or judgment creditor" until notice of the lien is recorded.⁷

⁴§ 64a, 52 Stat. 874 (1938), as amended, 11 U.S.C. § 104a (1964); See MacLachlan §§ 150-55.

⁵Bankruptcy Act § 65a, 52 Stat. 875 (1938), 11 U.S.C. § 105a (1964). See MacLachlan §§ 301-02.

⁶ If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Int. Rev. Code of 1954, § 6321.

⁷"[T]he lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate. . . ." Int. Rev. Code of 1954, § 6323(a). Notice must be filed in the office designated by the law of the state or territory in which the property subject to the lien is situated. When the state or territory has not designated such an office, notice is filed with the clerk of the United States

If the federal government acquires a tax lien by demand and refusal before a taxpayer goes into bankruptcy, the tax claim will ordinarily⁸ be paid as a secured claim [I] ahead of the claims of both priority [II A] and general unsecured creditors [II B], even though the lien is not recorded,⁹ unless the trustee in bankruptcy can be made to fall within one of the 4 classes—mortgagees, pledgees, purchasers, or judgment creditors—against whom the tax lien must be recorded to be valid.

The "strong arm clause" of the Bankruptcy Act, which is a part of § 70c, provides:

The trustee, as to *all* property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a *lien by legal or equitable proceedings* at the date of bankruptcy, shall be deemed vested as of such date with all the *rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings*, whether or not such a creditor actually exists.¹⁰

This section has consistently been interpreted to give the trustee in bankruptcy all the powers of a "judgment creditor" to avoid liens when a judgment creditor would, under applicable state law, have better rights than such lienholder.¹¹ For example, the trustee is able to defeat the lien of a mortgagee who failed to record his mortgage before bankruptcy; the mortgagee then takes as a general unsecured creditor [II B] rather than as a secured claimant [I].¹²

The Courts of Appeals for the 2d, 3d, and 9th Circuits have not, however, held that the "strong-arm clause" vests the trustee with the

District Court in which the property is situated. Int. Rev. Code of 1954, § 6323(a) (1)-(2).

⁸Under certain circumstances the tax lien will not be paid until after payment of administration expenses and wages—the first two unsecured priority claims [II A 1, 2]. See text accompanying note 55, *infra*.

⁹See, e.g., cases cited at note 13, *infra*.

¹⁰52 Stat. 879 (1938), as amended, 11 U.S.C. § 110c (1964) [Emphasis added.]

¹¹See, e.g., *In re Sayre Manor, Inc.*, 120 F. Supp. 215 (D.N.J. 1954) (Unrecorded land purchase contracts void under New Jersey law against subsequent judgment creditors without notice void as to trustee); *McKay v. Trusco Finance Co.*, 198 F.2d 431, 433 (5th Cir. 1952) (Unrecorded conditional sales contract void as to judgment creditor with lien under Alabama law void as to trustee); *Sampbell v. Straub*, 194 F.2d 228, 231 (9th Cir. 1951), *cert. denied*, 343 U.S. 927 (1952) (Unrecorded homestead exemption void as to judgment lienholders under California law void as to trustee).

¹²E.g., *Hams v. Marshall*, 43 F.2d 703, 704 (2d Cir.) *cert. denied* 282 U.S. 882 (1930) (decided under bankruptcy Act § 47a, 30 Stat. 557 (1898), the predecessor to present § 70c). See 4 Collier § 70.55.

rights of a "judgment creditor" insofar as protection from the unrecorded federal tax lien is concerned.¹³ These decisions were based on the Supreme Court decision in *United States v. Gilbert Associates*¹⁴ involving a municipal tax assessment that the New Hampshire Supreme Court had held was "in the nature of a judgment."¹⁵ *Gilbert* sustained the validity of the unrecorded federal tax lien against the municipal tax claim, holding that a "judgment creditor," for purposes of defining the class protected from the unrecorded tax lien, is a creditor holding a judgment "in the usual, conventional sense of a judgment of a court of record."¹⁶ *Gilbert* stressed the necessity for a uniform interpretation of federal statutes and the confusion which would result from permitting state courts to make different interpretations of the phrase "judgment creditor."

When the 6th Circuit held that the "strong-arm clause" does give the trustee the rights of a judgment creditor as against the unrecorded federal tax lien,¹⁷ the Supreme Court granted certiorari¹⁸ to resolve the resulting inter-Circuit conflict and affirmed in *United States v. Speers*,¹⁹ thus settling the most common question involving the tax lien in bankruptcy proceedings.²⁰ In *Speers*, the federal government acquired a lien for more than \$14,000 in withholding taxes and interest on the property of the Kurtz Roofing Co. 17 days before bankruptcy. The lien arose by demand and refusal and was not recorded before bankruptcy. Sale of the assets of the Kurtz Roofing Co. after expenses of sale produced approximately \$14,000.²¹ The trustee successfully contended that "judgment creditors" are protected from the unrecorded federal tax lien by the Internal Revenue Code, and that under the "strong-arm clause" of the Bankruptcy Act the

¹³*Simonson v. Granquist*, 287 F.2d 489 (9th Cir. 1961), *rev'd on other grounds*, 369 U.S. 38 (1962); *In re Fidelity Tube Corp.*, 278 F.2d 776 (3d Cir.), *cert. denied sub nom. Borough of East Newark v. United States*, 364 U.S. 828 (1960); *Brust v. Sturr*, 237 F.2d 135 (2d Cir. 1956).

¹⁴345 U.S. 361 (1953) (decided under Int. Rev. Code of 1939, § 3672, the predecessor of § 6323).

¹⁵*Petition of Gilbert Associates, Inc.*, 97 N. H. 411, 414, 90 A.2d 499, 502 (1952).

¹⁶*United States v. Gilbert Associates*, *supra* note 14, at 364. A judgment creditor must also have a lien to be protected by § 6323 of the Int. Rev. Code. *Miller v. Bank of America*, 166 F.2d 415, 417 (9th Cir. 1948) (decided under Int. Rev. Code of 1939 § 3672, the predecessor of § 6323).

¹⁷*In re Kurtz Roofing Co.*, 335 F.2d 311 (6th Cir. 1964). See note, 1965 Duke L.J. 142; 53 Geo. L.J. 813 (1965).

¹⁸*United States v. Speers*, 379 U.S. 958 (1965).

¹⁹382 U.S. 266 (Black dissenting).

²⁰See *Levit, United States v. Speers—A Milestone*, 71 Com. L.J. 70 (1966).

²¹Notice of final meeting of creditors of Kurtz Roofing Co., No. 27743, (D. C. N. D. Ohio, W. Div., March 5, 1962).

trustee is *deemed* a "judgment creditor." Under the trustee's proposed plan of distribution, affirmed by *Speers*, the federal government received less than \$9,000 of the approximately \$14,000 realized from sale of the bankrupt's property;²² the Government's claim was reduced to the less favored status of a 4th priority unsecured tax claim [II A 4] sharing pro-rata with state and local taxes.

Speers permits for the first time an artificial judgment creditor, the bankruptcy trustee, to prevail against an unrecorded federal tax lien. The uniformity problem in *Gilbert* (the possibility of confusion resulting from permitting state courts to make different interpretations of the phrase "judgment creditor") is not present in *Speers* since interpretation of the Bankruptcy Act is a federal matter.²³

Speers felt that Congress intended to confer "judgment creditor" status on the trustee in bankruptcy. The predecessor of the "strong-arm clause" was enacted in 1910 and read in part:

Such trustees, as to all property in the custody or coming into the *custody of the bankruptcy court*, shall be deemed vested with all the rights, remedies, and powers of a creditor *holding a lien by equitable or legal proceedings* thereon; and also, as to all property *not in the custody of the bankruptcy court*, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.²⁴

Prior to this amendment, the Bankruptcy Act provided that the trustee was to be vested with the title of the bankrupt to all property "which might have been levied upon and sold under judicial process against . . . [the bankrupt]." ²⁵ However, in 1906 the Supreme Court in *York Mfg. Co. v. Cassell*²⁶ had refused, despite the existing lan-

²²The federal government actually received only about \$1800 since costs of the appeal to the Supreme Court had to be paid as an administration expense [II A 1] before payment of its tax claim [II A 4]. Notice of Final Meeting of creditors of Kurtz Roofing Co., No. 27743, (D. C. N. D. Ohio, W. Div., Feb. 7, 1966).

²³The application of *Gilbert* as a basis for holding that the trustee was not to be deemed a judgment creditor in order to prevail against the unrecorded federal tax lien met with much disapproval. See, e.g., 4 Collier § 70.49 n.3c, at 1415; MacLachlan § 183, at 192; Loiseaux, *Federal Tax Liens in Bankruptcy*, 15 Vand. L. Rev. 137, 138-42 (1961); Seligson, *Creditors Rights*, 32 N.Y.U.L. Rev. 708-11 (1957).

²⁴Act of June 25, 1910, ch. 412, 36 Stat. 838, 840 (Emphasis added.)

²⁵Bankruptcy Act, § 70a (5), 30 Stat. 565 (1898) (now as amended, 66 Stat. 429 (1952), 11 U.S.C. § 110(a) (5) (1964).

²⁶201 U.S. 344 (1906). See 4 Collier § 70.47, at 1396; MacLachlan § 183, at 187.

guage of the Act, to give the trustee title to property in the possession of the bankrupt as a vendee under an unrecorded conditional sale contract. In *Cassell*, the Court found that under the controlling Ohio conditional sales law only creditors with liens could avoid an unrecorded conditional sale and that the conditional sale contract was still good between the parties even though not recorded. Since the trustee took the same title to property that the bankrupt had, the trustee simply stood in the shoes of the bankrupt in such circumstances and could not be given the benefit of the Ohio recording act. The 1910 amendment, therefore, expanded the trustee's powers to reach those cases where state law protected creditors with unrecorded liens.²⁷

The only substantial amendment²⁸ to the "strong-arm clause," adopted in 1950,²⁹ clearly simplified the definition of the status of the trustee.³⁰ The distinction between property coming into the custody of the bankruptcy court and property not coming into the custody of the bankruptcy court was eliminated, and the clause conferring the "rights, remedies, and powers of a judgment creditor then holding an execution returned unsatisfied" was deleted. Instead, the trustee was given the rights of a creditor who "could have obtained a *lien by legal or equitable proceedings*" as to *all* property of the bankrupt whether or not such property comes into the custody of the bankruptcy court. Since the rights of a creditor holding a lien by legal or equitable proceedings are ordinarily greater than those of a judgment creditor holding an execution returned unsatisfied,³¹ the elimination of the distinction as to possession by the 1950 amendment clearly put the trustee in the stronger of the 2 positions which had existed under the original enactment of the "strong-arm clause."³²

A creditor with a lien through legal or equitable proceedings does not necessarily have a judgment. For example, a creditor may acquire a lien by attachment prior to judgment.³³ A "judgment creditor" does not necessarily have a lien; in some jurisdictions a judgment does not become a lien until properly docketed.³⁴ It has generally been

²⁷See 4 Collier § 70.47, at 1388-91.

²⁸Other amendments occurred in 1938, ch. 575, § 1, 52 Stat. 879, and 1952, ch. 579, § 23, 66 Stat. 420.

²⁹Act of March 18, 1950, ch. 70, § 2, 64 Stat. 25.

³⁰See 4 Collier § 70.47, at 1393.

³¹See 4 Collier § 70.47 n.18, at 1393; MacLachlan, § 70c of the *Bankruptcy Act*, 24 Ref. J. 107 (1950).

³²See MacLachlan § 183, at 192.

³³See 4 Collier § 70.49, at 1412, n.3a at 1413.

³⁴See 4 Collier § 67.08 and cases cited in n.7 at 96-97.

held, however, that the "strong-arm clause" gives the trustee the rights of a judgment creditor as against imperfect liens other than the unrecorded federal tax lien.³⁵ For example, the trustee's rights are better than those of a mortgagee who has failed to record his mortgage.³⁶ *Speers* said that the purpose of the 1950 amendment was to broaden rather than reduce the powers of the trustee³⁷ since "elsewhere in the same legislation it was recognized that the category of those holding judicial liens includes judgment creditors,³⁸ and a judicial lienholder generally has 'greater rights than a judgment creditor.'"³⁹

Originally the federal tax lien statute did not protect any subsequent creditors from the secret tax lien.⁴⁰ In 1893 the Supreme Court held⁴¹ that the tax lien was valid against a bona fide purchaser for value, but to alleviate the harshness of this holding, Congress provided in 1913 that the federal tax lien would not be valid against a "mortgagee, purchaser, or judgment creditor" until the lien had been recorded.⁴² Pledgees were added in 1939 to the classes protected.⁴³ During the period in which the term "judgment creditor" appeared in both the "strong-arm clause" of the Bankruptcy Act and the tax lien sections of the Internal Revenue Code, the 2d Circuit in 1949 said in dictum in *United States v. Sands*⁴⁴ that the trustee in bankruptcy was to be deemed a "judgment creditor" for purposes of avoiding the unrecorded tax lien.⁴⁵ After the 1950 deletion of the term "judgment creditor" from the "strong-arm clause," and after the *Gilbert* holding that a judgment creditor for purpose of protection from the unrecorded federal tax

³⁵See 4 Collier § 70.49, at 1412-13.

³⁶See e.g., *Hams v. Marshall*, *supra* note 12.

³⁷H.R. Rep. No. 1293, 81st Cong., 1st Sess. 7 (1949); See 4 Collier § 70.47, at 1393.

³⁸Act of March 18, 1950, ch. 70, 64 Stat. 24, 25 (1950), 11 U.S.C. § 96a(4). See 4 Collier § 70.49, n.3, at 1415; MacLachlan § 183, at 192 (1957); Loiseaux, *supra* note 23, at 139.

³⁹*United States v. Speers* *supra* note 19, at 273, quoting H.R. Rep. No. 745, 86th Cong., 1st Sess., to accompany H.R. 7242, p. 10. See Loiseaux, *supra* note 23, at 139.

⁴⁰Rev. Stat., § 318b (1875), as amended, ch. 125, 20 Stat. 327, 331 (1879).

⁴¹*United States v. Snyder*, 149 U.S. 210 (1893).

⁴²Act of March 4, 1913, ch. 166, 37 Stat. 1016.

⁴³Int. Rev. Code of 1939, § 401, ch. 247, 53 Stat. 862, 882.

⁴⁴174 F.2d 384, 385 (2d Cir. 1949).

⁴⁵*Speers* said that the 2d Circuit was "the only Court of Appeals [in *Sands*, *supra* note 44,] squarely to pass upon the question." *United States v. Speers*, *supra* note 19, at 272 (Emphasis added.) Although *Sands* unequivocally stated that the trustee in bankruptcy had the rights of a judgment creditor as against the unrecorded federal tax lien, since the collector had taken possession of the property before bankruptcy the court upheld the Government's unrecorded lien on the ground that it was a statutory lien by distraint.

lien meant a creditor with a judgment of a court of record, a Congressional effort was made expressly to exclude from the Internal Revenue Code "artificial" judgment creditors such as the trustee in bankruptcy from the classes protected against the unrecorded federal tax lien.⁴⁶ The Senate, however, deemed it "advisable to continue to rely upon judicial interpretation of existing law."⁴⁷ *Speers* felt that this existing law sought to be preserved was not *Gilbert* but the dictum in *Sands*, and cases holding that the trustee in bankruptcy was to have the rights which a judgment creditor would have under state law.⁴⁸ Although *Gilbert* held that for purposes of avoiding the unrecorded federal tax lien a judgment creditor must be a creditor with a judgment of a court of record, at the time the legislation was proposed, "*Gilbert* had not yet been applied by any court to displace the rights of the trustee in bankruptcy as against an unrecorded federal tax lien."⁴⁹

Speers also found that after the view began to spread that *Gilbert* compelled exclusion of the trustee in bankruptcy from the protection given judgment creditors against the unrecorded federal tax lien, legislation had been introduced "expressly to reiterate the trustee's power to upset unrecorded federal tax liens."⁵⁰ The proposed legislation⁵¹ on 1 occasion passed both Houses of Congress but was vetoed by President Eisenhower.⁵² *Speers* based its holding in part upon such "expressions of congressional discontent with recent decisions" denying the trustee the protection given judgment creditors against unrecorded tax liens.⁵³

Speers indicates that under an opposite result—upholding of the validity of the unrecorded federal tax lien against the trustee—the Government would have received "the full amount owing to it."⁵⁴ Even if this result had been reached, § 67c of the Bankruptcy Act⁵⁵

⁴⁶H.R. Rep. No. 1337, 83d Cong., 2d Sess., to accompany H.R. 8300, p. A407; 1954 U. S. Code Cong. & Ad. News 4554.

⁴⁷S. Rep. No. 1622, 83d Cong., 2d Sess., to accompany H.R. 8300, p. 575; 1954 U. S. Code Cong. & Ad. News 5224; H. Conf. Rep. No. 2543, 83d Cong. 2d Sess., to accompany H.R. 8300, p. 78.

⁴⁸E.g., *MacKay v. Trusco Finance Co., Sampsell v. Straub*, *supra* note 11.

⁴⁹*United States v. Speers*, *supra* note 19, at 274.

⁵⁰*Ibid.*

⁵¹H. R. 7242, 86th Cong., 1st Sess., § 6; H. R. 394, 88th Cong. 2d Sess., § 6; H. R. 136, 89th Cong., 1st Sess., § 6.

⁵²H.R. 7242, 86th Cong., 1st Sess., § 6, vetoed by President on Sept. 8, 1960, 106 Cong. Rec. 19168.

⁵³*United States v. Speers*, *supra* note 19, at 275.

⁵⁴*Id.* at 269.

⁵⁵66 Stat. 427 (1952), 11 U.S.C. § 107(c) (1964).

provides that payment of statutory liens, including liens for taxes owing to the United States, may be *postponed* until payment of the first two priority claims, administration expenses and wages up to \$600 [II A 1, 2]. This provision is applicable only if:

- (1) The bankrupt estate is insolvent.
- (2) The lien is on personal property.⁵⁶
- (3) The lien is not accompanied by possession.
- (4) The lien has not been enforced by sale prior to the filing of the petition in bankruptcy.

Although these requirements limit the instances to which the statutory lien postponement provisions of § 67c are applicable, the federal tax lien can under the proper circumstances be subordinated to the administration expense and wage priorities. This possibility existed before *Speers*.⁵⁷ Thus, in those cases where the trustee could already have applied the statutory lien postponement provision, the only benefit to unsecured creditors is to enhance the positions of the priority class 3 creditors [II A 3] and state and local tax claims [II A 4] to the extent the Government's position is made less favorable. The unrecorded federal tax lien still has priority over the claims of unsecured general creditors [II B].

The Government contended in its brief that to allow the trustee to invalidate the unrecorded federal tax lien would result in a "windfall" to secured creditors who are not mortgagees, pledgees, purchasers, or judgment creditors whose security was obtained *subsequent* to the unrecorded tax lien.⁵⁸ Under this contention, creditors who are not already protected by the recordation requirement of § 6323 of the Internal Revenue Code but whose liens are nevertheless valid in bankruptcy as secured claims [I], advance monetarily by the amount of the invalidated tax claim. To illustrate: Assume that before bankruptcy the Government acquires, but fails to record, a tax lien for \$10,000 and that subsequent to the tax lien but still before bankruptcy a creditor files, but does not reduce to judgment, a valid⁵⁹ attachment lien which will be paid as a secured claim [I] in bankruptcy. Assume that sale of the property produces no more than

⁵⁶"Personal property" has been interpreted to mean *tangible* personal property. *United States v. Eiland*, 223 F.2d 118, 123 (4th Cir. 1955).

⁵⁷See 4 Collier § 67.27.

⁵⁸Brief for Petitioner, *United States v. Speers*, *supra* note 19.

⁵⁹To be valid the attachment must not be followed by bankruptcy within 4 months of its acquisition if at the time the lien was obtained the debtor was insolvent. Bankruptcy Act § 67a, 52 Stat. 875 (1938), as amended, 11 U.S.C. § 107(a) (1964).

\$10,000. Unless the trustee can avoid the unrecorded tax lien, the Government takes the entire amount, because as against the federal tax lien the attachment lien is "inchoate" until judgment and therefore does not make the attachment holder a judgment creditor.⁶⁰ But, if the federal tax lien is invalid against the trustee for failure to record and thereby reduced from a secured claim [I] to an unsecured tax claim [II A 4], the attachment lien will be the first secured claim to be paid, thus producing an obvious windfall for the attaching creditor. *Speers* accepted this contention without argument:

It is true that the consequence of depriving the United States of claimed priority for its secret lien is to improve the relative positions of creditors—if there are any not already protected by § 6323—whose security was obtained subsequent to the Government's lien and who, once the federal lien is invalidated, have a prior claim to the secured assets.⁶¹

Such windfalls to junior lienors could be avoided if the trustees could assert the Government's invalidated rights for himself and obtain the amount the Government would have obtained had the federal tax lien been recorded for the benefit of the general estate [II]. Other sections of the Bankruptcy Act which enable the trustee to avoid or postpone certain transfers and security interests expressly provide for subrogation of the trustee to the invalidated interest, resulting in a larger distribution to the general estate [II]. § 67c, dealing with *postponement of statutory* liens, not only allows the trustee to postpone statutory liens, including federal tax liens, on personal property not in the lienholder's possession until payment of the administration and wage expense priorities; it also permits the trustees to step into the shoes of the creditor whose statutory lien has been postponed for the benefit of the general bankrupt estate.⁶² But, although *Speers* enables the trustee to avoid the unrecorded tax lien, it does not appear that he is in a position to use any preservation provision such as that contained in § 67c or other sections of the Bankruptcy Act to preserve the lien for the benefit of the general bankrupt estate and

⁶⁰United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950) (attachment lien inchoate until judgment, tax lien attaching prior to judgment entitled to priority). The "choate lien doctrine" requires that an antecedent lien must be specific and perfected to prevail against the government's lien. Choateness is always a matter of federal law. See Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 YALE L.J. 905 (1954).

⁶¹United States v. *Speers*, *supra* note 19, at 275-76.

⁶²66 Stat. 427 (1952), 11 U.S.C. § 107(c) (1964).

prevent windfalls to competing lienholders. § 60⁶³ is the voidable preference section of the Bankruptcy Act. When a creditor of the bankrupt, having reasonable cause to believe the bankrupt insolvent, would receive a greater percentage of his debt than creditors of the same class, the trustee may avoid transfers made within 4 months before bankruptcy by the bankrupt debtor to such creditor-transferee. A transfer within the meaning of the Bankruptcy Act⁶⁴ includes securing an involuntary as well as voluntary lien.⁶⁵ A tax lien is an involuntary lien. § 60 further provides that where the preference is voidable, the court may

order such lien or title to be preserved for the benefit of the general bankrupt estate, in which event such lien or title shall pass to the trustee.

If these requirements are met, § 60 would apply to tax liens as involuntary transfers⁶⁶ were it not for § 67b which provides for a sweeping validation of statutory liens even though arising while the debtor is insolvent and within 4 months before bankruptcy.⁶⁷ § 67b allows statutory liens, including liens for federal taxes, to be perfected *after* bankruptcy if perfected within the time allowed by the applicable federal or state law creating or recognizing the lien.⁶⁸ As *Speers* pointed out:

§ 67, sub. b permits an otherwise inchoate federal tax claim to be "perfected" by assessment and demand within the four months prior to bankruptcy or afterwards. It does not nullify or purport to nullify the consequences which flow from the Government's failure to file its perfected lien prior to the date when the trustee's rights as a statutory judgment creditor attach—namely, on filing of the petition in bankruptcy.⁶⁹

Although it would now seem superfluous to be able to perfect the tax lien after bankruptcy since it must also be recorded to be valid against the trustee,⁷⁰ § 67b would always permit the lien to be per-

⁶³64 Stat. 24 (1950), as amended, 11 U.S.C. § 96 (1964).

⁶⁴Bankruptcy Act § 1 (30), 30 Stat. 544 (1898), as amended, 11 U.S.C. § 1 (30) (1964).

⁶⁵3 Collier § 60.07, 60.09 (14th ed. 1964).

⁶⁶3 Collier § 60.12.

⁶⁷66 Stat. 427 (1952), 11 U.S.C. § 107(b) (1964).

⁶⁸See 4 Collier § 67.20 at 183.

⁶⁹*United States v. Speers*, *supra* note 19, at 278.

⁷⁰The "strong-arm clause" may in other instances render impossible the perfection of statutory liens after bankruptcy under § 67b. See Oglebay, *Some Developments in Bankruptcy Law*, 24 Ref. J. 63 (1950).

fected within the 4 months before bankruptcy thus taking it out of the § 60 voidable preference category.

§ 67a⁷¹ is another section that must be analyzed in connection with preventing windfalls to competing lienholders when the unrecorded federal tax lien is invalidated. It provides for invalidation of judicial liens and also contains an avoidance and preservation provision. Under § 67a every lien obtained by attachment, judgment, levy, "or other legal or equitable process or proceedings" within 4 months before filing of a petition in bankruptcy shall be void if the debtor was insolvent at the time the lien was obtained, and the bankruptcy court may order any such lien to be preserved for the trustee for the benefit of the general bankrupt estate. However, a federal tax lien is a statutory lien rather than a lien obtained by "legal or equitable process or proceedings," § 67a is therefore *inapplicable*.⁷²

§ 70e⁷³ provides that any transfer or obligation incurred by the bankrupt estate which is voidable under non-bankruptcy law by any creditor having a claim provable in bankruptcy shall be void against the trustee, and that the trustee may preserve such transfer or obligation for the benefit of the general bankrupt estate. But, to apply § 70e, it must be shown that at least 1 of the present creditors of the estate holding a provable claim was a creditor as against whom the transfer was fraudulent or voidable under the controlling state or federal law.⁷⁴

Although it appears no existing provision of the Bankruptcy Act can be used to preserve the invalidated tax lien for the trustee for the benefit of the general bankrupt estate [II] to prevent windfalls to competing lienholders,⁷⁵ the same result might be achieved by reference to the priorities contemplated by the Internal Revenue Code. It can be argued that the trustee's rights against the unrecorded federal tax lien in no way affect the federal government's rights against other lienholders against whom the unrecorded federal tax lien is valid. The Internal Revenue Code provides that to be valid against a "mortgagee,

⁷¹52 Stat. 874 (1938), as amended, 11 U.S.C. § 107(a) (1964).

⁷²"[L]iens created by statute to protect particular classes of persons are governed in bankruptcy by sub-divisions *b* and *c* of § 67, whatever the mode of perfection or enforcement." 4 Collier 67.12 [1] n.2a, at 120. See *e.g.*, *Davis v. City of New York*, 119 F.2d 559 (2d Cir. 1941) (city sales tax lien arising on docketing of a warrant in county clerk's office held statutory lien within § 67b rather than lien obtained by legal proceedings).

⁷³52 Stat. 882 (1938), as amended, 11 U.S.C. § 110(e) (1964).

⁷⁴4 Collier § 70.90, at 1729.

⁷⁵See Comment, *Avoiding Federal Tax Liens in Bankruptcy*, 39 Texas L. Rev. 616 (1961); Note, 35 Ind. L.J. 351, 353-57 (1960).

pledgee, purchaser, or judgment creditor" the federal tax lien must be recorded; if the lien is not recorded, a judgment creditor such as the trustee in bankruptcy has greater rights to the taxpayer's property than the Government. The Internal Revenue Code does not provide, however, that the existence of a judgment creditor will increase the rights of any other lienholder against whom the unrecorded tax lien is still valid. Rather, after the amount of the judgment creditor's lien has been paid, any balance remaining should be applied to the tax lien and *then* to the lien which is junior to the federal tax lien. Since the "strong-arm clause" of the Bankruptcy Act gives the trustee the power of a judgment creditor as to *all* property of the bankrupt taxpayer, as a practical matter there will never be anything left for a lienholder junior to the tax lien after the trustee has defeated the unrecorded tax lien. Thus, such junior lienholders who would receive windfalls under the assumption in *Speers* could only take as general creditors [II].

The *Speers* holding will never benefit more than a few claims, primarily unsecured state and local tax claims which, even then, will only share pro-rata with the federal tax claim. Third priority creditors' fraud expenses [II A 3] will also benefit, but such claims are rare.⁷⁶ Except in cases involving real property, administration expenses and wages [II A 1 & 2], the first 2 priorities, would by virtue of § 67c (the statutory lien postponement section) be paid before the federal tax lien anyway unless the Government takes possession of the property before bankruptcy,⁷⁷ the bankrupt estate is solvent, or the Government enforces its lien by sale prior to bankruptcy.⁷⁸ Furthermore, if the Court is correct in assuming the elevation of liens ordinarily behind the tax lien, the result is a windfall to junior lienholders simply because of the intervention of bankruptcy. It is obvious that this result is not contemplated by the Bankruptcy Act⁷⁹ inasmuch as all other sections permitting the trustee to invalidate liens and transfers provide that the trustee can preserve and assert the rights of the claimant whose interest has been invalidated for the benefit of the general bankrupt estate [II].⁸⁰

⁷⁶See Note, 39 Ref. J. 55, 56, n.21 (1965).

⁷⁷See *Goggin v. Division of Labor Law Enforcement*, 336 U.S. 118 (1949).

⁷⁸See text accompanying note 54, *supra*.

⁷⁹See Seligson, *Recent Developments in the Field of Federal Tax Claims*, 29 Ref. J. 7, 11 (1955).

⁸⁰Bankruptcy Act § 60, 64 Stat. 24 (1950), as amended, 11 U.S.C. § 96 (preferences) (1964); § 67a, 52 Stat. 875 (1938), as amended, 11 U.S.C. § 107(a) (1964) (judicial liens); § 67c, 66 Stat. 427 (1952), 11 U.S.C. § 107(c) (1964) (postponement of statutory liens); § 67d, 66 Stat. 428 (1952), 11 U.S.C. § 107(d)

The *Speers* holding does, however, conform to the general policy of the strong-arm clause and the entire Bankruptcy Act in giving the trustee broader control over the bankrupt's assets at the date of bankruptcy than would a holding that an unrecorded federal tax lien is valid in bankruptcy as a secured claim [I].⁸¹

While the Bankruptcy Act attempts to make distributions to the bankrupts' creditors as fair as possible, it also seeks to enable the bankrupt debtor to return to economic and social productiveness by discharging him from claims of his old creditors.⁸² Even though the amount the Government receives is altered by *Speers*, the bankrupt taxpayer is still liable for the excess amount not realized in bankruptcy, since no tax claim is dischargeable.⁸³ If avoidance of the unrecorded federal tax lien results in larger payments to junior lienholders and priority creditors, then to the extent of such payments the bankrupt is left with a greater amount of nondischargeable tax indebtedness.

The policy of insuring the collection of the Government's revenues is strong⁸⁴ as evidenced by the existence of the secret tax lien and the strict judicial definition of the classes against whom the unrecorded lien is invalid under § 6323 of the Internal Revenue Code.⁸⁵ Since allowing the trustee to invalidate the unrecorded tax lien primarily benefits unsecured state and local tax claims and, presumably, junior liens not protected by § 6323 of the Internal Revenue Code, as a result of *Speers* the policy of protecting the federal revenue is altered somewhat by the advent of bankruptcy. *Speers* permits a result in bankruptcy which nonbankruptcy cases such as *Gilbert* refused to reach.⁸⁶ While the unrecorded federal tax lien defeated the local assessment in *Gilbert*, *Speers* allowed the local tax to share pro-rata

(1964) (fraudulent transfers); § 70e, 52 Stat. 882 (1938), as amended, 11 U.S.C. § 110(e) (1964) (transfers voidable by any creditor of the bankrupt voidable by trustee).

⁸¹See 4 Collier § 70.45, at 1384.

⁸²See MacLachlan § 100.

⁸³Bankruptcy Act § 17 (9) (1), 30 Stat. 544 (1898), 11 U.S.C. § 35 (9) (1) (1964).

⁸⁴The purpose of the secret tax lien is to insure prompt and certain collection of taxes. See *United States v. Security Trust & Sav. Bank*, 340 U.S. 47, 51 (1950); *United States v. Bond*, 279 F.2d 837, 847 (4th Cir. 1960), *cert. denied*, 364 U.S. 895 (1960); "The Court today gives frail and inadequate support, I think, for its judicial destruction of the Government's congressionally created lien." *United States v. Speers*, *supra* note 19, at 280 (Black dissenting).

⁸⁵See *United States v. Security Trust & Sav. Bank*, 340 U.S. 47, 53 (1950) (concurring opinion); Walker, *What Protection Against the Secret Federal Tax Lien?* 9 J. Taxation 8 (1958).

⁸⁶*United States v. Gilbert Associates*, 345 U.S. 361 (1953).

with the unrecorded federal tax claim. Although *Speers* to a limited extent represents an erosion in favor of state and local governments of the effectiveness of the unrecorded federal tax lien, its effect upon distributions to general creditors of the bankrupt is nonexistent. Of course, the Government can avoid the whole *Speers* problem entirely by recording its lien before bankruptcy in accordance with § 6323 of the Internal Revenue Code. If the Government should, as a matter of policy, decide that the effect of *Speers* upon the federal revenue is great enough to warrant recordation in all cases, then the result of *Speers* will be simply the elimination of the secret aspects of the federal tax lien.

JOSEPH D. LOGAN, III

TAXATION—LEGAL FEES IN UNSUCCESSFUL CRIMINAL DEFENSE HELD DEDUCTIBLE AS BUSINESS EXPENSES

In *Commissioner v. Tellier*¹ the Supreme Court was presented with the argument that legal fees incurred in the unsuccessful defense of a criminal charge arising out of taxpayer's business, though they meet the literal requirements of § 162(a), are not deductible because deduction would reward criminal activity. Taxpayer in *Tellier* was engaged in the business of underwriting and selling securities. He was convicted and fined \$18,000 for violating the fraud section of the Securities Act of 1933,² the mail fraud statute,³ and conspiracy to violate both of these statutes.⁴ In his defense taxpayer incurred and paid approximately \$23,000 in legal fees, and he sought to deduct this expenditure as an "ordinary and necessary" business expense under § 162(a) of the Internal Revenue Code.⁵ The Commissioner disallowed the deduction and was sustained by the Tax Court on the ground that "public policy" bars the deduction of legal expenses incurred in defense of acts found to be criminal.⁶ The 2d Circuit en banc unanimously reversed⁷ and the Supreme Court agreed, holding that such expenses are "ordinary and necessary" within the

¹86 Sup. Ct. 1118 (1966).

²48 Stat. 84 (1933), as amended 15 U.S.C. § 77q(a) (1954).

³18 U.S.C. § 1341 (1948).

⁴18 U.S.C. § 371 (1948).

⁵Int. Rev. Code of 1954, § 162(a), "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 . . ."

⁶Walter F. Tellier, 32 P-H Tax Ct. Mem. 1207 (1963).

⁷*Tellier v. Commissioner*, 342 F.2d 690 (2d Cir. 1965).

meaning of § 162(a) of the Internal Revenue Code, hence fully deductible because no sharply defined public policy is frustrated by allowing the deduction.⁸

The Internal Revenue Code of 1954 allows a deduction for "all the ordinary and necessary expenses" incurred in carrying on a trade or business.⁹ Judicial interpretation of the statutory language "ordinary and necessary" requires only that the expenditure be directly connected with or proximately result from the taxpayer's business,¹⁰ that the expenditure be common and accepted in that type of business,¹¹ and that the expenditure be appropriate at the time or helpful to the taxpayer.¹² In short "ordinary" has been construed to mean "normal" or "common" among similarly situated businessmen, and "necessary" has been construed to mean "helpful" or "appropriate" to the maintenance of the taxpayer's business.¹³ Cardozo in applying the statutory language to legal fees said:

Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against attack.¹⁴

Although the Code imposes no general requirement that business expenses be lawful or arise out of lawful activities,¹⁵ the judiciary has developed a "public policy" exception to the Code language denying the deduction of otherwise "ordinary and necessary" expenses if

⁸86 Sup. Ct. 1118 (1966).

⁹Int. Rev. Code of 1954, § 162(a).

¹⁰E.g., *Kornhauser v. United States*, 276 U.S. 145, 153 (1928).

¹¹E.g., *Lilly v. Commissioner*, 343 U.S. 90, 93 (1952); *Commissioner v. Heininger*, 320 U.S. 467, 471 (1943); *Deputy v. duPont*, 308 U.S. 488, 495 (1940).

¹²E.g., *Lilly v. Commissioner*, *supra* note 11, at 93-94; *Commissioner v. Heininger*, *supra* note 11, at 471.

¹³See, e.g., *Lilly v. United States*, 348 U.S. 90 (1952); *Deputy v. duPont*, 308 U.S. 488 (1940); *Welch v. Helvering*, 290 U.S. 111, 113-14 (1933); *Kornhauser v. United States*, 276 U.S. 145 (1928). *Commissioner v. Tellier*, *supra* note 1, at 1120 provides:

The principal function of the term ordinary in § 162(a) is to clarify the distinction, often difficult, between those expenses that are currently deductible and those that are in the nature of capital expenditures, which, if deductible at all, must be amortized over the useful life of the asset.

¹⁴*Welch v. Helvering*, *supra* note 13, at 114.

¹⁵*Commissioner v. Heininger*, *supra* note 11, at 474; 50 Cong. Rec. 3849 (1913).

such expenditures arise out of or are related to unlawful activities.¹⁶ Of course some expenditures, particularly those illegal or unethical in themselves, may validly be disallowed as extraordinary if they are uncommon or unaccepted ways of doing business.¹⁷ The underlying reason for disallowing expenditures associated with illegal activity is that the allowance of a deduction will, through the consequent reduction of tax liability, benefit, hence encourage, illegal activities.¹⁸ Although such reasoning has merit, it fails to recognize that a basic goal of the federal tax system is conformation of tax liability solely to the ability to pay.¹⁹ To accomplish this the tax should be measured by net, rather than gross income. No matter how large the gross from business activities may be, if there is no net income, there is, at least theoretically, no greater ability to pay than there would have been if the activities had not been engaged in.²⁰ The denial of otherwise "ordinary and necessary" business expense deductions results in measuring tax liability in terms of gross income, contrary to a basic principle of our tax system.²¹

The judiciary early formulated rules as to the tax deductibility of litigation expenses. No deduction is allowed for legal expenses if they are incurred in purely personal litigation.²² However, legal expenses incurred in maintaining or defending a civil action arising out of the

¹⁶See, e.g., *United States v. Worcester*, 190 F. Supp. 548 (D. Mass. 1961); *Dixie Mach. Welding & Metal Works, Inc. v. United States*, 315 F.2d 439 (5th Cir. 1963); *N. A. Woodworth Co. v. Kavanaugh*, 202 F.2d 154 (6th Cir. 1953).

¹⁷See, e.g., *United Draperies, Inc. v. Commissioner*, 340 F.2d 936 (7th Cir. 1964), where it was held: "the record reveals nothing inherent in the nature of petitioner's drapery enterprise which serves to endow such payments with a character of ordinariness they would not otherwise possess. In reaching this conclusion we do so apart from consideration of the morality or legality of the practice." *Id.* at 938, but compare the dissent which felt that the "kickback" payments were ordinary and necessary within the meaning of the applicable regulations. The dissenting justice stated: "the methods used by the taxpayer in the instant case should be prohibited," but that this result should be attained by Congressional action and not by court edict. *Id.* at 938. See also Reid, *Dissallowance of Tax Deductions on Grounds of Public Policy—A Critique*, 17 Fed. B.J. 575, 582-83 (1957).

¹⁸E.g., *Jerry Rossman Corp. v. Commissioner*, 175 F.2d 711 (2d Cir. 1949).

¹⁹See Keesling, *Illegal Transactions and the Income Tax*, 5 U.C.L.A. L. Rev. 26, 35 (1958).

²⁰*Ibid.*

²¹*Ibid.*

²²See *United States v. Gilmore*, 372 U.S. 39, 49 (1963), where the Court held that "the origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test of whether the expense was 'business' or 'personal'" within the meaning of § 162(a).

conduct of business have uniformly been held deductible.²³ Moreover, taxpayers have uniformly been allowed to deduct legal fees incurred in the successful defense of a criminal action where the acts arose out of the conduct of their business. Successful defenses include acquittal,²⁴ dismissal,²⁵ nolle prosequi,²⁶ and favorable consent decrees.²⁷ Until *Tellier* the lower courts had uniformly disallowed the deduction of legal fees incurred in the unsuccessful defense of criminal actions where the acts arose out of the conduct of business.²⁸

This disallowance was first established in *Burroughs Bldg. Material Co. v. Commissioner*²⁹ in 1932 by the same Circuit that later abrogated it. Taxpayer had claimed deductions for fines imposed and legal fees incurred in a criminal prosecution for antitrust violations. *Burroughs* disallowed the deduction of the fines and legal fees, reasoning that public policy requires that "illegal" acts not be sanctioned by the courts, and concluded: "If the fines and costs cannot be deducted, the legal expenses . . . should naturally fall with the fines themselves."³⁰ The court overlooked an important distinction between fines and legal fees in arriving at its conclusion, as have courts following this precedent. The amount of a fine, in theory, represents an appropriate exaction for unlawful conduct. Although disallowing deduction of a fine may be necessary to sustain its punitive effect,³¹ litigation expenses are, in theory, of no concern to the criminal law. Their disallowance creates an additional penalty not called for by the statutory violation. Further, the amount of legal expenses varies with the time spent in conducting the defense rather than with the severity of the crime; thus the denial of the deduction may be unduly harsh in relation to the statutory penalty.³²

The application of a broad "public policy" rationale in disallowing business deductions was considerably restricted in 1943 by the Supreme

²³See, e.g., *Foss v. Commissioner*, 75 F.2d 326 (1st Cir. 1935); *John W. Clark*, 30 T.C. 1330 (1958).

²⁴*Commissioner v. People's-Pittsburg Trust Co.*, 60 F.2d 187 (3rd Cir. 1932).

²⁵*Commissioner v. Shapiro*, 278 F.2d 556 (7th Cir. 1960).

²⁶*Morgan S. Kaufman*, 12 T.C. 1114 (1949).

²⁷*National Outdoor Advertising Bureau, Inc. v. Helvering*, 89 F.2d 878 (2d Cir. 1937).

²⁸See, e.g., *Bell v. Commissioner*, 320 F.2d 953 (8th Cir. 1963); *Acker v. Commissioner*, 258 F.2d 568 (6th Cir. 1958); *Burroughs Bldg. Material Co. v. Commissioner*, 47 F.2d 178 (2d Cir. 1931); *Anthony Cornero Stralla*, 9 T.C. 801 (1947).

²⁹47 F.2d 178 (2d Cir. 1931).

³⁰*Id.* at 180.

³¹*Cf. Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958).

³²See Note, 51 Colum. L. Rev. 752, 757 (1951).

Court in *Commissioner v. Heininger*.³³ The Court held that a business expense deduction may be disallowed only when permitting the deduction would "frustrate sharply defined national or state policies proscribing particular types of conduct."³⁴ *Lilly v. Commissioner*³⁵ added a further restriction when it allowed business expense deductions for kickback payments by opticians to doctors for glasses prescribed by the doctors because there was no clear frustration of a public policy "evidenced by some governmental declaration." The Court suggested such declarations should be left to "the province of legislatures."³⁶ Finally, the "test of nondeductibility always is the severity and the immediacy of the frustration resulting from allowance of the deduction."³⁷

The Supreme Court has found "frustration of sharply defined policy" in only 2 types of otherwise "ordinary and necessary" business expenses: (1) criminal fines,³⁸ (disallowed in order not to frustrate legislative policy by reducing the 'sting' of the prescribed penalty); (2) lobbying expenditures,³⁹ (disallowed on the ground that expenses incurred in influencing legislation or securing government contracts should not receive governmental sanction in any form).⁴⁰

Moreover, the Supreme Court has continually emphasized that the intent of Congress in providing for deduction of ordinary and necessary business expenses was, except where specifically provided otherwise,⁴¹ to tax *net* income regardless of its source, rather than to "reform men's moral characters."⁴² Thus, in 1958 the Court in *Commissioner v. Sullivan*⁴³ held payments for rent and employees' salaries in the conduct of an illegal gambling enterprise were deduct-

³³320 U.S. 467 (1943).

³⁴*Id.* at 473.

³⁵343 U.S. 90 (1952).

³⁶*Id.* at 97.

³⁷*Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30, 35 (1958).

³⁸*Hoover Motor Express Co. v. United States*, 356 U.S. 38 (1958).

³⁹*Cammarano v. United States*, 358 U.S. 498 (1959); *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941).

⁴⁰See Note, 67 Harv. L. Rev. 1408 (1954). These holdings are now embodied in § 162(e)(2) of the Int. Rev. Code of 1954. § 162(e)(2) states that the § 162 deduction is disallowed "For any amount paid or incurred . . . in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums."

⁴¹E.g., Int. Rev. Code of 1954, § 165(d) which limits the deduction of wagering losses to the amount of wagering gains.

⁴²50 Cong. Rec. 3849 (1913) (cited in *Tellier supra* note 8, at 1121); *Commissioner v. Sullivan*, 356 U.S. 27, 29 (1958); *Commissioner v. Heininger*, 320 U.S. 467, 474 (1943).

⁴³356 U.S. 27 (1958).

ible, even though the payments violated the applicable state penal statute. *Sullivan* reasoned that amounts paid as wages and rent are "ordinary and necessary expenses" in the accepted meaning of those words and that to disallow them "would come close to making this type of business taxable on the basis of its gross receipts, while all other business would be taxable on the basis of net income. If that choice is to be made, Congress should do it."⁴⁴ As a result of *Sullivan*, the Justice Department recommended to Congress a bill disallowing expenses incurred by businesses violating state and federal statutes.⁴⁵ The proposal was never enacted. A few years earlier Congress had considered a bill disallowing expenses resulting from illegal gambling and rejected it on the ground that the Internal Revenue Code is not intended to penalize or prohibit unlawful activities.⁴⁶

These recent rejections by Congress coupled with the Supreme Court decisions in *Heininger* and *Lilly* seem to endorse neutrality in the administration of the tax statutes where illegal conduct is invoked as a basis for disallowing business deductions. In any case the frustration doctrine announced in *Heininger* requires only that allowance of a deduction not frustrate sharply defined public policy, that is, more than frustration of vague or general policy is required.

The attitude with which the pre-*Tellier* lower courts have approached the issue presented in *Tellier* is illustrated by Learned Hand's statement that to allow deduction of counsel fees for an unsuccessful defense would tend to "subsidize the obduracy of those offenders who were unwilling to pay without a contest and who therefore added impenitence to their offense."⁴⁷ Such reasoning is especially inappropriate when applied to vague statutes regulating trade practices, in which neither the Government nor the defendant can in any real sense be said to know the requirements of the law before the courts declare it.⁴⁸ As a result of Hand's language and of dictum in *Heininger*,⁴⁹ it has been suggested that the deduction be allowed only where the criminal defense is asserted in good faith.⁵⁰ This suggestion

⁴⁴*Id.* at 29.

⁴⁵H.R. Rep. No. 7394, 86th Cong., 1st Sess. (1959).

⁴⁶97 Cong. Rec. 12230-44 (1951).

⁴⁷*Jerry Rossman Corp. v. Commissioner*, 175 F.2d 711, 713 (2d Cir. 1949).

⁴⁸See Comment, 72 Yale L.J. 108, 135 (1962).

⁴⁹320 U.S. 467, 471. "Since the record contains no suggestion that the defense was in bad faith or that the attorney's fees were unreasonable, the expenses incurred in defending the business can also be assumed appropriate and helpful, and therefore 'necessary.'"

⁵⁰McDonald, *Deduction of Attorney's Fees for Federal Income Tax Purposes*, 103 U. Pa. L. Rev. 168, 180 (1954).

has been criticized for the administrative difficulties it presents, since a test based on the good faith of the defense would seem to place an impossible burden on the courts, the Internal Revenue Service, and the taxpayer.⁵¹ Moreover, it is difficult to know what, short of a defense that itself violates the law, is a bad faith defense. Perhaps Hand's contention has merit where the crime is *malum in se*. In making no reference to either the nature of the crime for which the taxpayer was convicted, or the merits of the defense presented, the Supreme Court apparently rejected by implication both of these distinctions. But the Commissioner, who has long espoused the view rejected in *Tellier*, will in all probability continue to use such distinctions to disallow these deductions.⁵²

The 2d Circuit in holding contrary to long established precedent remarked:

There has been no 'governmental declaration' of any 'sharply defined' national or state policy of discouraging the hiring of counsel and the incurring of other legal expense in defense against a criminal charge. In fact it is highly doubtful whether such a public policy could exist in the face of the Sixth Amendment's guaranty of the right to counsel.⁵³

Both the 2d Circuit's and the Supreme Court's reasoning are related to decisions defining the defendant's constitutional right to counsel. The Court stated that no public policy is offended when one faced with serious criminal charge employs a lawyer to help in his defense. To the contrary, "in an adversary system of criminal justice, it is a basic of our public policy that a defendant in a criminal case have counsel to represent him."⁵⁴ But the reasoning in *Tellier* may not be sound. Late in its opinion the Court assumed the issue to be whether there is a public policy to deter the employment of counsel. Surely no such policy exists. The real issue is whether there is a public policy against deducting litigation expenses incurred in unsuccessfully defending a criminal charge. The Court merges these 2 issues by presupposing that a denial of the deduction would deter the employ-

⁵¹Comment, 72 Yale L.J. 108, 134 (1962).

⁵²"During the oral arguments before the Court, the question arose as to whether a person engaged in bank robbing as a trade or business could deduct his legal fees in fighting prosecution. A liberal reading of the Court's opinion could lead to a 'yes' answer. Under the rationale of *Sullivan*, it is apparent that the business itself does not have to be legal. However, it remains to be seen if *Tellier* can be stretched that far." 24 J. Taxation 300 (May 1966).

⁵³*Tellier v. Commissioner*, 342 F.2d 690, 694 (2d Cir. 1965).

⁵⁴*Commissioner v. Tellier*, *supra* note 1, at 1122.

ment of counsel. The Court then cites *Gideon v. Wainwright*⁵⁵ to justify its decision. *Tellier*, however, is not concerned with an indigent denied the right to counsel. If the Court's reasoning is followed to its logical conclusion, legal fees for all criminals, not just those whose crime has occurred in a business context, should be deductible.

The Supreme Court, by asserting that "the federal income tax is a tax on net income, not a sanction against wrongdoing,"⁵⁶ supports the concept of moral neutrality in the tax Code. The Court's statement brings into question *any* public policy doctrine in denying deductions of otherwise "ordinary and necessary" business expenses. Rejection of the elusive public policy criteria would be consistent with what appears to be the attitude of Congress: tax laws relating to business are intended to tax net income, regardless of its source. Where Congress has intended to curb particular forms of *business* conduct by the tax statutes, it has done so by specific legislation.⁵⁷ This legislative practice combined with the inconsistencies and confusion which result from the judicial ad hoc public policy doctrine calls for legislative determination of which business expenses should be disallowed on public policy grounds. The courts should not by themselves add a morality gloss to our already complex tax Code.

PETER W. MARTONE

TOWARD A UNIFORM COTENANCY LAW

For the magic word "survivorship" opens a Pandora's box, releasing strange spirits from the past, spirits as strange and alien to the modern world as the Salem witches. Here comes *Joint Tenancy*, with his handmaidens, *Per Tout* and *Per My*. There in solemn black march the *Four Unities*, in cadence slow. *Vested Remainder* dances the gavotte with his wife, *Contingent* to the strains of lutes played by *Severance* and *Ius Accrescendi*. Through the air on evanescent wings float *Possibilities*, now alone and now coupled with an *interest*.¹

⁵⁵372 U.S. 335 (1963).

⁵⁶*Commissioner v. Tellier*, *supra* note 1, at 1120.

⁵⁷See Int. Rev. Code of 1954, § 162(c). "No deduction shall be allowed . . . for any expenses paid or incurred if the payment thereof is made, directly or indirectly, to an official or employee of a foreign country, and if the making of the payment would be unlawful under the laws of the United States if such laws were applicable to such payment and to such official or employee." Section 162(e) disallows certain lobbying expenses.

¹Stephenson, *Survivorship Deeds Under the Statute*, 34 Conn. B.J. 15-16 (1960).

The desirability of some form of joint ownership is demonstrated by its use in the common law for over 6 centuries² as well as its availability in every jurisdiction today.³ The common law provided 3 forms of joint ownership which are still in use: Tenancy in Common, Joint Tenancy, and Tenancy by the Entirety.⁴

(1) Tenancy in Common was the simplest: each tenant owned only an undivided part of the estate⁵ subject to compulsory partition by either of the tenants or forced sale for division of the proceeds of the sale⁶ with no right of survivorship.⁷

(2) Joint Tenancy was that joint estate with a destructible right of survivorship. In this form of ownership the right of 1 tenant to receive the whole estate at the death of the other(s) could be cut off by compulsory partition,⁸ forced sale for division of the proceeds from the sale,⁹ or a sale without the permission of the other tenant.¹⁰ This estate was favored by the common law and any transfer to 2 or more tenants was *presumed* to be a joint tenancy, which automatically carried a right of survivorship.¹¹

(3) Tenancy by the Entirety, a form of joint ownership available only to married tenants,¹² contained an *indestructible* right of survivorship.¹³ Since at common law husband and wife were 1 person

²See English, *Concurrent Estates in Real Property I* (pt. 1), 11 Catholic U.L. Rev. 63 (1962).

³See 4 Powell, Real Property ¶ 602 (1965); 2 Tiffany, Real Property § 424 (3d ed. 1939).

⁴Tenancy by Coparcenary is of little or no significance today. See 1 Aigler, Smith & Tefft, Property 703 (1960); 4 Powell, Real Property ¶ 600 (1965); 2 Tiffany, Real Property ¶ 429 (3d ed. 1939).

⁵State v. Hoskins, 357 Mo. 377, 208 S.W.2d 221, 222 (1948); Taylor v. Millard, 118 N.Y. 244, 23 N.E. 376, 377 (1890); See McConnel v. Kibbe, 43 Ill. 12 (1867).

⁶Willard v. Willard, 145 U.S. 116, 120-21 (1892). "Partition" refers to division of the property itself among joint owners. *Ibid.* When property held by tenants in common is incapable of equitable division it may be sold and the proceeds from the sale divided equally among the tenants. Henry v. White, 224 Ala. 427, 140 So. 391 (1932).

⁷Hartford Nat'l Bank & Trust Co. v. Harvey, 143 Conn. 233, 121 A.2d 276, 280 (1956); In re Hoermann's Estate, 234 Wis. 130, 290 N.W. 608, 610 (1940); Woodward v. Congdon, 34 R.I. 316, 83 Atl. 433, 435 (1912).

⁸Gwinn v. Commissioner, 287 U.S. 224, 228 (1932); Midgley v. Walker, 101 Mich. 583, 60 N.W. 296 (1894).

⁹*Ibid.*

¹⁰*Ibid.*; Green v. Skinner, 185 Cal. 435, 197 Pac. 60, 61 (1921).

¹¹Swartzbaugh v. Sampson, 11 Cal. App. 2d 451, 54 P.2d 73, 75 (1936); Allen v. Almy, 87 Conn. 517, 89 Atl. 205, 207 (1913); Prall v. Burckhardt, 299 Ill. 19, 132 N.E. 280, 283 (1921).

¹²Simons v. Bollinger, 154 Ind. 83, 56 N.E. 23, 24 (1900); see Taub v. Shampianier, 95 N.J.L. 349, 112 Atl. 322 (Sup. Ct. 1921).

¹³"Indestructible" in this sense means that it cannot be cut off by a third

and the estate belonged to that entity and not to either alone, the right of survivorship could not be cut off by compulsory partition, forced sale for division, or attempted transfer by 1 spouse without the permission of the other spouse.¹⁴

Two serious objections have been made to survivorship as it was used at common law. First, widespread use of survivorship among laymen without full recognition of all its ramifications often resulted in frustration of the real intent of the parties.¹⁵ This was especially undesirable where the survivorship was created not by an act of the parties but by the common law presumption in favor of joint tenancy. The second objection was that the indestructible nature of the right of survivorship in tenancy by the entirety could be used to defeat the rights of the tenants' creditors.¹⁶

Different jurisdictions have attempted to meet these 2 objections in many different ways. A very small minority has tried to meet both objections by abolishing joint tenancy and tenancy by the entirety, leaving only tenancy in common, an estate without a right of survivorship.¹⁷

The more usual method of meeting the objection of the unin-

party or by an act of one tenant alone. *Phillips v. Krakower*, 46 F.2d 764, 765 (4th Cir. 1931); *Hoffmann v. Newell*, 249 Ky. 270, 60 S.W.2d 607, 609 (1932).

¹⁴This idea was commonly expressed by saying such tenants hold per tout and not per my; see *Taub v. Shampianier*, 95 N.J.L. 349, 112 Atl. 322 (Sup. Ct. 1921).

¹⁵In *Bernhard* the parties apparently had no idea they were creating an indestructible right of survivorship. It can hardly be seriously asserted that the words "as tenants by the entirety with the right of survivorship" sufficiently alerts the layman to the indestructible nature of the estate he is creating.

¹⁶Since the survivorship cannot be destroyed and there is no way to ascertain who the survivor will be, there can be no attachment since the debtor's interest in the property is unascertained. A second reason for non-attachment is the common law fiction that the estate belongs to both of the tenants as one but to neither of them alone. English, *Concurrent Estates in Real Property II*, (pt. 2) 12 Catholic U.L. Rev. 1, 2 (1963).

¹⁷Washington withdrew from this dwindling minority with Wash. Sess. Laws 1961, ch. 2, which repealed Wash. Rev. Code § 11.04.070 (1953). Alabama was briefly in this minority before Ala. Code tit. 47, § 19 (1958) was amended in 1945, 4 Powell, *Real Property* ¶ 602 n.15 (1965). Oregon tried to abolish joint tenancy by statute, now Ore. Rev. Stat. § 93.180 (1953), but the Supreme Court of Oregon apparently construed the statute to mean that no more than the old common law presumption in favor of joint tenancy was destroyed. For an explanation of the status of the Oregon law as well as the ambiguity of the revised statute see O'Connell, *Are Joint Tenancies Abolished In Oregon?*, 21 Ore. L. Rev. 159 (1942). Alaska apparently follows the Oregon view of joint tenancy, Alaska Stat. § 34.15.130 (1962), *Pilip v. United States*, 186 F. Supp. 397, 402 (D. Alaska 1960), although Alaska Stat. § 34.15.140 (1962), expressly allows creation of a limited tenancy by the entirety.

tentional use of survivorship, however, has been by statutory abolition of the common law presumption in favor of joint tenancy and creation of a statutory presumption in favor of a tenancy in common.¹⁸ Under such statutes a grant to 2 or more grantees is presumed to create a tenancy in common, an estate without survivorship, instead of a joint tenancy, an estate with survivorship. This presumption can always be rebutted by an express provision in the instrument showing a clear intent to create a joint tenancy, on the rationale that such an estate is permissible if the grantor realizes what he is doing.¹⁹

In slightly more than half the jurisdictions the method of dealing with the creditors' objection to tenancy by the entirety has been to abolish tenancy by the entirety outright,²⁰ leaving joint tenancy as the only jointly held estate with survivorship. Although a few jurisdictions have simply held that tenancy by the entirety does not completely insulate against creditors,²¹ a sizable minority has refused to change the common law rule that a tenancy by the entirety is not subject to levy or attachment for any debt not incurred by both spouses jointly.²²

Alabama judicially abolished tenancy by the entirety in 1860.²³ The *presumption* in favor of joint tenancy was abolished by a statute which allowed joint tenancy *only if* the intent to create it were clearly expressed:

When one joint tenant dies before the severance, his interest does

¹⁸See, e.g., *Lynch v. Murray*, 139 F.2d 649 (5th Cir. 1943); *Prall v. Burckhardt*, 299 Ill. 19, 132 N.E. 280 (1921); *Salvation Army, Inc. v. Hart*, 239 Ind. 1, 154 N.E.2d 487 (1958); *Midgley v. Walker*, 100 Mich. 583, 60 N.W. 296 (1894); *In re Blumenthal's Estate*, 236 N.Y. 448, 141 N.E. 911 (1923).

¹⁹*Allen v. Almy*, 87 Conn. 517, 89 Atl. 205, 207 (1913); *Frey v. Wubben*, 26 Ill. 2d 62, 185 N.E.2d 850 (1962); *Wilken v. Young*, 149 Ind. 1, 41 N.E. 68 (1895).

²⁰Another method of achieving the same result is to refuse to recognize it. For an excellent grouping and classification of the methods by which tenancy by the entirety is not recognized in 29 jurisdictions see Phipps, *Tenancy By Entireties*, 25 Temp. L.Q. 24, 32-33 (1951).

²¹In Kentucky and Tennessee the creditor can levy and sell the interest of the debtor spouse. The buyer at execution thus gets only the contingent right of survivorship, see *Hoffmann v. Newell*, 249 Ky. 270, 60 S.W.2d 607 (1932); *Francis v. Vastine*, 229 Ky. 431, 17 S.W.2d 419 (1929); *Cole Mfg. Co. v. Collier*, 95 Tenn. 115, 31 S.W. 1000 (1895). In Arkansas the purchaser at execution takes the debtor spouse's interest in half the rents and profits as well as the contingent right of survivorship, see *Moore v. Denson*, 167 Ark. 134, 268 S.W. 609 (1924); *Branch v. Polk*, 61 Ark. 388, 33 S.W. 424 (1895).

²²For a grouping and classification of the 20 jurisdictions which have retained tenancy by the entirety, see Phipps, *Tenancy By Entireties*, 25 Temp. L.Q. 24, 33-34, 46-57 (1951).

²³See *Walthall v. Goree*, 36 Ala. 728 (1860).

not survive to the other joint tenants, but descends and vests as if his interest had been severed and ascertained, provided, however, that in the event it is stated in the instrument creating such tenancy, that such tenancy is with right of survivorship, or other words used therein showing such intention, then upon the death of one joint tenant, his interest shall pass to the surviving joint tenant or tenants according to the intent of such instrument. This shall include those instruments . . . in which . . . it clearly appears that the intent is to create such a survivorship between joint tenants as is herein contemplated.²⁴

Thus, as in the majority of jurisdictions, after this statute was adopted the law of Alabama appeared to be that while a tenancy by the entirety with an indestructible right of survivorship could not be created under any circumstances, a joint tenancy with a destructible right of survivorship could be created if the intent to do so were clearly expressed.

The Supreme Court of Alabama, however, interpreted this statute in a very unusual way in *Bernhard v. Bernhard*.²⁵ There the husband filed a bill to force a sale for division of the proceeds from the house and land which he and his estranged wife had been granted. The deed stated that the parties were to take

as joint tenants with right of survivorship . . . it being the intention of the parties to this conveyance, that (unless the joint tenancy hereby created is severed or terminated during the joint lives of the grantees herein), in the event one grantee herein survives the other, the entire interest in fee simple shall pass to the surviving grantee. . . .²⁶

According to the view uniformly adhered to in jurisdictions which, like Alabama, have abolished tenancy by the entirety but allow creation of joint tenancy by express intention, such language would have created a joint tenancy (with a destructible right of survivorship) in accordance with the intent of the parties.²⁷ Not recognizing this, the *Bernhard* court took the novel position that the *estate* of joint tenancy, instead of the common law *presumption* in favor of joint tenancy, had been abolished by the statute.²⁸ The reason seems to be

²⁴Ala. Code tit. 47, § 19 (1958).

²⁵177 So. 2d 565 (Ala. 1965).

²⁶*Id.* at 566.

²⁷*Supra* notes 18, and 19.

²⁸*Bernhard*, *supra* note 25, at 567, cites only 1 case as authority for this construction, *Finch v. Haynes*, 144 Mich. 352, 107 N.W. 910 (1906), which is cited incorrectly since it expressly distinguished the situation presented by

the incorrect assumption that the first part of the statute abolishing joint tenancy was inconsistent with the latter part allowing it.²⁹ Apparently believing itself forced to choose between 2 inconsistent statutory clauses, the court implied that the more logical construction was that the legislature had intended to retain only 1 incident of joint tenancy, survivorship, rather than the entire estate of joint tenancy. To replace the abolished estate of joint tenancy the court fashioned a strange estate called a "tenancy in common with an indestructible right of survivorship" which the court equated to a tenancy in common for the joint lives of the tenants with cross-contingent remainders in both tenants.³⁰ This estate has been used before in other jurisdictions,³¹ usually when an attempted joint tenancy fails for want of one of the 4 unities;³² but this case is the first instance of forcibly establishing it over the intention of both the legislature and the parties to the instrument.

The court fictionalized the intent of the parties in order to achieve this result by saying that the intention of the parties was other than it patently was. It seized upon a provision in the deed which in effect

Bernhard. The Michigan Supreme Court, in carefully limiting their result to grants "to A & B and the survivor of them," considered a precedent where, as in *Bernhard*, the grant was "to A & B as joint tenants with a right of survivorship" and held:

That was a case where the interest of one of two joint tenants under a deed, where the right of survivorship was expressly granted, was purchased under an execution sale . . . and this court held that such interest was subject to levy and sale. . . . *If the deed under consideration had . . . made the grantees therein named joint tenants of the fee, either of those grantees could, by conveyance in her lifetime, have deprived the other of the right of survivorship.* . . . But that deed [to A & B and the survivor of them] did not make the grantees joint tenants of the fee. 'Deeds and devices . . . to two or more, and to the survivor of them and his heirs . . . make them joint tenants for life with a contingent remainder in fee to the one who survives'.

Id. at 910-11 (1906) (Emphasis added.)

²⁹*Supra* note 25, at 566-67.

³⁰The term "tenancy in common with cross-contingent remainders" means that each tenant has a life interest in the estate with all of the rights and duties of tenants in common followed by a remainder in fee simple in the whole estate contingent upon his surviving the other tenant. Since the survivor is unascertainable while both tenants are living, the land cannot be partitioned or sold for division of the proceeds since the interest of such party cannot be determined until the death of one.

³¹See, e.g., *Hass v. Hass*, 248 Wis. 212, 21 N.W.2d 398 (1946); *Burns v. Nolette*, 83 N.H. 489, 144 Atl. 848 (1929); *Schultz v. Brohl*, 116 Mich. 603, 74 N.W. 1012 (1898).

³²See, e.g., *Anson v. Murphy*, 149 Neb. 716, 32 N.W.2d 271 (1948).

only restated the Alabama Simultaneous Death Act³³—if both parties died simultaneously there could be no survivor hence the property must descend as if the estate had been a tenancy in common. Since by statute this rule operates in every joint tenancy, the provision added nothing. However, one provision which is not present in every joint tenancy is the clause, “unless the joint tenancy hereby created is severed or terminated during the joint lives of the grantees herein.” (Emphasis added.) The intent of the parties concerning the possibility of termination could hardly be plainer.

The result in *Bernhard*, however, does not seem inequitable. The court did not allow the husband to sell the house in which his estranged wife was living and divide the proceeds from the sale, because the estate created by the court, tenancy in common with cross-contingent remainders, was not subject to compulsory sale for division.³⁴ Two analyses can be suggested as rational bases for the result in *Bernhard*: First, it can be called a protection of the rights of an estranged wife before divorce. If the court had sold the house and had given her half the proceeds, the result would have been to reduce, at least temporarily, her house-occupying station in life by one half. Normally when a marriage fails, the wife who has devoted herself to domestic skills has few, if any, skills with which she can compete in the labor market, while the husband has acquired more earning capacity by developing skills in more demand on the labor market. Second, married people tend to view their physically indivisible joint property not as half “his” and half “hers,” but as “theirs” in the sense that it would somehow be improper for either to alienate his half interest without the consent of the other. In this sense the marital entity may be more than an old common law concept: in certain areas of behavior it is almost a psychological fact.

In fact this result, if not this analysis, would obtain in almost half the jurisdictions today under the rationale that tenancy by the entirety is neither partitionable nor salable for division.³⁵ While in such jurisdictions that result is restricted to married tenants,³⁶ the *Bernhard* result applies to *all* joint owners in Alabama since there is no distinction between married tenants and unmarried tenants.³⁷ The importance

³³Ala. Code tit. 16 § 36 (1958).

³⁴Simes & Smith, *Future Interests* § 1772 (2d ed. 1956).

³⁵See Huber, *Creditors' Rights In Tenancies By The Entireties*, 1 Boston College Industrial and Commercial L. Rev. 197, 198 (1959); Phipps, *Tenancy By Entireties*, 25 Temp. L.Q. 24, 36 (1951).

³⁶*Supra* note 35.

³⁷*Supra* note 23.

of this difference between Alabama and other jurisdictions is that the chief objections to tenancy by the entirety, creation of an estate without full knowledge of technical results and possible defeat of creditors' rights, now attach in Alabama to *every* joint estate in which the parties have created a right of survivorship. If the only estate with survivorship left by the court's interpretation of the statute is tenancy in common with a right of survivorship, and if that kind of contingent right of survivorship is indivisible because of the contingency of the interests of the parties, it follows that every joint estate with survivorship is indivisible. It also must follow that since every joint estate with survivorship is indivisible because of the contingency of interests of the tenants, the estate is insulated against those who are creditors of 1 spouse only. For if the reason for non-division is that a contingent remainder is by its very nature indivisible, it is immaterial whether a spouse or a creditor is trying to have it sold for division. Thus every landowner in Alabama could by timely action completely insulate his estate from attachment by creditors simply by transferring it to himself and another as tenants in common for their joint lives with the right of survivorship.³⁸

Obviously, the court will at least have to modify or restrict its *Bernhard* opinion. Just how it can do so without overruling *Bernhard* is not clear. The case cannot be restricted on the basis of the intention of the parties, since the intention of the parties in *Bernhard* was to create a severable joint tenancy and not a tenancy in common with an indestructible right of survivorship. There is no reason for restricting the opinion to married tenants since the statute (1842) applies to all joint owners,³⁹ and the judicial abolition (1860) of tenancy by the entirety leaves no distinction between married and unmarried joint tenants.⁴⁰

Apparently the case must be distinguished on some fictional ground or it must be overruled. Assuming that the court wants to pursue a policy of protection of the rights of an estranged wife even when creditors are involved, it will probably limit this case in some way to married tenants. If that happens, the court will have done something far more significant than fictionalize the result of the present case: it will have reinstated tenancy by the entirety. Although there may be a theoretical difference between the concept of tenancy by

³⁸Ala. Code tit. 46 § 19 (1958) gives a landholder the power to make a conveyance to himself and another with the right of survivorship.

³⁹*Supra* note 24.

⁴⁰*Supra* note 23.

the entirety and tenancy in common with an indestructible right of survivorship,⁴¹ the practical results of both estates are identical: the creation of a joint estate between married tenants only, with an indestructible right of survivorship immune from attachment by creditors of 1 spouse only.

If that is the direction of the opinion, it contains 3 serious flaws. First, the court has created uncertainty as to what the substantive law of real property actually is. It is clear that the case must be modified or overruled, but how is the practicing attorney to know which? The court obviously has adopted the policy of protecting the rights of the estranged wife by preventing the husband from forcing sale of "their" property, but what will happen when that policy conflicts with the policy of protecting the rights of non-joint creditors? Assuming that the court considered all relevant implications of its decision, it has, in effect, weighed the advantages of tenancy by the entirety against its disadvantages and decided that the advantages outweigh the disadvantages. Since the court did not even mention such an obvious implication,⁴² the practicing attorney can only guess whether it was considered, thus can only guess whether the court actually wishes to pursue this policy when non-joint creditors are involved.

A second flaw in the decision is the potential confusion the decision has created in the language of property law. While a tenancy in common with a right of survivorship is not exactly a technical contradiction in terms, such terminology will create pointless confusion. Although survivorship is not an estate itself, it is something more than an alienable characteristic of an estate. It is the label that identifies the estate as either a joint tenancy or a tenancy by the entirety and not a tenancy in common since a basic distinction between tenancy in common and the other 2 joint estates is that survivorship is not a feature of tenancy in common.⁴³ Saying that survivorship is only an incident of 1 estate which can arbitrarily be assigned to another estate, while perhaps technically permissible,⁴⁴ subject to the requirements of due process, is like saying that having equestrian

⁴¹A tenant by the entirety owns the whole estate while a tenant in common with an indestructible right of survivorship owns only a part of the estate with a contingent remainder in fee simple in the whole.

⁴²The point was raised neither in the opinion, nor in the brief of counsel arguing for division of proceeds from forced sale, Brief for Appellee, Bernhard v. Bernhard, 177 So. 2d 565 (Ala. 1965), and it could hardly be expected to be raised in Appellant's Brief.

⁴³See *United States v. Jacobs*, 306 U.S. 363, 370 (1939); Moynihan, Introduction to Real Property, 220, 224, 229 (1962).

⁴⁴See *supra* note 41.

characteristics is only an incident of an animal called a "horse" which can arbitrarily be assigned to another animal. If the decision of the court is that results uniquely obtainable from tenancy by the entirety are desirable, it should overrule the 1860 case abolishing tenancy by the entirety and avoid the kind of confusion which results from a misdirected sense of reverence.⁴⁵

The third and basic flaw in this opinion, is its ad hoc approach designed to deal with one particular problem of co-ownership without proper regard for the whole body of co-ownership law. It was this same approach that originally raised this problem in *Walthall v. Goree*⁴⁶ when the Supreme Court of Alabama abolished tenancy by the entirety on the narrow ground that it was inconsistent with the married women's property act.⁴⁷ *Bernhard* treated the problem in the same narrow way, and instead of considering the relation of a particular estate to the rest of joint ownership law, considered only the relation of that particular estate to a particular statute. The approach of trying to deal with the relation of *one* joint estate to *one* statute or set of social conditions overlooks the problem that a significant adjustment of any one common law joint estate necessitates a corresponding adjustment in some other common law joint estate. The common law provided almost any kind of estate which the parties to a conveyance wished to create, and when 1 of these estates is deprived of a useful feature by a narrow reading of a statute, then some other estate must be adapted to fulfill that feature. The proper approach would be based on the realization that the utility of a particular estate in modern property law is determined by its relation to other joint estates as well as its relation to modern social conditions. Trying to adjust joint tenancy to modern conditions without considering its relation to gaps in the law left by tenancy in common and tenancy by the entirety is as ludicrous as trying to adjust the flight pattern of an airplane without considering weather conditions.

Unfortunately, this approach is not confined to the judiciary. This is precisely the approach urged on courts and legislatures by many legal periodicals, which seem more concerned with criticizing tenancy

⁴⁵The Alabama approach seems to be that while the decision abolishing tenancy by the entirety was not technically correct, it should not be overruled because of its venerability. *Goree*, *supra* note 23, was based on an implicit non sequitur; that because under the married women's property act tenancy by the entirety was no longer mandatory, it was no longer permissible. See, Gillon, *Joint Titles with Survivorship*, 22 Ala. Lawyer 341, 353 (1961).

⁴⁶*Supra* note 23.

⁴⁷*Supra* note 45.

by the entirety than with creating a viable, integrated law of co-ownership.⁴⁸ This approach as well as its conclusion is suspect.

While the lack of compulsory division among tenants by the entirety may frustrate the rights of some creditors who do not have the signatures of both husband and wife or do not check their credit properly, it does not follow that the estate should be abolished without considering whether it serves any useful function. The Alabama experience indicates that abolition of tenancy by the entirety does not automatically improve the law of co-ownership. Moreover, it would seem that protection of the wife's rights in jointly held property as opposed to her husband's creditors is at least as appealing as protection from an estranged spouse.⁴⁹

The proper suggestion to the legislature is to begin anew. It should consider the reasons for and against all 3 common law joint estates with an eye to rewriting the whole body of co-ownership law to fit modern conditions. The final result would be surprisingly similar to the common law. Such a statute could read:

§ 1. Any transfer to two or more persons jointly is presumed to be a *tenancy in common*. This presumption is rebuttable only by language on the face of the instrument expressly showing an intent to set up a joint tenancy or a tenancy by the entirety.

§ 2. A common law *joint tenancy* with a *destructible* right of survivorship may be created if that is the intent of the parties as expressly manifested on the face of the instrument. Any tenants, including husband and wife, may hold as joint tenants, and any deed styled "with a right of survivorship" without stating whether it is intended to be a joint tenancy or a tenancy by the entirety is presumed to be a joint tenancy.

§ 3a. A tenancy by the entirety with an indestructible right of survivorship may be created between husband and wife, if such intention is expressed on the face of the instrument, subject to two limitations:

⁴⁸See, e.g., Ritter, *A Criticism Of The Estate By The Entirety*, 5 Fla. L. Rev. 153 (1952); For less extreme examples, see English, *Concurrent Estates in Real Property II* (pt. 2), 12 Catholic L. Rev. 1 (1963); Huber, *Creditors' Rights In Tenancies By The Entireties*, 1 Boston College Industrial and Commercial L. Rev. 197 (1959); Comment, 42 U. Det. L.J. 362 (1965).

⁴⁹Under existing law a strongly reasoned case can be made out for both creditor and wife. While it seems inequitable to defeat the rights of the creditor who has done all he may think is legally necessary to insure he will be paid, it also seems inequitable to make the wife pay from her own property (and it is her own property: *per tout*) for her husband's bad judgment in business.

(i) that all such instruments contain the statement "It is understood by the grantor⁵⁰ and the grantees that neither of the grantees may sell or encumber his own interest in the property without the consent of the other grantee, any oral agreement notwithstanding."

(ii) that a brief description of all property held by tenants by the entirety be filed [with a central filing system easily accessible to all creditors] identifying the property so held and stating that the grantees hold as tenants by the entirety.

§ 3b. Failure to meet both the requirements of § 3a(i) and § 3a(ii) above converts the estate into a joint tenancy with a destructible right of survivorship. No tenant by the entirety may assert such tenancy as a defense against an attachment by a creditor if the tenant held the property in question other than as a tenant by the entirety at the time the obligation was incurred.

RONALD W. MOORE

ALCOHOLISM AND ITS SYMPTOMS: CRIME OR DISEASE?

Joe B. Driver was convicted of public intoxication for the first time when he was 24. He was convicted of the same offense over 200 times in the next 35 years, spending an estimated 2/3 of his life in jail. Most of those convictions occurred in Durham, North Carolina, under a statute¹ making public intoxication a misdemeanor punishable by fine or imprisonment. Following at least 3 previous convictions in Durham for public intoxication in 1963, Driver was arrested in December, 1963, for the same offense.² After posting bail

⁵⁰The inclusion of the grantor is to cover such situations as a testator's wish to devise land to one of his married children.

¹N.C. Gen. Stat. § 14-335 (1951) provides in part:

If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting, in any county . . . herein named, he shall be guilty of a misdemeanor, and upon conviction shall be punished as is provided in this section

In 1965 this statute was amended by N.C. Gen. Stat. § 14-335 (Supp. 1965):

12. In . . . Durham [County] . . . by a fine, for the first offense, of not more than fifty dollars . . . , or imprisonment for not more than thirty days; for the second offense within a period of twelve months, by a fine of not more than one hundred dollars . . . or imprisonment for not more than sixty days; and for the third offense within any twelve months' period such offense is declared a misdemeanor, punishable as a misdemeanor within the discretion of the court.

²Driver v. Hinnant, 356 F.2d 761, 763 (4th Cir. 1966).

he was released pending trial, but the next day he was arrested for being drunk in the Durham County Court House itself. Conviction for both offenses followed. Those 5 convictions resulted in a 2-year prison sentence, the maximum allowable under North Carolina law for a misdemeanor.³ On appeal the Supreme Court of North Carolina affirmed the convictions and sentence in a per curiam decision.⁴ Driver's habeas corpus petition to the United States District Court for the Eastern District of North Carolina⁵ was denied despite the court's decision that Driver was a chronic alcoholic.⁶ The court defined alcoholic as one who habitually and chronically uses "alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages"⁷ and stated that "a chronic alcoholic is a sick person in need of proper medical, institutional, and rehabilitative treatment."⁸ From this denial Driver appealed to the Court of Appeals for the 4th Circuit, which reversed the conviction⁹ on the grounds that Driver lacked the requisite criminal intent and that the punishment was in violation of the cruel and unusual punishment clause of the Eighth Amendment as applied to the states.

Driver v. Hinnant,¹⁰ citing *Morisette v. United States*,¹¹ held that an "evil intent" or a "consciousness of wrongdoing" was necessary for Driver to be convicted.¹² *Morisette* is distinguishable because it dealt with larceny, an offense which requires criminal intent. There are a number of crimes, however, which have never required a criminal intent.¹³ Driver's behavior falls into this category and is in the

³N.C. Gen. Stat. § 14-3 (1953) provides in part that "all misdemeanors, where punishment is not prescribed shall be punished as misdemeanors at common law" The maximum sentence at common law for a misdemeanor is 2 years. *State v. Wilson*, 216 N.C. 130, 4 S.E.2d 440, 441 (1939).

⁴*State v. Driver*, 262 N.C. 92, 136 S.E.2d 208 (1964). What troubled the North Carolina Supreme Court was that Driver had not been punished directly for the disease of alcoholism but for succumbing to the disease in public. The 4th Circuit overcame this difficulty by citing the World Health Organization's definition of alcoholism as "a chronic illness that manifests itself as a *disorder of behavior*." *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966). This meant that public intoxication was a symptom of the disease of alcoholism.

⁵*Driver v. Hinnant*, 243 F. Supp. 95 (E.D.N.C. 1965).

⁶*Id.* at 97.

⁷*Ibid.* The court adopted the Congressional definition of a chronic alcoholic.

⁸*Ibid.* The court took judicial notice of this fact.

⁹*Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966).

¹⁰*Id.* at 764.

¹¹342 U.S. 246, 250-52 (1952).

¹²*Driver v. Hinnant*, *supra* note 9, at 764.

¹³Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933), discusses this in detail.

nature of what may be termed "public welfare offenses."¹⁴ This type of offense, which includes such crimes as illegal sales of intoxicating liquor,¹⁵ traffic violations,¹⁶ motor-vehicle law violations,¹⁷ and criminal nuisances¹⁸ has traditionally been penalized without requiring the criminal intent held necessary by *Morisette*. Driver's lack of criminal intent should thus have no bearing on the problem since intent constituted no part of his statutory offense. But *Hinnant* held that Driver's misbehavior could not be punished "as a transgression of a police regulation" that does not require intent as an element of the crime.¹⁹ *Hinnant* neglects to explain why. Perhaps the court wanted to strengthen its decision by having a ground for reversal in addition to that of cruel and unusual punishment. Or, the court may have reasoned that the length of Driver's sentence changed his offense from a public welfare offense, usually punished by light fine or jail sentence,²⁰ to one requiring criminal intent. Finally, *Hinnant* may have meant literally what it said: evil intent is an indispensable ingredient of any crime.²¹ Requiring criminal intent would virtually abolish public welfare offenses and other statutory crimes such as adultery, bigamy,²² or (statutory) rape.²³

Hinnant's main reliance appears to be on the Federal Constitutional prohibition against cruel and unusual punishment as interpreted by

¹⁴*Ibid.*

¹⁵*Hill v. State*, 19 Ariz. 78, 165 Pac. 326 (1917). See generally Sayre, *supra* note 13, at 84-85.

¹⁶*Commonwealth v. Closson*, 229 Mass. 329, 118 N.E. 653 (1918). See generally Sayre, *supra* note 13, at 87.

¹⁷*Commonwealth v. Coleman*, 252 Mass. 241, 147 N.E. 552 (1925). See generally Sayre, *supra* note 13, at 87.

¹⁸*State v. Cray*, 85 Vt. 99, 81 Atl. 450 (1911). See generally Sayre, *supra* note 13, at 86.

Driver's behavior would fall under this general category, which includes "annoyances . . . to the public health, safety, repose or comfort." Sayre, *supra* note 13, at 73.

¹⁹*Driver v. Hinnant*, *supra* note 9, at 764.

²⁰Sayre, *supra* note 13, at 72, 83.

²¹*Driver v. Hinnant*, *supra* note 9, at 765.

²²*People v. Vogel*, 46 Cal. 2d 798, 299 P.2d 850 (1956); *People v. Spoor*, 235 Ill. 230, 85 N.E. 207 (1908); *State v. Sherwood*, 68 Vt. 414, 35 Atl. 352 (1896). See generally Packer, *Mens Rea and the Supreme Court*, 1962 *Supreme Court Rev.* 107, 149; Sayre, *supra* note 13, at 74-75.

²³*Askew v. State*, 118 So. 2d 219 (Fla. 1960); *People v. Lewellyn*, 314 Ill. 106, 145 N.E. 289 (1924); *Lawrence v. Commonwealth*, 73 Va. (30 Gratt.) 845 (1878).

Some cases have already taken this view. See, e.g., *People v. Hernandez*, 39 Cal. Rptr. 361, 393 P.2d 673 (1964); *State v. Ruhl*, 8 Iowa 447, 450 (1859).

See generally Packer, *supra* note 22, at 146-52; Sayre, *supra* note 13, at 73-74; 22 Wash. & Lee L. Rev. 119 (1965).

Robinson v. California.²⁴ Defendant in *Robinson* had been convicted under a California statute²⁵ making it a crime to be addicted to the use of narcotics. All that was required for conviction under the statute was the defendant's presence in California while addicted to drugs; it was not necessary to prove that he had used narcotics while in California. The United States Supreme Court held 6-2 that the *status* of drug addiction cannot constitutionally be a crime.²⁶ Five Justices held that the punishment violated the cruel and unusual punishment prohibition of the Eighth Amendment as applied to the states through the due process clause of the Fourteenth Amendment:

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. *Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.*²⁷

Robinson did not explain why the Eighth Amendment is applicable to the states or why the punishment therein was cruel and unusual. It did not discuss the matter of applicability, but assumed that the prohibition was applicable to the states as it is now accepted to be.²⁸

²⁴370 U.S. 660 (1962). Hinnant stated: "Robinson . . . sustains, if not commands, the view we take." *Driver v. Hinnant*, at 764.

²⁵Cal. Health & Safety Code § 11721, reads in part:

No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics.

²⁶Mr. Justice Frankfurter did not participate in the decision. Mr. Justice Stewart wrote the Court's opinion with Justices Black, Brennan, and Mr. Chief Justice Warren concurring. Justices Douglas and Harlan wrote separate concurring opinions, Douglas on cruel and unusual punishment grounds and Harlan on the ground that the punishment was "for a bare desire to commit a criminal act." Justices White and Clark dissented.

²⁷*Robinson v. California*, 370 U.S. at 666, 667. (Emphasis added.)

²⁸*Pointer v. Texas*, 380 U.S. 400, 411-12 (1965) (concurring opinion); *Driver v. Hinnant*, 243 F. Supp. 95, 99-100 (E.D.N.C. 1965); *Redding v. Pate*, 220 F.

Similarly, *Robinson* simply assumed that the punishment violated the standards of the Eighth Amendment.

Prior to *Robinson* the Supreme Court had specifically held the Eighth Amendment ban against cruel and unusual punishment inapplicable to the states.²⁹ Those earlier decisions were questioned in *Louisiana ex rel. Francis v. Resweber*³⁰ which assumed, but did not decide, that the cruel and unusual punishment clause was applicable to the states.³¹ *Robinson* was thus novel in its application of the cruel and unusual punishment clause to the states.

The Eighth Amendment ban on cruel and unusual punishment was adopted in 1791 as part of the Bill of Rights almost verbatim from the 10th clause of the English Declaration of Rights of 1688.³² But the scope of the prohibition is not certain. In *Wilkerson v. Utah*³³ the Supreme Court said:

Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden³⁴

The early ban was undoubtedly aimed at torture and other barbarous punishments,³⁵ but the Supreme Court has recognized that the

Supp. 124, 127 (N.D. Ill. 1963); Staff of Subcomm. On Constitutional Rights, Senate Comm. On The Judiciary, 87th Cong., 2d Sess., Layman's Guide To Individual Rights Under The United States Constitution (Comm. Print 1962); Corwin & Peltason, Understanding the Constitution 138-39 (3d ed. 1965).

²⁹O'Neil v. Vermont, 144 U.S. 323, 332 (1892); *Pervear v. Commonwealth*, 72 U.S. (5 Wall.) 475, 479-80 (1866); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (dictum).

See *Driver v. Hinnant*, 243 F. Supp. 95, 97 & n.8 (E.D.N.C. 1965).

³⁰329 U.S. 459 (1947).

³¹*Id.* at 462.

³²*Robinson v. California*, *supra* note 24, at 675; Sutherland, *Constitutionalism in America* 99 (1965); Note, 79 Harv. L. Rev. 635, 636 (1966). Some authorities say the origin dates back to the Magna Carta or the Laws of Edward the Confessor. 34 Minn. L. Rev. 134, 135 (1950).

³³99 U.S. 130 (1878).

³⁴*Id.* at 135-36. For a similar view see *Weems v. United States*, 217 U.S. 349, 375 (1910).

³⁵*Robinson v. California*, *supra* note 24, at 675; Note, 79 Harv. L. Rev. 635, 636-37 (1966).

The prohibition has also been held to include:

a. burning at the stake. *In re Kemmler*, 136 U.S. 436, 446 (1890). See generally *Robinson v. California*, *supra* note 24, at 675; *Trop v. Dulles*, 356 U.S. 86 (1958); Note, 79 Harv. L. Rev. 635 (1966).

b. crucifixion. *In re Kemmler*, *supra*.

See generally *Robinson v. California*, *supra* note 24; *Trop v. Dulles*, *supra*; Note, 79 Harv. L. Rev., *supra*.

c. breaking on the wheel. *In re Kemmler*, *supra*. See generally *Robinson*

prohibition "must be capable of wider application than the mischief which gave it birth . . ." if the prohibition is "to be vital."³⁶ *Ex parte Pickens*³⁷ held that the clause "is to be considered in the light of developing civilization;" it is therefore "not necessary to speculate as to what might have been considered cruel and inhuman punishment in 1787."³⁸ Other courts have held that punishment is cruel and unusual if it "shocks the moral sense of all reasonable men as to what is right and proper under the circumstances"³⁹ or is "so excessive as to shock the sense of mankind."⁴⁰ In *Trop v. Dulles*⁴¹ the Supreme Court struck down as cruel and unusual a method of punishment involving no pain or physical hardship: deprivation of citizenship for wartime desertion. The Supreme Court held that the Eighth Amendment "is not static": it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁴²

It appears that the true *Robinson* rationale was that drug addiction was not a crime and that any punishment for that which is not a crime is cruel and unusual. *Robinson* thus limits the state's power to define what a crime is, which appears to be a matter of substantive due process. In his dissent Justice White observed that the Court's reasoning resembled that of substantive due process.⁴³ Other comments on *Robinson* have also recognized this and have suggested that a decision based on substantive due process would have been more rational.⁴⁴ Since the statute bore no "rational relation to some legitimate legisla-

v. California, *supra* note 24; *Trop v. Dulles*, *supra*; Note, 79 Harv. L. Rev., *supra*.

d. the rack, *O'Neil v. Vermont*, 144 U.S. 323, 363 (1892).

See generally *Robinson v. California*, *supra* note 24; *Trop v. Dulles*, *supra*; Note, 79 Harv. L. Rev., *supra*.

e. the thumbscrew, *O'Neil v. Vermont*, *supra*.

See generally *Robinson v. California*, *supra* note 24; *Trop v. Dulles*, *supra*; Note, 79 Harv. L. Rev., *supra*.

f. quartering, *Robinson v. California*, *supra* note 24, at 675; Note, 79 Harv. L. Rev., *supra* at 637.

g. in some circumstances, solitary confinement. See *Robinson v. California*, *supra* note 24, at 675-76.

³⁶*Weems v. United States*, 217 U.S. 349, 373 (1910).

³⁷101 F. Supp. 285 (D. Alaska 1951).

³⁸*Id.* at 288.

³⁹*Weber v. Commonwealth*, 303 Ky. 56, 196 S.W.2d 465, 469 (1946).

⁴⁰*Hayes v. United States*, 112 F.2d 417, 420 (10th Cir. 1940).

⁴¹356 U.S. 86 (1958).

⁴²*Id.* at 100-01.

⁴³*Robinson v. California*, *supra* note 24, at 689.

⁴⁴Note, 79 Harv. L. Rev., *supra* note 35, at 649; 29 Brooklyn L. Rev. 139, 141 (1963).

tive end [control of narcotics] *i.e.*, conduct rightfully regulated within the four corners of the police power," it did not comport with substantive due process.⁴⁵ In other words, to punish as criminal that which is not criminal violates due process, and, according to *Robinson*, also violates the prohibition against cruel and unusual punishment.

Robinson thus creates the problem of determining what is punishable as a crime. The Model Penal Code defines a crime as any offense defined by the Code or by statute for which the death penalty or imprisonment may be exacted.⁴⁶ A crime has also been defined as "*any act or omission prohibited by public law for the protection of the public, and made punishable by the state in a judicial proceeding in its own name.*"⁴⁷ A crime therefore is simply what the legislature has made punishable through a criminal proceeding. But this definition is of no use in determining what acts or omissions the legislature constitutionally may punish. It seems obvious that if the legislature passed, for no reason, a Pink Car Law which required all cars to be painted pink, the law would be held unconstitutional. A law must bear a rational relation to some legitimate legislative end; the Pink Car Law would not. It is not so obvious why punishment for drug addiction or alcoholism or public intoxication of the alcoholic would be unconstitutional.

Although it was not discussed, *Hinnant's* reasoning approximates the Durham Rule for insanity cases: *Durham v. United States*⁴⁸ held that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."⁴⁹ Driver's intoxication was certainly the product of a disease. Application of the Durham Rule⁵⁰ would relieve Driver of criminal responsibility. Even

⁴⁵29 Brooklyn L. Rev., *supra* note 44, at 141.

⁴⁶Model Penal Code § 1.04 (1) (Proposed Official Draft, 1962).

⁴⁷Clark & Marshall, Crimes § 2.01 at 79 (6th ed. 1958).

⁴⁸214 F.2d 862 (D.C. Cir. 1954).

⁴⁹*Id.* at 874-75.

⁵⁰Application of the combination M'Naghten-Irresistible Impulse Test or the Substantial Capacity Test promulgated by the American Law Institute would yield the same result.

The M'Naghten Rule was established in Daniel M'Naghten's Case, 8 Eng. Rep. 718 (1843), and is as follows:

If, because of . . . 'defect of reason,' the defendant did not know what he was doing he is not guilty of crime.

Even if the defendant knew what he was doing he is not guilty of crime if, because of this 'defect of reason,' he did not know what he was doing was wrong. Perkins, Criminal Law 747 (1957).

The Irresistible Impulse Test is that one has an impulse to commit a criminal act, the actor not being able to overcome or resist the impulse because insanity

though Driver's physical acts comprised what would normally be a crime, he lacked culpability and therefore could not be held criminally responsible.⁵¹ Public intoxication of an alcoholic is therefore, under the Durham rule, not a crime.

"[T]he idea of basing treatment for disease on purgatorial acts and ordeals is an ancient one in medicine'" ⁵² tracing back to the Biblical belief that disease represented punishment for sin. The general belief was that " 'relief [from sin] could take the form of a final heroic act of atonement.' " ^{52a} Basis for the belief that intoxication is a sin may be found in Biblical condemnations of drunkenness.⁵³ Under early English law drunkenness was punishable by the ecclesiastical courts as a crime against religion⁵⁴ rather than as a common law crime.⁵⁵ But if the drunkenness went so far as to constitute a public nuisance, it was punishable as a common law crime.⁵⁶ Public intoxication was made a statutory offense in England in 1606.⁵⁷ But since the enactment of such statutes, advancements in medical and other scientific fields have invalidated the grounds on which such statutes were based. Generally alcoholism is viewed today as a disease, not a crime.⁵⁸ Much has been

or mental disease has destroyed the freedom of his will and his power of self-control, the actor is relieved of criminal responsibility. See generally Perkins, *supra* at 756-63.

The Substantial Capacity Test is:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks either substantial capacity to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. Model Penal Code § 4.01(1) (Proposed Official Draft 1962).

⁵¹Perkins, *op. cit. supra* note 50, at 5.

⁵²Robinson v. California, *supra* note 24, at 669.

^{52a}*Ibid.* The quotation continues:

This superstition appears to have given support to fallacious medical rationales for such procedures as purging, bleeding, induced vomiting, and blistering, as well as an entire chamber of horrors constituting the early treatment of mental illness. The latter included a wide assortment of shock techniques, such as the "water cures" (dousing, ducking, and near drowning), spinning in a chair, centrifugal swinging, and an early form of electric shock.* All, it would appear, were planned as means of driving from the body some evil spirit or toxic vapor.

[*Reference could be made here to the Salem Witch Trials in the 17th century. Author's note.]

⁵³Isaiah 5:11; Proverbs 23:31-32; 1 Corinthians 6:10; Ephesians 5:18.

⁵⁴Perkins, *op. cit. supra* note 50, at 777; 2 Stephen, History of the Criminal Law of England 410 (1883).

⁵⁵Perkins, *op. cit. supra* note 50, at 777.

⁵⁶*Ibid.*; 2 Wharton, Criminal Law § 1720 (12th ed. 1932).

⁵⁷5 Jac. 1, c.5 (1606); Perkins, *op. cit. supra* note 50, at 777.

⁵⁸Although alcoholism was generally not recognized as a disease until relatively

done in the past half century to improve penal methods, but little attention has been paid to the need for updating substantive criminal law. It has been said that criminal law is "one of the most faithful mirrors of a given civilization, reflecting the fundamental values on which the latter rests."⁵⁹ When these values change, it is also necessary for substantive criminal law to change.⁶⁰ That is the problem *Hinnant* faced. The solution may be civil commitment⁶¹ to a hospital or a rehabilitation center for the treatment of the disease.⁶²

Hinnant leaves questions unanswered and creates new problems.

recently, there is evidence that it was so recognized as early as 1804. See McCarthy, *Alcoholism: Attitudes and Attacks, 1775-1935*, 315 *Annals* 12 (1958).

Robinson v. California, *supra* note 24, at 667 n.8; Driver v. Hinnant, 356 F.2d 761 n.6 (4th Cir. 1966); Driver v. Hinnant, 243 F. Supp. 95, 97 & n.6 (E.D.N.C. 1965).

Brief for American Civil Liberties Union, appendix f, Driver v. Hinnant, *supra*; Brief for Appellant, appendix c, Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

Logan, *Alcoholism—A Legal Problem?*, 36 *Dicta* 446 (1959); Mann, *The Challenge of Alcoholism*, 24 *Fed. Prob.* 18, 19 (1960); Pinardi, *Helping Alcoholic Criminals*, 9 *Crime & Delinquency* 71 (1963).

⁵⁹Donnelly, Goldstein & Schwartz, *Criminal Law* 524 (1962).

⁶⁰*Ibid.*

⁶¹There is a basic distinction between criminal and civil punishment. This distinction was recognized in *White v. Reid*, 125 F. Supp. 647, 650 (D.D.C. 1954):

Therefore some of the features of penal institutions resemble those of educational, industrial and training schools for juvenile delinquents. The basic function and purpose of penal institutions, however, is punishment as a deterrent to crime. However broad the different methods of discipline, care and treatment that are appropriate for individual prisoners according to age, character, mental condition, and the like, there is a fundamental legal and practical difference in purpose and technique. Unless the institution is one whose primary concern is the individual's moral and physical well-being, unless its facilities are intended for and adapted to guidance, care, education and training rather than punishment, unless its supervision is that of a guardian, not that of a prison guard or jailer, it seems clear a commitment to such institution is by reason of conviction of crime and cannot withstand an assault for violation of fundamental Constitutional safeguards.

Benton v. Reid, 231 F.2d 780, 782 (D.C. Cir. 1956), held that jail is a "place for punishment of crimes" and to put one there who was prosecuted under a civil statute would raise "grave constitutional questions."

A similar result was reached in *In re Maddox*, 351 Mich. 358, 88 N.W.2d 470, 476 (1958).

⁶²Alexander, *Jail Administration* 237 (1957); Guttmacher & Wiehofen, *Psychiatry and The Law* 319 (1952); Perkins, *op. cit. supra* note 50, at 781; Brunner-Orne, *The Role of a General Hospital in the Treatment and Rehabilitation of Alcoholics*, 19 *Q.J. of Studies on Alcohol* 108, 108-09 (1958); Logan, *supra* note 58, at 446-50; MacCormick, *Correctional Views on Alcohol, Alcoholism, and Crime*, 9 *Crime & Delinquency* 15, 18, 27 (1963); Mann, *supra* note 58; Murtagh, *The Derelicts of Skid Row*, *The Atlantic Monthly*, March, 1962, at

No guideline has been established for determining when a person is a chronic alcoholic.⁶³ It is not clear what constitutes a symptom of alcoholism. Would driving by an alcoholic while intoxicated be a symptom?⁶⁴ Would an alcoholic's stealing in order to satisfy his insatiable desire to consume alcohol be a symptom?⁶⁵ Despite these and other unanswered questions, *Hinnant* brings the criminal law a step closer to a true reflection of the values of our civilization.

ROBERT H. POWELL, III

BLOOD GROUPING TEST RESULTS: EVIDENTIAL FACT OR CONCLUSION OF LAW?

When a husband petitioning for divorce on the ground of adultery alleges that he is not the father of a child born to his wife during their marriage, he usually finds himself confronted by a rule of evidence founded on the presumption of legitimacy,¹ a "policy presumption"² which is not easily surmounted.³ The considerations

81; Pinardi, *supra* note 58; Rubington, *The Chronic Drunkenness Offender*, 315 *Annals* 65, 66-67 (1958); Weil & Price, *Alcoholism in a Metropolis*, 9 *Crime & Delinquency* 60, 60-61 (1963); 111 U. Pa. L. Rev. 122, 127-28 (1962).

⁶³Washington Post, April 1, 1966, § A, p. 1, col. 1; Washington Post, April 1, 1966, § A, p. 6, col. 3.

⁶⁴Brief for Appellee, p. 23, *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966).

The early indications are that it will not be treated as a symptom. Washington Post, April 15, 1966, § B, p. 1, col. 4.

⁶⁵Brief for Appellee, *supra* note 64. The early indications are that it will be treated as a symptom. Washington Post, April 15, 1966, § A, p. 1, col. 2.

¹In most cases this policy presumption would be considered a rule of law and be conclusive. 9 Wigmore, *Evidence* § 2492 (3d ed. 1940). But see *infra* note 5. Some authors have been quite critical of such policy presumptions when the evidence factually refutes the presumption. *E.g.*,

Presumptions of law or fact arise from incidents in which the courts do not know what actually happened and for reasons of social discipline and policy have assumed a non-existent fact from a known existing fact . . . [W]hen the ignorance of their inception is cleared away by the discovery of science or experience, we should discard them and proceed along the newly lighted course. These presumptions of law often amount to a license to do wrong. The use of scientific proof will curb this legal encouragement of illegality . . . [A]fter a method has been conclusively verified, we should not be bound by presumptions in the face of it.

29 Iowa L. Rev. 121, 123-24 (1943).

²"When a child X is born to a wife A married to a husband B, it is natural to infer that the intercourse which begot the child was the intercourse of the husband B, *i.e.*, that the *child is legitimate*." 1 Wigmore, *Evidence* § 163 (3d ed. 1940).

³McCormick states that "it is universally agreed that in the case of this

behind this rule seek to protect children born during a legal marriage from the stigma of illegitimacy;⁴ courts have deferred to this policy by making proof of such illegitimacy difficult.⁵ A strict adherence to this policy can result in a declaration that a man is legally the father of a child when in fact he is not.⁶ A further injustice may occur when a divorce is not granted because the adultery would bastardize a child. Aid in the prevention of such injustice was realized upon the discovery and medical acceptance of blood grouping tests to determine nonpaternity.⁷ Such tests are usually acknowledged to be competent evidence only if they exclude paternity.⁸

Blood grouping test results are material and relevant evidence in both adultery-divorce and paternity proceedings. Where such evidence is admissible in divorce proceedings, it will usually involve a risk of bastardization. However, such a risk will rarely be involved in a paternity suit, because the woman involved is usually not married. In a paternity suit not involving a married woman, thus not involving the risk of bastardization, the only basis for not regarding evidence of blood grouping test results as conclusive is the possible unreliability of those results; when the woman involved is married, hence the risk of bastardization is involved, the presumption of legitimacy is a further basis for exclusion of such evidence. The courts have had less difficulty and been readier to admit such evidence when the risk of bastardization is not involved.

The Supreme Court of Nebraska held 4-3 in *Houghton v. Houghton*⁹ that competently administered tests excluding the husband as the

presumption, the adversary contending for illegitimacy does have the burden [of persuasion] . . . usually measured not by the normal standard for civil cases . . . but rather by the requirement of clear, convincing, and satisfactory proof . . . or even by the criminal formula, beyond a reasonable doubt." McCormick, Evidence § 309, at 646-47 (1954).

⁴*Houghton v. Houghton*, 179 Neb. 275, 137 N.W.2d 861, 872-73 (1965) (dissenting opinion); McCormick, Evidence § 309 (1954).

⁵"Presumptions have often developed into rules of substantive law. Here, however, the course of evolution has been from a rule of substantive law into a rebuttable presumption. But the strictness of an older day when if the husband was not beyond the four seas, the child was conclusively assumed to be his, lingers in modified form." McCormick, Evidence § 309 n.31, at 646 (1954).

⁶*Bullock v. Knox*, 96 Ala. 195, 11 So. 339 (1892).

⁷See generally Gradwohl, Legal Medicine 524 (1954).

⁸*Id.* at 534.

⁹179 Neb. 275, 137 N.W.2d 861 (1965). All 3 dissenting judges were opposed to permitting the blood test results to determine paternity conclusively. *Id.* at 872. The only 1 who gave his reasons thought legislation necessary to make blood grouping tests conclusive of paternity. *Id.* at 874. Since no dissenter questioned the propriety of taking judicial notice of the accuracy of such test

father of a child conceived during marriage provide conclusive evidence of nonpaternity, thereby overcoming the presumption of legitimacy. The Supreme Court's reversal granting the appellant husband a divorce on the ground of adultery was based solely on evidence of paternity-excluding blood test results.¹⁰

The wife had previously filed for divorce on the ground of extreme cruelty. Nine months later she filed a supplemental petition alleging that she had become pregnant due to the resumption of marital relations with her husband and once again sued for divorce on the ground of cruelty. The husband's amended answer and cross-petition admitted having relations with her, but denied any relations until after the time during which she claimed to have become pregnant. He cross-petitioned for a divorce on the ground of adultery. The child was born 7½ months after the date of the husband's admitted intercourse and was fully developed at birth. The trial court found the husband to be the father of the child and granted the wife an absolute divorce. The husband's motion for a new trial was denied and he appealed, alleging error in the trial court's failure to find that the results of the blood tests excluding his paternity were conclusive and overcame the presumption of the child's legitimacy. The Supreme Court of Nebraska reversed, stating in the syllabus, "In the absence of evidence of a defect in the testing methods, blood grouping tests are conclusive on the issue of nonpaternity."¹¹ In the court's opinion the results of the tests proved as a matter of law that the wife had committed adultery.¹²

The doctrine of the presumption of legitimacy—a child born to a married woman during wedlock is *prima facie* legitimate—arose under early English common law.¹³ The presumption was due to fear among the nobility of disinheritance.¹⁴ Early in the common law this presumption became conclusive unless the husband seeking to bastardize the child could prove either that he was beyond the "four seas" at all times during the relevant gestation period,¹⁵ or that he was under some physical disability.¹⁶ Physical disability was shown if the hus-

results, the only basis for not admitting evidence of these results would be policy considerations implicit in the presumption of legitimacy.

¹⁰*Id.* at 870.

¹¹*Id.* at 863.

¹²*Id.* at 870.

¹³*Banbury Peerage Case*, 1 Sim. & St. 153, 57 Eng. Rep. 62 (1811).

¹⁴*Wright v. Hicks*, 12 Ga. 155, 159 (1852).

¹⁵*Regina v. Murrey*, 1 Salk 122, 91 Eng. Rep. 115 (1704); *Rex. Albertson*, 1 Ld. Raym. 396, 91 Eng. Rep. 1163 (1698).

¹⁶*Rolle's Abridgment of the Common Law reports* that castration was con-

band was impotent, sterile, or prepubescent.¹⁷ Gradually the rule of the "four seas" was eroded¹⁸ as the courts began allowing the husband to show other evidence of nonaccess.¹⁹ Thus even if he was within the "four seas," he was allowed to show that the necessary access for him to be the father of the child was lacking.²⁰ A means of overcoming the presumption of legitimacy other than nonaccess was acknowledged when evidence that the child was of a different color from the putative parents, or, as it was quaintly put, "the child was against the laws of nature," was permitted.²¹ All of these means of overcoming the presumption evolved because courts recognized that it would be impossible under the circumstances for the husband to be the father.²²

The presumption of legitimacy caused considerable confusion in the United States as to the quantum of proof necessary to overcome it.²³ Analytically it is a problem of the quantum of proof necessary

sidered such a physical disability. See *Done & Egerton v. Hinton & Starky*, Roll. Abr. 358, pl. 8 (Eng. 1617), cited in 3 Eng. & Emp. Dig. 402, n.39 (repl. vol. 1960).

¹⁷Schatkin, *Disputed Paternity Proceedings* 20 (3d ed. 1953).

¹⁸*Pendrell v. Pendrell*, 2 Str. 925, 93 Eng. Rep. 945 (1732).

¹⁹Wigmore, *Evidence* § 134 (3d ed. 1940).

²⁰*Banbury Peerage Case*, *supra* note 15.

²¹Lord Campbell stated that "so strong is the legal presumption of legitimacy that, in the case of a white woman having a mulatto child, although the husband is also white, & the supposed paramour black, the child is presumed legitimate, if there was an opportunity for intercourse." *Piers v. Piers*, 13 Jur. 569, 572 (Eng. 1849) (dictum), cited in 3 Eng. & Emp. Dig. 399, n.15 (repl. vol. 1960).

In this country it has been held that such a birth would be against the laws of nature and thus the presumption is overcome. *Bullock v. Knox*, *supra* note 6.

²²Schatkin, *supra* note 17, at 20.

²³E.g., *Arkansas*: *Morrison v. Nicks*, 211 Ark. 261, 200 S.W.2d 100 (1947), the clearest evidence; *Florida*: *Eldridge v. Eldridge*, 153 Fla. 873, 16 So. 2d 163 (1944), evidence sufficiently strong to remove the presumption; *Illinois*: *People v. Powers*, 340 Ill. App. 201, 91 N.E.2d 637 (1950), strong and compelling evidence; *Indiana*: *Duke v. Duke*, 134 Ind. App. 172, 185 N.E.2d 478 (1962), clear evidence; *Kentucky*: *Ousley v. Ousley*, 261 S.W.2d 817 (Ky. 1953), higher degree of evidence than necessary to convict of a minor criminal offense; *Massachusetts*: *Commonwealth v. Stappen*, 336 Mass. 174, 143 N.E.2d 221 (1957), proof beyond all reasonable doubt; *Missouri*: *Ash v. Modern Sand & Gravel Co.*, 234 Mo. App. 1195, 122 S.W.2d 45 (1938), not overcome unless no judicial escape from doing so; *Nebraska*: *Zutavern v. Zutavern*, 155 Neb. 395, 52 N.W.2d 254 (1952), clear and convincing evidence; *Ohio*: *Ashley v. Ashley*, 118 Ohio App. 155, 193 N.E.2d 535 (1962), clear and convincing evidence; *Pennsylvania*: *Commonwealth v. Kerr*, 150 Pa. Super. 598, 29 A.2d 340 (1942), competent proof beyond a reasonable doubt; *Wisconsin*: *Schmidt v. Schmidt*, 21 Wis. 2d 433, 124 N.W.2d 569 (1963), clear and satisfactory preponderance of the evidence.

to satisfy the burden of persuasion placed upon the party attempting to bastardize the child.²⁴ The Model Code of Evidence states:

Whenever it is established in an action that a child was born to a woman while she was the lawful wife of a specified man, the party asserting the illegitimacy of the child has the burden of producing evidence and the burden of persuading the trier of fact *beyond a reasonable doubt* [as in criminal cases] that the man was not the father of the child.²⁵

In other words, to bastardize, it is necessary to prove beyond a reasonable doubt the impossibility of the putative paternity.²⁶

The question now is whether courts will regard scientific blood grouping tests as another method of showing impossibility of paternity. When the scientific facts derived from blood grouping tests first became available, courts were reluctant to receive these facts in evidence, probably because of a lack of understanding of the scientific procedure involved and a desire to avoid change.²⁷

In some states the courts have understood and accepted the value of these tests as a factual exclusion of paternity and have taken judicial notice of their accuracy.²⁸ These states acknowledged that the results of blood grouping tests were receiving universal approval as an exclusion of paternity among scientists knowledgeable in pathology.²⁹ The courts recognized that by continuing to disregard the test results, which were considered scientifically accurate,³⁰ they

²⁴McCormick, Evidence § 309, at 646-47 (1954).

²⁵Model Code of Evidence rule 703 (1942). (Emphasis added.)

²⁶This is easily understood because of the desire to keep a child legitimate. This social policy is so strong in some states that the child is declared legitimate even if the marriage is determined to be void. *E.g.*, La. Civ. Code Ann. art. 118 (West 1959); W. Va. Code Ann. § 4086 (1961).

²⁷In *State ex rel. Slovak v. Holod*, 63 Ohio App. 16, 24 N.E.2d 962 (1939), the court went to great lengths to avoid giving such test results conclusive weight despite the fact that *State v. Wright*, 59 Ohio App. 191, 17 N.E.2d 428 (1938), had affirmed a trial judge who granted a new trial when the verdict named the defendant the father despite test results excluding paternity.

²⁸"[J]udicial notice is one of the first hurdles a scientific test or experiment must overcome in order to simplify methods of proof, and eventually achieve the weight to which it is entitled." Richardson *Modern Scientific Evidence*, § 12.17, at 338 (1961).

Some courts have taken judicial notice of the accuracy and reliability of blood tests in the absence of statute. *E.g.*, *Beach v. Beach*, 114 F.2d 479 (D.C. Cir. 1940); *Cortese v. Cortese*, 10 N.J. Super. 152, 76 A.2d 717 (Super Ct. App. Div. 1950); *State v. Damm*, 64 S.D. 309, 266 N.W. 667 (1936) (dictum).

²⁹*E.g.*, *Commissioner ex rel. Tyler v. Costonie*, 277 App. Div. 90, N.Y.S.2d 804, 806 (1950) (concurring opinion).

³⁰*E.g.*, *Retzer v. Retzer*, 161 A.2d 469, 471 (Munic. Ct. App. D.C. 1960).

would be ignoring new means of proof, which would result in decisions contrary to those produced by the older policy.³¹ Reliability of such tests may be proved, of course, by judicial notice through resort to sources of indisputable accuracy.³²

In other states statutes make the test results admissible evidence. Some statutes permit the test results in evidence only in bastardy proceedings;³³ others permit them in both bastardy and divorce proceedings.³⁴ Those states denying the admission of the test results in divorce proceedings appear to have attached more importance to the policy against making a child illegitimate than to the policy against requiring a man to support a child not his own.

A majority of the states with statutes on this subject hold that the test results are admissible only if they exclude the man as father of the child.³⁵ In this respect the experts agree that the test results are

³¹E.g., *Beach v. Beach*, *supra* note 28.

³²McCormick, *Evidence* § 325, at 691-92 (1954).

³³*Alabama*: Ala. Code tit. 27, § 12(5) (Supp. 1963) in conjunction with *Mason v. Mason*, 276 Ala. 265, 160 So. 2d 881 (1964); *Arkansas*: Ark. Stat. Ann. § 34-705.1 (repl. vol. 1962); *California*: Cal. Civ. Proc. Code § 1980.6; *District of Columbia*: D.C. Code Ann. § 16-2347 (Supp. V 1966); *Louisiana*: *Williams v. Williams*, 230 La. 1, 87 So. 2d 707 (1956), has held that in a divorce proceeding the husband is not entitled to prove adultery by means of blood test results; *Maryland*: Md. Ann. Code art. 16, § 66G (Supp. 1965); *Rhode Island*: R.I. Gen. Laws Ann. § 15-8-13 (1956); *West Virginia*: W.Va. Code Ann. § 4776(1) (1961).

³⁴*Colorado*: Colo. Rev. Stat. Ann. § 52-1-27 (perm. supp. 1960); *Connecticut*: Conn. Gen. Stat. Ann. § 52-184 (1958); *Illinois*: Ill. Ann. Stat. ch. 106½, § 5 (Smith-Hurd Supp. 1965); *Indiana*: Ind. Ann. Stat. § 3-658 (Supp. 1965); *Maine*: Me. Rev. Stat. Ann. tit. 19, § 262 (1964); *Massachusetts*: Mass. Ann. Laws ch. 273, § 12A (1956); *Mississippi*: Miss. Code Ann. § 383-08 (Supp. 1964); *Nevada*: Nev. Rev. Stat. § 56.020 (1951); *New Hampshire*: N.H. Rev. Stat. Ann. § 522:1 (1955); *New Jersey*: N.J. Stat. Ann. § 2A:83-2 (1952); *New York*: N.Y. Family Ct. Act § 532; *North Carolina*: N.C. Gen. Stat. § 8-50.1 (Supp. 1965); *Ohio*: Ohio Rev. Code Ann. § 2317.47 (Baldwin 1964); *Oregon*: Ore. Rev. Stat. § 109.250 (1953); *Pennsylvania*: Pa. Stat. Ann. tit. 28, § 307.1 (Supp. 1965); *Tennessee*: Tenn. Code Ann. § 24-716 (Supp. 1965); *Wisconsin*: Wis. Stat. § 325.23 (1963).

³⁵*Alabama*: Ala. Code tit. 27, § 12(5) (Supp. 1963); *Arkansas*: Ark. Stat. Ann. § 34-705.1 (repl. vol. 1962); *Colorado*: Colo. Rev. Stat. Ann. § 52-1-27 (perm. supp. 1960); *District of Columbia*: D.C. Code Ann. § 16-2347 (Supp. V 1966); *Connecticut*: Conn. Gen. Stat. Ann. § 52-184 (1958); *Indiana*: Ind. Ann. Stat. § 2-658 (Supp. 1965); *Maine*: Me. Rev. Stat. Ann. tit. 19, § 262 (1964); *Maryland*: Md. Ann. Code art. 16, § 66G (Supp. 1965); *Massachusetts*: Mass. Ann. Laws ch. 273, § 12A (1956); *Nevada*: Nev. Rev. Stat. § 56.020 (1951); *New Jersey*: N.J. Stat. Ann. 2A:83-2 (1952); *New York*: N.Y. Family Ct. Act § 532; *Ohio*: Ohio Rev. Code Ann. § 2317.47 (Baldwin 1964); *Rhode Island*: R.I. Gen. Laws Ann. § 15-8-13 (1956); *Tennessee*: Tenn. Code Ann. § 24-716 (Supp. 1965); *West Virginia*: W.Va. Code Ann. § 4776 (1) (1961); *Wisconsin*: Wis. Stat. § 325.23 (1963).

conclusive only in excluding the putative father.³⁶ The results might show him to have a blood type which the father of the child must have had; but this only indicates that of all the people of that blood type or group, he, as well as anyone else with that blood type or group, *could* have been the father of the child.³⁷ (There is some authority for the opinion that as new types and groups are discovered and the information concerning them is made available, it will be possible eventually for positive statistical probability proof of paternity to be made.)³⁸ The states which have adopted the Uniform Act on Blood Tests to Determine Paternity³⁹ permit admission of the test results even if they do not exclude the putative father when the types and groups of the parties involved are rare.⁴⁰ In Alabama the statute does not admit results if the experts disagree upon the findings or conclusions,⁴¹ while those states which have adopted the Uniform Act allow the trier of facts to consider all the facts including the test results and determine the paternity question if the experts disagree.⁴²

Medical experts agree that blood groups never change during lifetime, and that by the laws of genetics it is indisputable that no individual can possess a blood group factor which is absent in both of his true parents.⁴³ Therefore when the blood types of the mother and child are known, medical experts can determine scientifically what the blood type of the father may be and what it cannot be.⁴⁴ The medical profession does not claim that the tests are infallible even if correctly administered, but instead admits that there are theoretical exceptions—one in approximately every 50,000 to 100,000 cases.⁴⁵ Such exceptions, however, are of little importance when it is considered that when "tests are accurately performed there is hardly any other evidence that can approach in reliability the conclusions based on

³⁶Davidsohn, Levine, Wiener, *Medicolegal Application of Blood Grouping Tests*, 149 A.M.A.J. 699, 703 (1952).

³⁷McCormick, *Evidence* § 178, at 382 (1954).

³⁸Wiener, *Parentage and Blood Groups*, 191 Scientific American 78, 79 (July 1954).

³⁹Uniform Laws Ann. 102 (1952).

⁴⁰Uniform Act on Blood Tests to Determine Paternity § 4 (1952).

⁴¹*Alabama*: Ala. Code tit. 27, § 12(5) (Supp. 1963).

⁴²*California*: Cal. Civ. Proc. Code § 1980.6; *Illinois*: Ill. Ann. Stat. ch. 106½, § 4 (Smith-Hurd Supp. 1965); *New Hampshire*: N.H. Rev. Stat. Ann. § 522:4 (1955); *Oregon*: Ore. Rev. Stat. § 109.258 (1953); *Pennsylvania*: Pa. Stat. Ann. tit. 28, § 307.6 (Supp. 1965).

⁴³Allen, Diamond, Jones, *Medicolegal Applications of Blood Grouping*, 251 New England J. Medicine 146 (1954).

⁴⁴Gradwohl, *supra* note 7, at 546 (1954).

⁴⁵Davidsohn, *supra* note 36, at 702; Ross, *cf. The Value of Blood Tests as Evidence in Paternity Cases*, 71 Harv. L. Rev. 466, 468 (1958).

such blood tests."⁴⁶ By considering the results of all of the tests which are readily performable, the probabilities are one in one hundred billion that such an exception will occur.⁴⁷

In 1952 the American Medical Association Committee on Medico-legal Problems recommended judicial acceptance of blood test evidence of nonpaternity as a substitution of scientific fact for opinion.⁴⁸ According to its report, in tests upon families with a total of over 25,000 children, tests of the A-B-O groups revealed no exceptions to the expected results which could not be explained either by laboratory error or by a case of illegitimacy.⁴⁹ The Committee's report stated:

The theory of multiple alleles⁵⁰ leads to the following laws:

1. The agglutinogens A and B *cannot* appear in the blood of a person unless they are present in the blood of one or both of his parents.
2. A parent with blood of group AB *cannot* have a child with blood of group O, and a parent of group O *cannot* have a child of group AB.⁵¹

In tests which were completed upon families with a total of over 10,000 children using the M-N type for identification, the Committee

⁴⁶Davidsohn, *supra* note 36, at 702.

⁴⁷See, Ross, *The Value of Blood Tests as Evidence in Paternity Cases*, 71 Harv. L. Rev. 466, 468 (1958).

This conservative estimate is based on information obtained on the A-B-O, M-N and Rh-hr tests.

⁴⁸Schatkin, *supra* note 17, at 185.

⁴⁹Davidsohn, *supra* note 36, at 702.

⁵⁰Alleles is the term applied to members of a pair of contrasting genes. Sets of alleles may contain more than two members and such sets are called multiple alleles. Snyder & David, *Heredity* ch. 13, at 174 (5th ed. 1957).

⁵¹Davidsohn, *supra* note 36, at 702. (Emphasis added.) See the following chart for example.

MEDICO-LEGAL ASPECTS		
BLOOD GROUP OF CHILD	BLOOD GROUP OF MOTHER	BLOOD GROUP TO WHICH FATHER CANNOT BELONG**
O	O	AB
O	A	AB
O	B	AB
A	O	O, B
A	B	O, B
B	O	O, A
B	A	O, A
AB	A	O, A
AB	B	O, B
AB	AB	O

**Snyder & Davis, *Heredity* 183 (5th ed. 1957).

reported that there were no exceptions to the predicted results which could not be explained by cases of illegitimacy.⁵² The Committee reported that

according to the generally accepted theory, the M-N types are inherited by a pair of allelic genes M and N. . . . The theory leads to the following two laws: 1. Agglutinogens M and N *cannot* appear in the blood of a person unless they are present in the blood of one or both of his parents. 2. A parent with blood of type M *cannot* have a child with blood of type N, and a parent with type N blood *cannot* have a child with type M blood.⁵³

Use of the Rh-hr blood types in studies on families with a total of over 5,000 children revealed no exceptions to the theory that could not be explained by cases of illegitimacy.⁵⁴ The report stated:

For practical purposes the consequences of the genetic theory can be summarized in the following laws: 1. Blood properties Rho, rh', rh'', hr', and hr'' *cannot* appear in the blood of a person unless they are present in the blood of one or both his parents. 2. A parent who is rh'-negative (cc) *cannot* have an hr'-negative (CC) child; nor can an hr'-negative (CC) parent have an rh'-negative (cc) child. 3. A parent who is rh''-negative (ee) *cannot* have an hr''-negative (EE) child; nor can an hr''-negative (EE) parent have an rh''-negative (ee) child.⁵⁵

As a result of these studies, in cases where a man is falsely accused of paternity, proof of nonpaternity by the A-B-O, M-N, and Rh-hr tests can at present be expected to result in exoneration of over 50% of those accused.⁵⁶

⁵²Davidsohn, *supra* note 36, at 702.

⁵³*Ibid.* (Emphasis added.) See the following chart for example.

MEDICO-LEGAL APPLICATION OF THE BLOOD TYPES

TYPE OF CHILD	TYPE OF MOTHER	TYPE TO WHICH FATHER CANNOT BELONG**
M	M	N
M	MN	N
N	N	M
N	MN	M
MN	M	M
MN	N	N

**Schatkin, *supra* note 17, at 170.

⁵⁴Davidsohn, *supra* note 36, at 703.

⁵⁵*Ibid.* (Emphasis added.) See Schatkin, *supra* note 17, at 171-92c, for full discussion of all the complexities.

⁵⁶McCormick, Evidence § 178, at 380 (1954); Richardson, Modern Scientific

When the legal profession does accept the test as positively excluding paternity, the problem of the weight to be given the test results arises. Some courts hold that paternity-excluding test results should be weighed equally with other evidence by the trier of fact.⁵⁷ This position has been strongly attacked:

In contested divorce actions . . . judges apparently prefer to accept the testimony of the wife rather than the objective blood test findings, so that in courts of this country . . . not much progress has been made away from the law of the 'four seas' . . .

When a court refuses to dissolve or annul a marriage of two completely incompatible people, even though there is scientific proof of the wife's deceit or fraud . . . the court would not appear to be carrying out its responsibilities as an administrator of justice.⁵⁸

Consideration of the blood test results equally with other evidence has also been called judicial blindness to the advances of science.⁵⁹ Medical experts and legal writers have also attacked the position of those courts which consider the testimony of the expert who administers and interprets the results of the blood tests to be on the same evidentiary level as regular expert testimony concerning hypothetical situations.⁶⁰ Unlike the testimony of the usual expert, the blood grouping expert deals with nonhypothetical facts of the case at hand. One medicolegal authority states that "the pathologist whose report excludes paternity is not giving 'opinion' evidence, . . . [but is] testifying to a fact of life and Nature."⁶¹

The testimony of the parties in a paternity proceeding is seldom highly credible. There is an understandable self-serving interest on the part of each party which makes his testimony subject to doubt.⁶² The fact that the medical expert testifying in the case is a disinterested

Evidence § 12.3, at 324 (1961); Schatkin, *supra* note 17, at 206; Sussman, Blood Grouping Tests in Disputed Paternity Proceedings, 155 A.M.A.J. 1143 (1954); Davidsohn, *supra* note 36, at 702; Allen, *supra* note 43.

⁵⁷E.g., Groulx v. Groulx, 98 N.H. 481, 103 A.2d 188 (1954); Ross v. Marx, 24 N.J. Super. 25, 93 A.2d 597 (1952); State *ex rel.* Steiger v. Gray, 76 Ohio L. Abs. 393, 145 N.E.2d 162 (Juv. Ct. 1957).

⁵⁸124 A.M.A.J. 776 (1944).

⁵⁹Beck v. Beck, 153 Colo. 90, 384 P.2d 731 (1963); Prochnow v. Prochnow, 274 Wis. 491, 80 N.W.2d 278, 285 (1957) (dissenting opinion).

⁶⁰Denton, *Blood Groups and Disputed Parentage*, 27 Can. B. Rev. 537, 547-48 (1949).

⁶¹Gradwohl, *supra* note 7, at 576 (1954).

⁶²State *ex rel.* Steiger v. Gray, *supra* note 57, at 165.

Chapter IX of Schatkin, *supra* note 17, describes a number of cases in which the complaining female changed her testimony when faced with the blood test results. Unfortunately these are for the most part unreported cases.

third person should make his testimony more credible than that of the parties.

Where test results show that the husband could not possibly have been the father of his wife's child, the only question remaining for determination by the trier of fact is whether the tests were properly conducted. This involves the procedures in administering the blood tests, the qualifications of the persons testing the blood and interpreting the test. Authorities on legal medicine agree on the qualifications necessary for those who administer the tests and the general procedures to be followed. The tests must be carried out and interpreted by an expert. For some authorities this means having a pathologist or serologist,⁶³ not a medical technologist. However, there is no reason why a medical technologist cannot qualify as an expert in making such tests, leaving the pathologist or serologist as the interpreting expert. *Houghton* acknowledged that technicians were competent to perform the tests under ordinary circumstances impliedly because of the extensive education now required to become a medical technician.⁶⁴

Authorities also stipulate steps which should be followed in performing the tests and feel that in addition to the necessity of fresh⁶⁵ and properly labeled⁶⁶ blood specimens, the expert should at all times have a large panel of persons of representative blood groups and types available from among whom he can obtain blood samples. These serve as positive and negative controls of the various antibodies employed⁶⁷ so that the reactions of known blood types can be compared with the test specimens. The results of the control tests are to be included in the final report.⁶⁸ The main test should be completely carried out for the A-B groups, the M-N types, and the Rh-hr types,⁶⁹ and the final report should contain the intermediate results for all tests performed.⁷⁰ Additional tests may be performed by equally qualified colleagues of the expert performing the tests,⁷¹ thereby increasing the

⁶³Denton, *supra* note 60, at 547; Richardson, *supra* note 56, § 12.15 citing Denton's article; Schatkin, *supra* note 17, at 203; Sussman, *supra* note 56; Davidsohn, *supra* note 36, at 704.

⁶⁴*Houghton v. Houghton*, *supra* note 9, at 866.

⁶⁵Sussman, *supra* note 56.

⁶⁶*Ibid.*; Denton, *supra* note 60, at 548.

⁶⁷Davidsohn, *supra* note 36, at 704.

⁶⁸*Ibid.*

⁶⁹Schatkin, *supra* note 17, at 203.

⁷⁰Denton, *supra* note 60, at 548.

⁷¹*Ibid.*; Sussman, *supra* note 56, at 1144.

credibility of the results. Some states permit the court to require that tests be made by more than 1 expert.⁷²

There has been some difference of opinion concerning the various sera to be used—some writers require the expert to make the serum himself,⁷³ while others allow the use of commercially prepared serum.⁷⁴ Those requiring the expert to prepare his own serum feel that in this way he best acquires the experience needed for such precise work.⁷⁵

The only areas in which the results of blood grouping tests should be open to attack are in the method of testing or in the qualifications of the persons performing the tests. In the event of error in one of the aspects of the tests, the jury may be permitted to determine from the evidence what effect such error will have on the evidentiary weight to be afforded such test results.⁷⁶ A mere questioning of the methods or persons employed should not be sufficient to allow the jury to determine such weight; there should be evidence that there was something materially wrong, e.g., failure to keep the test specimens in a place inaccessible to interested persons.⁷⁷ A better solution in case of doubt is to recess the court or continue the case to allow further testing.⁷⁸ The evidence in such a situation is constant because the blood types of the parties involved will never change.

Competently administered blood grouping tests which exclude paternity should be considered conclusive as a matter of law.⁷⁹ Once the results excluding paternity are no longer challenged, impossibility of paternity comparable to the common law nonaccess has been shown. When the courts recognize that the scientific results are much

⁷²*California*: Cal. Civ. Proc. Code § 1980.4; *Maine*: Me. Rev. Stat. Ann. tit. 19, § 262 (1964); *Mississippi*: Miss. Code Ann. § 383-09 (Supp. 1964); *New Hampshire*: N.H. Rev. Stat. Ann. § 522:2 (1955); *New Jersey*: N.J. Stat. Ann. § 2A:83-2 (1952); *Ohio*: Ohio Rev. Code Ann. § 2317.47 (1964); *Oregon*: Ore. Rev. Stat. § 109.254 (1953); *Pennsylvania*: Pa. Stat. Ann. tit. 28, § 307.1 (Supp. 1965); *Tennessee*: Tenn. Code Ann. § 24-716 (Supp. 1965); *Wisconsin*: Wis. Stat. § 52.36(1) (1963).

⁷³Davidsohn, *supra* note 36, at 699.

⁷⁴*Ibid.*

⁷⁵Davidsohn, *supra* note 36, at 699.

⁷⁶Commissioner *ex rel.* Tyler v. Costonie, *supra* note 29, at 805 (1950).

⁷⁷Denton, *supra* note 60, at 548.

⁷⁸25 Iowa L. Rev. 823, 825 (1940).

⁷⁹Uniform Act on Blood Tests to Determine Paternity § 5 (1952).

The A.M.A. Committee did not recommend that the courts be bound by the test results when they excluded paternity. Davidsohn, *supra* note 36, at 703. Richardson says this is due to a "deference to the judicial process rather than any lack of faith in the test." Richardson, Modern Scientific Evidence § 12.12, n.34 (1961).

more accurate than any other evidence of nonpaternity, they will discover that they have not changed the quantum of proof necessary to overcome the presumption of legitimacy; blood grouping exclusion shows impossibility.

LOUIS C. ROBERTS, III

POLICE SURVEILLANCE OF PUBLIC TOILETS

Clandestine police surveillance of public toilets as a means of detecting consensual homosexuality has raised Fourth Amendment problems concerning the right of privacy and freedom from unreasonable searches. Public toilets are known to provide an environment for criminal activities,¹ and observation by hidden parties provides an effective means of apprehending the participants. The most recent decisions have approved systematic and continuous surveillance through air vents,² peepholes,³ and even a 2-way mirror,⁴ with the result that the privacy apparently offered the public is deceptive. The result of such decisions is a balancing of the individual's Fourth Amendment right of freedom from unreasonable search and seizure against the exigencies of law enforcement. The problem is far-reaching: such searches may affect every citizen who uses public facilities, not just the few who are suspected of violations. The United States Supreme Court has not yet considered the problem, but has denied certiorari in 3 cases decided in 1965.⁵

In *Smayda v. United States*,⁶ the 9th Circuit refused to apply the Fourth Amendment restrictions to peephole observation of a public toilet in a national park campsite. The manager of the campsite had received several complaints of homosexual activity in a particular

¹"Judges can take judicial knowledge from the case files in their own courts that public toilets in metropolitan parks, terminals, theaters, department stores and in similar places, frequented daily by masses of people, are often the locale of vice of many kinds such as sexual perversion, sale of narcotics, petty thefts, robbery and assaults." *People v. Young*, 214 Cal. App. 2d 131, 29 Cal. Rptr. 492, 494 (Dist. Ct. App. 1963).

²*Id.* at 494.

³*People v. Norton*, 209 Cal. App. 2d 173, 25 Cal. Rptr. 676 (Dist. Ct. App. 1962).

⁴*State ex rel. Poore v. Mayer*, 176 Ohio St. 78, 197 N.E. 2d 577, cert. denied, 379 U.S. 928 (1964).

⁵In addition to the principal case, see *People v. Hensel*, 233 Cal. App. 2d 834, 43 Cal. Rptr. 865 (Dist. Ct. App.), cert. denied, 382 U.S. 942 (1965). Cf. *State ex rel. Poore v. Mayer*, 176 Ohio St. 78, 197 N.E.2d 557, cert. denied, 379 U.S. 928 (1964), petition for removal denied, 243 F. Supp. 777 (N.D. Ohio 1965).

⁶352 F.2d 251 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966).

restroom. The restroom toilets were open to the public, and not elaborately constructed: board partitions between the 3 stalls were 18 inches above the floor, and the doors had no latches, thereby affording only a minimum of privacy. The manager, with the help of park police, constructed observation windows, disguised as air vents, in the ceiling of the restroom. Surveillance was conducted after 11 p.m. on successive Saturdays. After the officers had observed some 40 persons using the facility, they photographed the defendants committing a criminal homosexual act.⁷ They were arrested and prosecuted for violating the Assimilative Crimes Act; violation of the pertinent California statute thus became a federal offense.⁸ The district court denied the defendants' motion to suppress the evidence procured by the surveillance.

The Court of Appeals affirmed on 2, possibly 3, grounds: (1) the defendants waived any right of privacy they might have had;⁹ (2) the search was not unreasonable within the meaning of the Fourth Amendment,¹⁰ because it was undertaken upon reasonable cause,¹¹ and (3) possibly because a public toilet is not a "house" as defined by the Fourth Amendment,¹² hence there was no search.

The concurring opinion found that there was no "intrusion into a constitutionally protected area,"¹³ that the actions of the manager as a private individual were not within the Fourth Amendment prohibitions,¹⁴ and that there was no right of privacy *per se*.¹⁵

A strong dissent emphasized that the purpose of the Fourth Amendment is to protect the *partial* right of privacy which a person might

⁷Cal. Pen. Code § 288a.

⁸18 U.S.C. § 13 (1950). "The Assimilative Crimes Act creates a federal offense; it refers to the California statutes for its definition and its penalty, but it does not incorporate the whole criminal and constitutional law of California We look, then, to the Constitution of the United States, not that of California." *Smayda v. United States*, *supra* note 6, at 253.

⁹*Id.* at 255, citing *People v. Norton*, 209 Cal. App. 2d 173, 25 Cal. Rptr. 676, 678 (Dist. Ct. App. 1962).

¹⁰*Smayda v. United States*, *supra* note 6, at 255.

¹¹*Id.* at 257. The term "reasonable cause" is used throughout the opinion, apparently in preference to "probable cause." "Reasonable cause has been generally defined to be such a state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that *the person* is guilty of a crime." *People v. Ingle*, 53 Cal. 2d 407, 412-13, 348 P.2d 577, 580, 2 Cal. Rptr. 14, 17 (1960). (Emphasis added.)

¹²*Smayda v. United States*, *supra* note 6, at 256.

¹³*Id.* at 257; see *Manwaring, California and the Fourth Amendment*, 16 Stan. L. Rev. 318, 329 (1964) (search requires a physical intrusion).

¹⁴*Smayda v. United States*, *supra* note 6, at 257, citing *Burdeau v. McDowell*, 256 U.S. 465 (1921) (leading case).

¹⁵*Smayda v. United States*, *supra* note 6, at 258.

reasonably expect in a given situation.¹⁶ The dissenter rejected the theory that the defendants waived their rights,¹⁷ indicated that cutting the holes in the ceiling was a physical intrusion,¹⁸ and concluded that no similar search had ever been held reasonable.¹⁹ Finally, he termed the search a general exploratory search, "reminiscent of the abusive writs of assistance and general warrants which motivated the adoption of the Fourth Amendment."²⁰

Waiver of Fourth Amendment rights, the first ground of decision, should not have been inferred from the present fact situation. Federal and state decisions make it overwhelmingly clear that the right of freedom from unreasonable searches can be waived by consent,²¹ but that the consent must be unequivocal, specific, and intelligently given.²² Some courts say they "indulge every reasonable presumption against waiver" of fundamental rights.²³ *People v. Norton*²⁴ found a waiver of rights where the act was committed in the open area of the restroom, but recognized that this waiver would not extend to acts committed in the stalls.²⁵ Thus assuming a search, if the search in the present case is to stand it must do so on the strength of the determination of its reasonableness.

Smayda's discussion of the reasonableness of the search was similar to that in the 5 previous toilet surveillance cases which California appellate courts have decided to date,²⁶ and which are now the basic

¹⁶*Id.* at 259. The majority conceded there was a protected right of privacy in a public toilet. *Id.* at 257.

¹⁷*Id.* at 260.

¹⁸*Id.* at 261, citing *Silverman v. United States*, 365 U.S. 505, 512 (1961).

¹⁹*Smayda v. United States*, *supra* note 6, at 261, citing *Manwaring*, *supra* note 13, at 350 (search merely a substitute for less intrusive methods).

²⁰*Smayda v. United States*, *supra* note 6, at 262.

²¹See, e.g., *Chapman v. United States*, 346 F.2d 383, 387 (9th Cir. 1965); *Shafer v. State*, 214 Tenn. 416, 381 S.W.2d 254, 258-59 (1964); *Simmons v. State*, 210 Tenn. 443, 360 S.W.2d 10, 11 (1962).

²²*United States v. Como*, 340 F.2d 891, 893 (2d Cir. 1965); *Montana v. Tomich*, 332 F.2d 987, 989 (9th Cir. 1964); *United States v. Katz*, 238 F. Supp. 689, 694-95 (S.D.N.Y. 1965); *State v. King*, 44 N.J. 346, 209 A.2d 110, 113 (1965).

²³See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *United States v. Royster*, 204 F. Supp. 760, 763 (N.D. Ohio 1961); *People v. Cangione*, 33 Misc. 2d 23, 224 N.Y.S.2d 549, 552 (Queen's County Ct. 1962).

²⁴209 Cal. App. 2d 173, 25 Cal. Repr. 676 (Dist. Ct. App. 1962).

²⁵*Id.* at 678.

²⁶See *Bielicki v. Superior Court*, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962) (stalls held to offer maximum privacy); *Britt v. Superior Court*, 58 Cal. 2d 469, 374 P.2d 817, 24 Cal. Rptr. 849 (1962) (stalls held to offer maximum privacy); *People v. Hensel*, *supra* note 5 (act done in open area of restroom); *People v. Young*, *supra* note 1 (no partitions); *People v. Norton*, *supra* note 6 (no doors). Of these, the first two, *Bielicki* and *Britt* excluded the evidence as an unreasonable

source of case law on the subject.²⁷ All 5 cases have spoken strictly in Fourth Amendment terms, although there have been suggestions that due process²⁸ and Fifth Amendment self-incrimination²⁹ considerations may also apply. All 5 cases have approached the problem in a way common to search and seizure, by considering 3 separate grounds:³⁰ (1) whether the particular activity constituted a search; (2) whether the place investigated was within the Fourth Amendment protection of "persons, houses, papers, or effects;"³¹ (3) whether the search was reasonable. In *Smayda*, the holding of reasonableness was of paramount importance, and the contentions that there was no search and that the toilet was not a "house" were only summarily considered.

(1) *Smayda* recognized that "both the eye and the ear as well as the hand, can 'search'. . . ." ³² This is the general rule,³³ and it was first applied to peephole surveillance in *Bielicki v. Superior Court*.³⁴ The later California decisions,³⁵ however, have been prone to take peephole surveillance cases out of the rule by following the principle that there is no search in observing that which is open to public view.³⁶ Activities which are considered open to public view fall into

invasion of privacy, but the later three refused to follow them by finding that the acts were open to public view.

²⁷In addition to *United States v. Smayda*, see *State ex rel. Poore v. Mayer*, 243 F. Supp. 777 (N.D. Ohio 1965), which adopted the reasoning of the three later California cases, on similar fact situations. *Craft v. State*, 181 So. 2d 140 (Miss. 1965), did not cite the California cases, but relied instead on a trespass theory to admit the evidence obtained by a peephole search.

²⁸*Beane, The Constitutional Right to Privacy in the Supreme Court*, 1962 Supreme Court Rev. 212, 247-48.

²⁹*King, Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations*, 33 Geo. Wash. L. Rev. 240 (1964).

³⁰63 Colum. L. Rev. 955, 956 (1963).

³¹"[E]very person who enters an enclosed stall in a public toilet is entitled to believe that, while there, he will have at least the modicum of privacy that its design affords." *Smayda v. United States*, *supra* note 6, at 257.

³²*Id.* at 255.

³³See, e.g., *People v. Kramer*, 38 Misc. 2d 889, 239 N.Y.S.2d 303, 307 (Sup. Ct. 1963) (observation of premises from wall held to be a search); *People v. Sheridan*, 236 Cal. App. 2d 756, 46 Cal. Rptr. 295, 297 (Dist. Ct. App. 1965) (searching held to be a function of sight); *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855, 858 (1955) (looking through window held not to be unreasonable search); *Craft v. Mississippi*, *supra* note 24 (peephole view held to be a lawful search).

³⁴"[T]he term implies some exploratory investigation or an invasion and quest . . . or seeking out" *Bielicki v. Superior Court*, *supra* note 26, at 553-54.

³⁵*People v. Hensel*, *supra* note 5, *People v. Young*, *supra* note 1, *People v. Norton*, *supra* note 24.

³⁶"Merely to observe what is perfectly apparent to any member of the

2 categories: acts observable in or from an area open to the public in plain view of police as well as to any member of the public,³⁷ and acts observable by looking through an open window.³⁸

(2) The contention that the stalls were private places analogous to houses and therefore covered by the Fourth Amendment was rejected in *Smayda*.³⁹ But that point was unimportant to the outcome since the court conceded, as did generally the earlier cases,⁴⁰ that there was a protected right of privacy in a public toilet.⁴¹ The protection from unreasonable searches of houses has been extended to include a taxicab,⁴² an automobile,⁴³ an office,⁴⁴ a store,⁴⁵ and a temporarily unoccupied dwelling.⁴⁶ Thus there is no reason why, upon recognition of a right of privacy in *Smayda* circumstances, the toilet could not be considered a house for Fourth Amendment purposes. It was unfortunate that the court relied on the theory that visual observation of a house without a trespass is not a search,⁴⁷ for there is a growing awareness of the inadequacies of the trespass test in this context.⁴⁸ Peephole surveillance cases are regarded as out of the "mainstream of search-and-seizure jurisprudence,"⁴⁹ and it is for this reason that reliance on analogy to search for tangible objects is not appropriate in a peephole surveillance case.⁵⁰ *Silverman v.*

general public who might happen on the premises is not a search." *People v. Young*, *supra* note 1, at 494. The rule is well established, see, e.g., *Trujillo v. United States*, 294 F.2d 583 (10th Cir. 1961); *Petteway v. United States*, 261 F.2d 53, 54 (4th Cir. 1958). The extension of this rule to activities in enclosed areas of toilet stalls does not necessarily follow. No such mechanical approach should be used. *Lanza v. New York*, 370 U.S. 139 (1962); *Nelson v. Hancock*, 239 F. Supp. 857 (D.N.H. 1965).

³⁷*People v. Rayson*, 197 Cal. App. 2d 33, 17 Cal. Rptr. 243 (Dist. Ct. App. 1961) (observation of shoe shine parlor from street).

³⁸*People v. Martin*, *supra* note 33 (a leading case).

³⁹*Smayda v. United States*, *supra* note 6, at 256.

⁴⁰See *Bielicki v. Superior Court*, *supra* note 26, at 556; *Britt v. Superior Court*, *supra* note 26, at 851.

⁴¹*Smayda v. United States*, *supra* note 6, at 257.

⁴²*Rios v. United States*, 364 U.S. 253 (1960).

⁴³*Gambino v. United States*, 275 U.S. 310 (1927) (car treated as extension of person).

⁴⁴*Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

⁴⁵*Amos v. United States*, 255 U.S. 313 (1921) (store adjoining house).

⁴⁶*Roberson v. United States*, 165 F.2d 752, 754-55 (6th Cir. 1948).

⁴⁷*Smayda v. United States*, *supra* note 6, at 256.

⁴⁸*Infra* note 50.

⁴⁹*Manwaring*, *supra* note 12, at 347.

⁵⁰Similar analogy was tried in early electronic surveillance cases, such as *Olmstead v. United States*, 277 U.S. 438 (1928), where it was held that there could be no seizure of a voice which is intangible. *King*, *supra* note 29, discusses the disadvantages of such techniques, and *Beaney*, *supra* note 28, discusses the right

United States,⁵¹ held that insertion of a spike microphone into a wall was an intrusion into a constitutionally protected area, but stressed that the intrusion was not to be determined by local trespass law. Subtle distinctions based on property law were rejected more recently in *Stoner v. California*.⁵²

(3) The holding that the search was reasonable is certainly the significant holding of *Smayda*. It is here that *Smayda* differs from California precedents, which had admitted the evidence acquired by surveillance by factually distinguishing the *Bielicki* land mark.⁵³ The *Smayda* holding of reasonableness is in direct conflict with *Bielicki*, which held the search unreasonable for lack of probable cause.⁵⁴ If observation of the toilet can be considered a reasonable search, it would not be prohibited by the Fourth Amendment, which applies only to unreasonable searches and seizures.⁵⁵ In order to find the *Smayda* search reasonable, it is necessary, as the concurring opinion recognizes, that "a somewhat less strict view of what constitutes adequate proof of probable cause for search must be taken"⁵⁶—"somewhat less strict" because focus on a particular suspect is generally required to constitute reasonable cause.⁵⁷ Because there is not a particular suspect, it becomes extremely difficult to distinguish a peephole

of privacy in this area. That mechanical analysis fails to consider the nature of the freedom protected is reflected in Justice Douglas's statement that

My trouble with *stare decisis* in this field is that it leads us to a matching of cases on irrelevant facts. An electronic device on the outside wall of a house is a permissible invasion of privacy according to *Goldman v. United States* . . . while an electronic device that penetrates the wall, as here, is not. Yet the invasion of privacy is as great in one case as in the other.

Silverman v. United States, 365 U.S. 505, 512-13 (1961) (concurring opinion).

This was at least tacitly recognized in an earlier case, *Brock v. United States*, 223 F.2d 681, 685 (5th Cir. 1955) which held that suggestive questioning through a window to a person talking in his sleep violated the "right to be left alone."

A visual search may be illegal even without a trespass. *People v. Regalado*, 224 Cal. App. 2d 586, 36 Cal. Rptr. 795 (Dist. Ct. App. 1964) (observation of hotel room through peephole in door); *McDonald v. United States*, 335 U.S. 451 (1948) (looking through transom of rooming house). Moreover, a trespass may not of itself render a search illegal. *United States v. Young*, 322 F.2d 443 (4th Cir. 1963) (trespass on grounds surrounding building is not per se an illegal search); "[A] simple trespass without more does not invalidate a subsequent seizure." *United States v. Lewis*, 227 F. Supp. 433, 436 (S.D.N.Y. 1964).

⁵¹365 U.S. 505 (1961).

⁵²376 U.S. 483 (1964).

⁵³*Smayda v. United States*, *supra* note 6, at 253.

⁵⁴*Ibid.*; *Bielicki v. Superior Court*, *supra* note 26.

⁵⁵See, e.g., *United States v. Abel*, 258 F.2d 485 (2d Cir. 1958), *aff'd* 362 U.S. 217 (1960).

⁵⁶*Smayda v. United States*, *supra* note 6, at 259.

⁵⁷*Id.* at 257.

surveillance from a general exploratory search for evidence. The usual rule is that *no* such general exploratory search can be justified even with a warrant.⁵⁸ This rule is the most significant obstacle to sustaining the reasonableness of a toilet surveillance. Since the sole purpose of the general surveillance is to obtain evidence of guilt, both *Bielicki v. Superior Court*⁵⁹ and *Britt v. Superior Court*⁶⁰ considered such surveillance a general exploratory search. *Smayda* attempted a distinction, saying that other exploratory searches involved "physical invasion of private premises, an arrest, and then a general exploratory search of the premises for evidence of crime."⁶¹ Such a distinction seems to overlook the obvious, for persons and effects may be searched without an invasion of premises and without an arrest; and premises may be searched without a physical invasion.⁶² More significant is *Smayda's* holding that

when, as here, the police have reasonable cause to believe that public toilet stalls are being used in the commission of crime, and when, as here, they confine their activities to the times when such crimes are most likely to occur, they are entitled to institute clandestine surveillance The public interest in its privacy, we think, must, to that extent, be subordinated to the public interest in law enforcement.⁶³

This reemphasizes the importance of the holding of the reasonableness of the search, and makes it even more apparent that the validity of the decision is highly, even entirely, dependent on the wisdom of the determination of reasonableness.

There are doubts as to the wisdom of the determination that, even under the restrictive circumstances just mentioned, a peephole surveillance should be allowed to compromise the right of privacy.⁶⁴ But there is authority indicating that there are situations where the

⁵⁸See, e.g., *United States v. Lefkowitz*, 285 U.S. 452, 465 (1932); "Whatever reason law enforcement officials may have to believe that illegal activities are being conducted within a house, they may not, without a warrant, invade the house for the purpose of searching for and seizing evidence of criminal acts.", *United States v. Young*, *supra* note 50, at 444; *Drayton v. United States*, 205 F.2d 35, 37 (5th Cir. 1953) (fact premises had an unsavory reputation did not authorize a general search); *United States v. Bayley*, 240 F. Supp. 649, 658 (S.D.N.Y. 1965) "[s]earches for and seizures of mere evidence are always unreasonable"; 2 Underhill, *Criminal Evidence* § 410, at 1055 (5th ed. 1956).

⁵⁹*Supra* note 26, at 554.

⁶⁰*Supra* note 26, at 850.

⁶¹*Smayda v. United States*, *supra* note 6, at 256.

⁶²Cases cited note 50, *supra*.

⁶³*Smayda v. United States*, *supra* note 6, at 257.

⁶⁴*Infra* notes 84-88 and accompanying text.

usual standards of reasonableness can be relaxed.⁶⁵ The United States Supreme Court has repeatedly and emphatically stated that "there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."⁶⁶ This was recently reemphasized in *Ker v. California*,⁶⁷ which was taken on certiorari after *Mapp v. Ohio*⁶⁸ for the express purpose of further explication of "the standard by which state searches and seizures must be evaluated."⁶⁹ *Ker* stated that the "standards of reasonableness . . . are not susceptible of procrustean application."⁷⁰ This is very much in accord with the abovementioned disapproval of the use of improper analogy, such as trespass, in search and seizure cases.⁷¹ The test of reasonableness of a search is usually stated in broad terms, typically,

whether the thing done, in sum of its form, scope, nature, incidents and effect, impresses as being fundamentally unfair or unreasonable in the specific situation when the immediate end sought is considered against the private right affected.⁷²

The determination of reasonableness involves a balancing of interests,⁷³ or an examination of the total fact situation with regard to the constitutional right of privacy.⁷⁴ Reasonableness has been called the fundamental requirement of the Fourth Amendment.⁷⁵

Despite such broad views of what constitutes reasonableness, *Smyda* is still an extension of traditional concepts. There are several ways in which the more traditional concepts may be asserted in a case of this type: Courts have held that reasonableness depends on the existence of probable cause,⁷⁶ or even on whether there was a trespass.⁷⁷

⁶⁵See *Carroll v. United States*, 267 U.S. 132, 156 (1925) (a leading case holding that where impracticable a warrant is not necessary for search of an automobile); Comment, 22 Wash. & Lee L. Rev. 221, 222 (1965).

⁶⁶*Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). See *Rios v. United States*, *supra* note 42, at 255; *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950).

⁶⁷374 U.S. 23 (1963).

⁶⁸367 U.S. 643 (1961).

⁶⁹*Ker v. California*, *supra* note 67, at 24.

⁷⁰*Id.* at 33.

⁷¹See note 50 *supra* and accompanying text.

⁷²*United States v. Cook*, 213 F. Supp. 568, 571 (E.D. Tenn. 1962).

⁷³See *People v. Pugach*, 15 N.Y.2d 65, 204 N.E.2d 176, 177, 255 N.Y.S.2d 833, 835 (1964).

⁷⁴*State v. Chinn*, 231 Ore. 259, 373 P.2d 392, 396 (1962).

⁷⁵*State v. Romeo*, 43 N.J. 188, 203 A.2d 23, 32 (1964).

⁷⁶See, e.g., *United States ex rel. Holloway v. Reincke*, 229 F. Supp. 132, 136 (D. Conn. 1964); *United States v. O'Leary*, 201 F. Supp. 926, 929 (E.D. Tenn. 1961).

⁷⁷See *Jones v. United States*, 339 F.2d 419, 420 (5th Cir. 1964) (equates physical intrusion with encroachment).

There are suggestions that the seriousness of the crime is to be considered, with greater constitutional scrutiny afforded methods of search in less serious crimes such as gambling or obscenity, and less exacting standards in more serious crimes such as burglary, robbery, or crimes involving a dangerous weapon.⁷⁸ Consensual homosexuality would presumably fall into the category of lesser crimes, so that it would be inappropriate to justify the surveillance by reference to the comparatively relaxed standards of reasonableness encountered in dealing with dangerous crimes. Also, it is frequently recognized that a warrantless search may be reasonable, hence justified, in exceptional circumstances.⁷⁹ But it would require a substantial extension to apply the exceptional circumstances principle to toilet surveillance cases. For the exceptional circumstances principle has been applied rarely, and if at all,⁸⁰ to the necessitous circumstances of some military searches,⁸¹ or more traditionally to instances of a crime committed in the officer's presence,⁸² or to threatened imminent destruction of evidence.⁸³

Even if such a search might be considered reasonable, the wisdom of such a determination is still doubtful. Most courts would find it distasteful that such a search entails widespread observation of innocent parties.⁸⁴ There is a basic objection to any systematic clandestine surveillance where privacy is apparently offered. Such surveillance violates the recognized right to be left alone,⁸⁵ and is probably a tortious invasion of privacy.⁸⁶ There is only a fine line between it and the drilling of peepholes in every door of a hotel, a practice condemned in *People v. Regalado*.⁸⁷ There is opinion to the effect

⁷⁸See, e.g., *Nueslein v. District of Columbia*, 115 F.2d 690, 696 (D.C. Cir. 1940); *People v. Salerno*, 38 Misc. 2d 467, 235 N.Y.S.2d 879, 884 (Sup. Ct. 1962); 63 Colum. L. Rev. 955, 958 (1963).

⁷⁹See, e.g., *Johnson v. United States*, 333 U.S. 10, 14-15 (1948); *McDonald v. United States*, *supra* note 50, at 456.

⁸⁰"It is of interest that no federal or New Jersey appellate decision has been found actually sustaining a search without a warrant, not incidental to an arrest, on the express basis of the exceptional circumstances rule." *State v. Naturile*, 83 N.J. Super. 563, 200 A.2d 617, 619 (Super. Ct. 1964). But see *Wayne v. United States*, 318 F.2d 205 (D.C. Cir. 1963) (abortion case where likelihood of death justified an otherwise unlawful entry).

⁸¹*United States v. Grisby*, 335 F.2d 652 (4th Cir. 1964).

⁸²*United States v. Rabinowitz*, 339 U.S. 56 (1950).

⁸³See *Chapman v. United States*, *supra* note 21.

⁸⁴See, e.g., *Smayda v. United States*, *supra* note 6, at 257.

⁸⁵See *United States v. Brock*, *supra* note 50.

⁸⁶Prosser defines the tort, as pertinent here, as an "intrusion upon the plaintiff's physical solitude or seclusion" which extends beyond physical intrusion to eavesdropping and even to peering in the windows of a home. Prosser, *Torts* § 112, at 833 (3d ed. 1964).

⁸⁷*Supra* note 50.

that consensual homosexuality poses too slight a threat to the general welfare to justify criminal sanctions.⁸⁸ It makes little sense to diminish the privacy of a large segment of the population to prevent acts posing only a slight threat to the public welfare.

Traditional concepts of justice have left little room for the Peeping Tom policeman, and it is difficult to understand why the present fact situation would necessitate such draconian measures. If, however, peephole surveillance is necessary to enforce the laws, it would be more in harmony with accepted principles of justice if notice of its likelihood were given. This has been done in other areas, with express notice in the case of highway signs warning of the possible use of radar, and implied notice in the case of postal employees who understand that their activities may be observed secretly. As applied to the present problem, a competently drafted vice statute may remove constitutional objections and serve as a deterrent to crime in toilets. Such a statute could provide a procedure to be followed once a magistrate is convinced of the need for surveillance of a specific facility or could provide for some permanent display of notice. In either case effective measures to insure procedural compliance would be necessary.⁸⁹

As important as the need for procedural safeguards is the need for a definitive and realistic statement of the extent of the right of privacy. If *Smayda* is to stand, it must do so apart from reliance on fictional reasoning to find a waiver of constitutional rights or on faulty analogy which recognizes no search without a physical trespass against the defendants. These do not provide proper guidelines for determining how the balance between the personal right of privacy and the practicalities of enforcement is to be struck.

WALTER H. RYLAND

UNCERTAINTY OF DURATION: THE CONTINUING PERFORMANCE CONTRACT

In *Poultry Haulers, Inc. v. Pillsbury Co.*¹ plaintiff agreed to transport poultry from various poultry farms in Alabama to defendant's

⁸⁸Comment, 70 Yale L.J. 623, 627-28 (1961).

⁸⁹Such measures might include: excluding evidence obtained in violation of the proper procedure; criminal or civil penalties against property owners or licensees who permit no-notice surveillance where privacy appears to be offered.

¹247 F. Supp. 556 (N.D. Ala. 1964), *aff'd per curiam* 353 F.2d 538 (5th Cir. 1965).

processing plant. The terms of the oral agreement provided that plaintiff was to haul for defendant "between 200,000 and 250,000 birds per week and was to receive sixty-five cents per one hundred pounds as compensation. . . ." ² The hauling was to "continue as long as the defendant had poultry to be hauled to its processing plant" ³ and as long as the hauling services were performed satisfactorily. Defendant also represented that if the hauling were performed satisfactorily the contract would exist for a reasonable time. After moving its plant to a new location, plaintiff-haulers began performance of the contract. Six months later the defendant informed plaintiff that the quantity of birds to be hauled would be increased to 300,000 per week. Plaintiff then purchased additional equipment in reliance upon defendant's representation. One month after the announced increase defendant served notice of an intention to reduce the weekly volume to 100,000 birds, "representing to plaintiff that they [defendant] would haul the remainder" ⁴ of the birds. Plaintiff treated the reduction in volume as a breach of contract, stopped transporting poultry for defendant, and sued for the breach. After careful consideration of the briefs and "an independent research of the law," ⁵ the United States District Court dismissed the complaint on the ground that under Alabama law the contract lacked mutuality and was uncertain as to its duration.

Lack of mutuality was not the significant reason for dismissing the complaint since the court merely stated that it was nowhere alleged "that the plaintiff was obligated to perform for any definite period of time." ⁶ The court's injection of mutuality into its discussion of the agreement only adds to its decision the confusion which surrounds that term. ⁷ Obviously the court was not saying that the contract lacked mutuality because plaintiff was not obligated or had not promised to perform; the complaint alleged that an "agreement existed between plaintiff and defendant, said agreement being that plaintiff would transport poultry." ⁸ Only the plaintiff-hauler could

²*Id.* at 557.

³*Ibid.*

⁴Amendment to Amendment to Complaint, Count Three, p. 2, Poultry Haulers, Inc. v. Pillsbury Co., *supra* note 1.

⁵Poultry Haulers, Inc. v. Pillsbury Co., *supra* note 1, at 557.

⁶*Id.* at 558.

⁷See 1A Corbin, Contracts § 152 (1963); 1 Williston, Contracts § 105A (3d ed. 1957). See generally Oliphant, *Mutuality of Obligation in Bilateral Contracts At Law* (pts. 1-2), 25 Colum. L. Rev. 705 (1925), 28 Colum. L. Rev. 997 (1928).

⁸Amendment to Amendment to Complaint, Count Three, p. 1, Poultry Haulers Inc. v. Pillsbury Co., *supra* note 1.

have promised to haul poultry. If the court thought the contract failed because plaintiff was obligated to perform *but* not for any determinable period of time, it was begging the question. Plaintiff promised to perform for the same period for which defendant promised—that period of time upon which they agreed. The actual question to be decided was whether the agreement was certain as to its duration. The answer to that question is the same as the answer to the question whether plaintiff was obligated to perform for any determinable time. It appears that the court, in saying the contract lacked mutuality, was really saying that it was uncertain as to its duration.

The court's holding that the contract was uncertain as to its durations implies a consideration of 2 issues: (1) Is a contract which expressly provides that it is to run "for a reasonable time" uncertain as to its duration? (2) Is a contract for continuing performance to run "as long as a shipper has particular goods to be shipped to its plant" uncertain as to its duration?

(1) The court gave no attention to the contract provision for duration for a reasonable time. Since the hauling contract was entirely oral, the court apparently thought that the reasonable time provision was included in the allegations of the complaint merely to assure maintenance of an action and actually had not been a term of the contract at all. But the court was not privileged to disregard this provision as not a part of the contract since it was considering a motion to dismiss under Federal Rule 12b(6)⁹ and had to accept all material, not inherently incredible, allegations of the complaint as true. It is clear that had the contract been read as providing for hauling for a reasonable time it would have been certain as to time¹⁰ and the motion to dismiss should not have been granted. For purposes of this discussion, the contract will be read as containing no express provision for duration for a reasonable time.

(2) The United States District Court held that the Alabama decision in *Howard v. East Tennessee, Va. & Ga. Ry.*¹¹ was controlling¹²

⁹It is not acknowledged by the court that the motion was under 12b(6), but there is no other proper motion.

¹⁰*Frankfurt-Barnett Co. v. William Prym Co.*, 237 Fed. 21 (2d Cir 1916). When a contract contains no duration provision, generally the law will imply a reasonable time for performance. Restatement, Contracts § 32, illustration 4 (1932); 1 Corbin, Contracts § 96 (1963); 1 Williston, Contracts § 38 (3d ed. 1957). It follows that a reasonable time is a sufficiently certain time.

¹¹91 Ala. 268, 8 So. 868 (1891).

¹²See 28 U.S.C. § 1332. Although not stated in the opinion, diversity of citizenship was apparently the ground for federal jurisdiction.

and failed to discuss the difference between the *Pillsbury* and *Howard* contracts. In *Howard* the defendant railroad hired plaintiff to work as its land agent to induce development along its route and to encourage passenger travel on its trains. The employment contract provided for stipulated monthly compensation to plaintiff but contained no provision concerning duration of the employment. The court thought "the material inquiry [was] . . . whether the contract as stated is not void for uncertainty, or one which either party could terminate at will."¹³ Plaintiff's claim for damages for defendant's refusal to permit him to continue in his employment was denied without clear explication of the ground of decision. The *Howard* result would have been the same whether the contract was void for uncertainty or a contract terminable at will since defendant claimed no damages for past services.

The general rule is that a contract which does not specify expressly or impliedly a particular period of time within which performance is to be rendered shall continue for a reasonable time.¹⁴ However, personal service contracts of unspecified duration are an exception¹⁵ to this general rule; the parties are presumed¹⁶ to have intended the contract to be terminable at will.¹⁷ But the contract is terminable at will only when the contract itself specifies no duration and when it is clear from the nature of the employment and the situation and object of the parties that no definite time was intended.¹⁸ The *Howard* agreement is typical of a personal service contract in which the parties do not expressly agree upon duration and probably have no understanding as to duration except that it is vaguely regarded as indefinite. To hold that the employee has no action for breach of contract upon the employer's terminating such an indefinite employment does not seem unjust.

The court failed to recognize a basic difference between the employment contract in *Howard* and the contract in *Pillsbury*. In *Howard* (1) there was a complete absence in the contract itself of any

¹³*Howard v. East Tennessee, Va. & Ga. Ry.*, *supra* note 11, at 868.

¹⁴See Restatement, Contracts § 32, illustration 4 (1932); 1 Corbin, Contracts § 96 (1963); 1 Williston, Contracts § 38 (3d ed. 1957).

¹⁵Restatement, Contracts § 32, illustration 1 (1932); 48 Mich. L. Rev. 80 (1949).

¹⁶*E.g.*, *Cummings v. Kelling Nut Co.*, 368 Pa. 448, 84 A.2d 323, 325 (1951).

¹⁷See Annot., 161 A.L.R. 706 (1946); 32 Mich. L. Rev. 107 (1933).

¹⁸See *Robson v. Mississippi River Logging Co.*, 43 Fed. 364 (C.C.N.D. Iowa 1890); *Putman v. Producers' Live Stock Marketing Ass'n*, 256 Ky. 196, 75 S.W.2d 1075 (1934); *Lubrecht v. Laurel Stripping Co.*, 387 Pa. 393, 127 A.2d 687 (1956); Restatement (Second), Agency § 442, comment *a* (1958); Restatement, Contracts § 235(d), comment *e* (1932); 3A Corbin, Contracts § 684 (1960); 1 Williston, Contracts § 39 (3d ed. 1957).

reference to duration, and (2) no circumstances implied a duration. The contract in *Pillsbury*, however, expressly provided for duration, though indefinite: plaintiff was to haul defendant's poultry *as long as* defendant had poultry to be hauled to its processing plant. *Howard* had indicated, and the *Pillsbury* court apparently so held quoting from *Howard*, that "in the absence of some agreement or peculiar circumstances connected with the engagement . . . *unless* some time is fixed during which the employment is to continue, either party may terminate the contract at will."¹⁹ If the *Pillsbury* court considered the "as long as" provision it did not say so. Under the Restatement of Contracts there are only 2 ways to invalidate the *Pillsbury* contract for indefinite duration.

I. If the "promise" according to its terms "makes the performance optional with the promisor [shipper] whatever may happen, or whatever course of conduct in other respects he may pursue," it is no promise at all, "often called an illusory promise."²⁰ If the defendant had "promised" to have poultry for plaintiff to haul as long as defendant wanted poultry hauled, there would have been no promise, hence no contract. However, "if there is a period of time, . . . fixed or indefinite, during which neither party is at liberty to terminate the contract, then the contract is not so indefinite or uncertain as to its duration as to be incapable of enforcement."²¹

II. If the promise or performance to be rendered by the promisor (shipper) is so indefinite as not to be "reasonably certain," it is too indefinite to be enforced.²²

If the defendant had promised to have poultry for plaintiff to haul until World War III occurs, duration would not be reasonably certain, and the contract would be too indefinite to be enforced.

"The question . . . is not whether the contract is for an *indefinite term*, it is whether the contract, by its terms, is *indefinite as to its duration*."²³ A contract is not fatally defective merely because it fails to specify a fixed termination date.²⁴ If duration of a contract is made to depend on an ascertainable future event that is reasonably certain to occur the contract is not so indefinite as to duration as

¹⁹*Howard v. East Tennessee, Va. & Ga. Ry.*, *supra* note 11, at 869, quoted in *Poultry Haulers, Inc. v. Pillsbury Co.*, *supra* note 1, at 558. (Emphasis added.)

²⁰Restatement, Contracts § 2, comment *b* at 4 (1932).

²¹*Prescott v. Puget Sound Bridge & Dredging Co.*, 31 Wash. 177, 71 Pac. 772, 774 (1903).

²²Restatement, Contracts § 32 at 40 (1932).

²³*Ketcham v. Hall Syndicate, Inc.*, 37 Misc. 2d 693, 236 N.Y.S.2d 206, 212 (1962), *aff'd* 242 N.Y.S.2d 182 (1963).

²⁴*Prescott v. Puget Sound Bridge & Dredging Co.*, *supra* note 21.

to be no contract.²⁵ The expression of a contingency, the occurrence of which terminates the contract, necessarily excludes the idea that each party is at liberty to terminate the contract at will.²⁶ While the contract in *Pillsbury* is uncertain in the sense that it is not known specifically how long defendant may have poultry to be hauled, it is not a contract for an unending time. The event terminating the *Pillsbury* contract—defendant's having no more poultry to be hauled to its processing plant—is sufficiently definite for the contract to be enforced even though the specific time the event will occur cannot be determined in advance.²⁷ The longest possible time the contract could run would be until defendant stopped operating its processing plant. Agreements continuing as long as a particular business is operated have been upheld against contentions of invalidity for uncertainty as to duration.²⁸ It is not suggested that this is actually the

²⁵*Fuchs v. United Motor Stage Co.*, 135 Ohio St. 509, 21 N.E.2d 669, 672 (1939); *City of Big Spring v. Board of Control*, 389 S.W.2d 523, 529 (Tex. Civ. App. 1965); *Pallange v. Mueller*, 206 Wis. 109, 238 N.W. 815 (1931); *Robson v. Mississippi River Logging Co.*, *supra* note 18, at 370 (dictum).

²⁶See *McMullan v. Dickerson Co.*, 63 Minn. 405, 65 N.W. 661, 662 (1896).

²⁷See *Brown v. Birmingham Water Works Co.*, 169 Ala. 230, 52 So. 915 (1910), *rev'd on other grounds* 191 Ala. 457, 67 So. 613 (1914) (contract to furnish water while plaintiff occupied a certain dwelling); *Long Beach Drug Co. v. United Drug Co.*, 13 Cal. 2d 158, 88 P.2d 698 (1939) (exclusive agency contract to run as long as druggist kept the company's products in stock and sold at full list price); *Carter White-Lead Co. v. Kinlin*, 47 Neb. 409, 66 N.W. 536 (1896) (contract to employ as long as the employer maintained a certain plant); *Rague v. New York Evening Journal Publishing Co.*, 164 App. Div. 126, 149 N.Y.S. 668 (1914) (contract to pay compensation as long as plaintiff refused to sell newspapers of a competing company); *Jugla v. Trouttet*, 120 N.Y. 21, 23 N.E. 1066 (1890) (contract to supply plaintiff with gloves as long as defendant manufactured them); *Deucht v. Storper*, 44 N.Y.S.2d 350 (N.Y. City Ct. 1943) (contract to employ plaintiff as long as defendant continued to employ workers trained by plaintiff); *Johnson v. Homestead-Iron Dyke Mines Co.*, 98 Ore. 318, 193 Pac. 1036 (1920) (contract to haul ore for defendant as long as defendant had hauling to be done); *Prescott v. Puget Sound Bridge & Dredging Co.*, *supra* note 21 (contract of employment as long as defendant was working at Manila); *American Steam Laundry Co. v. Riverside Printing Co.*, 171 Wis. 644, 177 N.W. 852 (1920) (contract to furnish steam while plaintiff occupied certain premises); *City of Superior v. Douglas County Tel. Co.*, 141 Wis. 363, 122 N.W. 1023 (1909) (contract to provide free telephone service to city offices as long as defendant operated telephone system in city); *Foster Wheeler Corp. v. Zell*, 250 Ala. 146, 33 So. 2d 255 (1947) (dictum) (employment contract to continue as long as defendant was engaged in a particular construction project).

²⁸See, e.g., *Ehrenworth v. George F. Stuhmer & Co.*, 229 N.Y. 210, 128 N.E. 108 (1920); *Fuchs v. United Motor Stage Co.*, *supra* note 25 (as long as plaintiff owned 15 shares in defendant company or as long as plaintiff continued in a particular business); *City of Big Spring v. Board of Control*, *supra* note 25; *Restatement, Contracts* § 32, illustration 3 (1932).

term contemplated by the parties. Just how long defendant would have poultry to be hauled is a question of contract interpretation.²⁹

The validity of contracts for an indefinite term has long been recognized,³⁰ and it is especially necessary that such contracts between business concerns be enforced today. Large-scale production and highly competitive markets give rise to business uncertainties and increased business hazards often making absolute or calendric certainty in commercial contracts impractical or undesirable. A significant manifestation of the need for flexibility in business contracts is the development of requirement and output contracts.³¹ Although such contracts are indefinite, it is well established that they are not invalid for lack of certainty.³² "Business necessities require contracts of this class, though more or less indefinite, to be upheld."³³ The arrangement in *Pillsbury* is not uncommon in modern business practice; to require greater specificity would work undue hardship. The court's failure to give any meaning to the "as long as" provision is clearly wrong, whether the court assumed it to be illusory or not reasonably certain.

Even assuming that the *Pillsbury* contract contained no duration provision of any kind, as the court must have assumed, it is not illusory nor lacking in reasonable certainty if the circumstances surrounding its making indicate the parties did not intend that the contract be terminable in the unfettered discretion of either party.³⁴ When a contract is not for the employment of a person's services but is between business concerns for the use of one party's business services, the surrounding circumstances would ordinarily indicate that it is unlikely that the parties intended the agreement to be terminable in the unfettered discretion of either party. Although the contract does not expressly provide for the period of time during which per-

²⁹Although the hauling contract was to run as long as defendant had poultry to be hauled, the term was subject to defendant's satisfaction with plaintiff's haulage. However, defendant's reservation of power to terminate for dissatisfaction with plaintiff's haulage is not regarded as absolutely discretionary. The duration of the contract depends upon defendant's exercising his honest business judgment and not upon his whim; he must be honestly dissatisfied. Restatement, Contracts § 32, illustration 9 (1932). Hence, a satisfaction requirement introduces no illusoriness.

³⁰See cases cited note 27 *supra*.

³¹See Havighurst & Berman, *Requirement and Output Contracts*, 27 Ill. L. Rev. 1 (1932).

³²Restatement, Contracts § 32, illustration 12 (1932); 1A Corbin, Contracts § 156 (1963); 1 Williston, Contracts § 104A (3d ed. 1957); Havighurst & Berman, *supra* note 31,

³³T. B. Walker Mfg. Co. v. Swift & Co., 200 Fed. 529, 531 (5th Cir. 1912).

³⁴See note 18 *supra* and accompanying text.

formance is to be rendered, the circumstances surrounding a commercial transaction will usually indicate that some performance period was intended.³⁵ The court, having considered the nature of the contract and having found no provision for duration, could have interpreted the contract terminable only after a reasonable time and, further, upon reasonable notice.

A contract between business concerns for continuing commercial services is likely to involve a change of position by at least 1 party with the knowledge and at the insistence of the other³⁶ which would result in hardship upon termination by the other party.

If the circumstances are such that a termination of the relation by one party will result in great hardship or loss to the other, as they must have known it would when they made the contract, this is a factor of great weight in inducing a holding that the parties agreed upon a specific period. The avoidance of such hardship is not the sole reason that influences the court; such proof indicates the kind of agreement that the parties probably would have made.³⁷

In situations similar to *Pillsbury* there is some authority for requiring reasonable notice of termination, though termination is at the unfettered will of either party.³⁸ The courts do not give reasons for requiring such notice except to state that such notice is the general rule.³⁹ It is important to note, however, that the contracts involved were all for haulage, as here, and were commercial contracts as distinguished from personal service contracts. The requirement of reasonable notice seems to recognize the commercial nature of the

³⁵See *Burkle v. Superflow Mfg. Co.*, 137 Conn. 488, 78 A.2d 698 (1951). Defendant agreed to supply various plumbing items and plaintiff agreed to solicit orders on a commission basis for the items supplied; there was no express contract duration provision. In holding the contract not terminable at will, the court said: "It is an agreement between two business concerns either of which might incur . . . substantial expense in the expansion of its facilities to meet expected continuing performance by the other. To hold that either could, at its option, bring the agreement to an end would be unreasonable." *Id.* at 702.

³⁶Plaintiff in *Pillsbury* stated in its complaint that it purchased additional equipment at defendant's insistence and request.

³⁷3A Corbin, Contracts § 684, at 227 (1960). See Restatement, Contracts § 90 (1932).

³⁸See *Dover Copper Mining Co. v. Doenges*, 40 Ariz. 349, 12 P.2d 288 (1932); *United States Finance Co. v. Barber*, 247 Miss. 800, 157 So. 2d 394 (1963); *Stonega Coke & Coal Co. v. Louisville & N.R.R.*, 106 Va. 223, 55 S.E. 551 (1906). *Contra*, *Victoria Limestone Co. v. Hinton*, 156 Ky. 674, 161 S.W. 1109 (1914); Restatement (Second), Agency § 442 (1958) (no particular length of time required, simply notice of termination).

³⁹See cases cited note 38 *supra*.

relationship and the altered position of the nonterminating party and seems to achieve at least as much as permitting termination only after a reasonable time.⁴⁰

The *Pillsbury* court fails to inquire into the circumstances surrounding the contract which it must necessarily have considered to interpret the hauling contract justly. The court mentioned in its statement of the facts that plaintiff moved its plant in entering upon performance of the contract and purchased additional equipment upon defendant's notice of an increase in weekly volume to 300,000 birds. The court suggested that "the expense incurred by plaintiff in making the move would constitute consideration for the contract"⁴¹ but dismissed that as insufficient to relieve the contract of its uncertainty and lack of mutuality. If plaintiff's reliance upon the contract constituted consideration, then a method for determining length of contract term has been established. It is settled contract law that if an employee gives consideration in addition to his promise to serve, the employer is held to have promised to employ him "for a time which is reasonable in view of the purposes of the party giving the consideration."⁴² Even if plaintiff's plant relocation were viewed as mere preparation and not part of the bargained-for performance,⁴³ certainly its purchase of additional equipment was reliance induced by defendant's subsequent promise and was binding on defendant.⁴⁴ Thus viewed, the plaintiff was entitled under the contract to haul poultry for a reasonable time, even if—as is doubtful—the contract contained no duration provision.

It may be that the court was refusing to interpret the contract as one to run for a reasonable time when it said that "this type of contract is not to be confused with the distributorship agreements"⁴⁵ relied on by the defendant. Certainly for many purposes there is a marked distinction between the contractual relations in a hauling contract and those in a distributorship. However, when a distributorship agreement contains no duration provision, the recent trend is to

⁴⁰Reasonable notice of termination seems to imply duration for a reasonable time but duration for a reasonable time does not necessarily imply reasonable notice.

⁴¹*Poultry Haulers, Inc. v. Pillsbury Co.*, *supra* note 1, at 559.

⁴²Restatement (Second), Agency § 442, comment *c* at 340 (1958). See Restatement, Contracts § 45 (1932); Restatement (Second), Contracts § 45, comment *b* at 202 (Tent. Draft No. 1, 1964).

⁴³See Restatement, Contracts § 45, comment *a* (1932).

⁴⁴See Restatement, Contracts § 90 (1932).

⁴⁵*Poultry Haulers, Inc. v. Pillsbury Co.*, *supra* note 1, at 559.

hold that such agreements run for a reasonable time.⁴⁶ Reasonable time is implied because of the consideration given by the distributor in addition to his promise to serve the manufacturer.⁴⁷ The expense of establishing new facilities and purchasing new equipment is, of course, not common to all hauling contracts; such expense much more frequently occurs in distributorship arrangements. But where the hauler relies to his detriment upon the promise that it will be allowed to haul goods, the rationale of the distributorship cases is applicable.

Pillsbury disregarded express provisions in the hauling contract and read it as containing no duration provision whatever. It proceeded to apply mechanically a rule dealing with the simple personal employment relationship where anticipated detrimental reliance and intent to be obligated for some period of time are less easily implied.⁴⁸ The court had before it several more reasonable, more realistic alternatives which would have resulted in an interpretation more compatible with business necessities. To have recognized that absolute certainty is not always practical in business agreements and to have upheld the contract as sufficiently certain within the context in which it was made would have been a more sensible approach.

WILLIAM McC. SCHILD

⁴⁶See *J. C. Miller Co. v. Park & Tilford Distillers Corp.*, 123 F. Supp. 484 (N.D. Cal. 1954); *Nathan Elson & Co. v. H. Beselin & Son*, 116 Neb. 729, 218 N.W. 753, 756 (1928); 4 Williston Contracts § 1027A, at 2852 (rev. ed. 1936).

⁴⁷See authorities cited note 46 *supra*; Restatement, Contracts §§ 45-46 (1932); Restatement (Second), Contracts § 45, comment *b* at 202 (Tent. Draft No. 1, 1964).

⁴⁸See note 18 *supra* and accompanying text.

BOOK REVIEWS

OF MEN, AND NOT OF LAW. Lyman A. Garber. New York: The Devin-Adair Company, 1966. 196 pp., \$3.95.

Alleged "judicial usurpation" of the legislative function in fields of law ranging from civil rights to sovereign immunity is the subject of Lyman A. Garber's book *Of Men, and Not of Law*. Although American courts usually speak only in response to a "case or controversy," they not only adjudicate with some interstitial legislation, but frequently legislate on a grand scale.¹ Proponents of grand-scale judicial legislation urge courts to promote reform by correcting injustices and guaranteeing constitutional rights to all citizens.² But opponents accuse the courts of acting as "super legislators,"³ and insist that most social, economic, and political evils cannot be cured by judicial decision.⁴ Mr. Garber is a member of this latter group.

The author places part of the blame for the increasing crime rate in the United States on the courts because of their alleged preoccupation with the protection of the criminal. According to the author, the successful prosecution of lawbreakers is becoming more and more difficult because judges have developed "infinite refinements on the technique of 'trying the record' instead of trying the criminal." (p. 117). He also says that "today Federal interference is the most notable factor in criminology and is the major force in extending further immunities to criminals." (p. 117). To support these statements, Mr. Garber points to the 31 reversals of state court judgments in 50 first-degree murder cases reviewed by the United States Supreme Court between 1935 and 1957. But the author fails to include the percentage of murder cases that were actually appealed, and 31 reversals in 22 years does not seem out of proportion to the great number of such cases and the severity of the penalty. On the other hand, Federal influence cannot be shown by statistics alone for the threat of a reversal undoubtedly has an important curbing effect upon state prosecutors.

Although the author praises rules that serve "solely" (p. 141) to minimize the chance of convicting an innocent man, he condemns rules that sometimes enable "unquestionably guilty" criminals to escape

¹See Pound, *The Formative Era Of Common Law* 124 (1938).

²E.g., Vanderbilt, *The Doctrine Of The Separation Of Powers And Its Present Day Significance* 135-39 (2d ed. 1963).

³*Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting).

⁴See *Reynolds v. Sims*, 377 U.S. 533, 624 (1964) (Harlan, J., dissenting).

punishment. For example, he criticizes the Federal evidence rule which generally excludes evidence obtained by unlawful means, such as unreasonable search and seizure. Mr. Garber suggests that the average citizen would prefer to have his home invaded by law-violating police officers rather than by law-violators called criminals, who, but for the exclusionary evidence rule, might be safely lodged in prison. Also, the author asserts that, with the exception of an occasional regulation that is frequently flouted, "a fair degree of law and order is achievable only when police power is so overwhelming that none but psychopathic persons dare break the law." (p. 6). The zealous and powerful police force advocated by Mr. Garber is not necessarily an ideal goal.

Of *Men, and Not of Law* also criticizes the judiciary for enabling the Federal government to increase its control over individual citizens. Two of the examples used by the author are the Supreme Court decisions in *Wickard v. Filburn* (1942)⁵ and *Shelley v. Kraemer* (1948).⁶ The former, by upholding the constitutionality of the wheat marketing quota provision of the Agricultural Adjustment Act of 1938, sustained a penalty against a farmer for raising wheat in excess of a quota set by the United States Department of Agriculture. This wheat was intended solely for the farmer's own family and livestock, and Mr. Garber claims this was an "invidious restriction on the freedom of the American farmer." (p. 36). The author neglects to mention, however, that prior to the effective date of the quota, the Secretary of Agriculture was required to conduct a national referendum of wheat growers. If 1/3 of those voting opposed the quota, the Secretary was required to suspend its operation. On May 31, 1941, 81% of those voting in the referendum favored the quota. Thus, though Farmer Wickard was bound by the majority vote of his fellow wheat farmers, he had an opportunity to vote against the quota.

Similarly, the author claims that *Shelley*, which prohibited state court enforcement of racially restrictive covenants in real estate contracts, "abridged one of the American citizen's most valued and valuable rights—the freedom to contract and the related doctrine of sanctity of contract." (p. 47). Mr. Garber apparently places property rights at the "tip-most top of the top-most tip of the eucalyptus tree," for he blatantly asserts that "the degree of liberty among human beings is measurable by the right to own and manage property, to buy and sell it, to contract." (p. 34).

There is no doubt that a good argument can be made for more

⁵317 U.S. 111 (1942).

⁶334 U.S. 1 (1948).

self-restraint in the area of judicial law-making. However, *Of Men, and Not of Law* fails rather miserably in its attempt, and is hardly the "revealing expose of judicial usurpation" claimed in the book's foreword. The book is of little value to laymen, lawyers, or students of government. It is neither particularly well-written nor well-documented, and the author's bias and lack of objectivity outweigh the occasional valid and interesting comment. The book is especially disappointing because of the importance of its subject, for today judges are exercising vast and undefined powers. The social philosophies of our judges are quite legitimately a matter of great concern to all citizens, because judges, once installed, are relatively independent of popular control. Such independence, coupled with legislation on a grand scale, can violate classical democratic theory. The people should rely on their legislative representatives (who can raise the issues with the people in their election campaigns) to make laws preserving the liberties of all.

MALCOLM G. CRAWFORD

MASTERPIECES OF LEGAL FICTION. Ed. by Maximilian Koessler. Rochester, New York: The Lawyers Co-operative Publishing Company, 1964. 862 pp., \$9.95.

For this collection of 38 stories, Maximilian Koessler gathers notable fiction in which law plays a prominent part. His scheme is simple. He includes full stories only and generally arranges them according to their time setting. Spanning Europe, America, and the Orient, the stories in this collection suggest problems leading into and out of the courtroom. Included are Herman Melville's "Billy Budd, Foretopman," Steen Steensen Blicher's "The Rector of Veilbye," and Anatole France's "Crainquebille." Less familiar treasures include Sir A. P. Herbert's "Is Marriage Lawful?" and "Computer in Court," Robert Bristow's "Beyond Any Doubt," and Vincent Starrett's "The Eleventh Juror."

The stories in this volume appeal to a wide variety of literary tastes. The suspense of "Billy Budd, Foretopman," for example, centers on 2 characters who, representing moral extremes, clash in a court-martial. As whimsical as "Billy Budd" is dramatic, Sir Herbert's "*Marrowfat v. Marrowfat: Is Marriage Lawful?*" questions whether marriage is a contract or a gamble. For those who enjoy speculating as to tomorrow's law, there is a futuristic twist in "Computer in Court," which discusses the possibility of a libel suit when a power failure causes a computer to publish an erroneous credit report.

For readers who enjoy classic stories for the changeless problems they present, there is Robert Bristow's "Beyond Any Doubt," an exploration into the minds of jurors during deliberation of a murder case; Steen Steensen Blicher's "The Rector of Veilbye," involving the execution of an innocent man as a result of the perfidious fabrication of circumstantial evidence; and Anatole France's "Crainquebille," the classic reflection on how justice is administered to the poor. In all of these stories, whether the central issue concerns jury deliberation, the execution of the innocent, or legal treatment of the poor, law is treated as a social dynamic, rather than as an intellectual discipline.

Aside from the intrinsic delights of each of the stories collected by Mr. Koessler the book has a further advantage: it does not have to be read from cover to cover to be enjoyed. The reader can enjoy it whether he reads for an hour or an afternoon. The final test of a good anthology is not whether you cannot put it down but how often you pick it up. This book should be picked up often.

MARK FERDINAND

UNSAFE AT ANY SPEED. Ralph Nader. New York: Grossman Publishers, 1965. 365 pp., \$5.95.

When the Senate Commerce Committee opened its hearings on the Highway Safety Act of 1966, Ralph Nader as author of *Unsafe At Any Speed* was among the first witnesses. A Phi Beta Kappa graduate of Princeton and a graduate of the Harvard Law School, this Washington, D. C., attorney has become the principal crusader for compulsory automobile safety standards. Before the Commerce Committee, he acted as the prime antagonist of the automobile manufacturers in calling for safety engineering legislation to take effect immediately. Nader's testimony received much publicity for himself and his book, which, on July 17, 1966, was 8th on the New York Times Book Review "General Best Seller List," its 13th week on the list.

Both the Commerce Committee and the author are concerned with the prevention of the shocking number of automotive deaths and injuries; in 1964 there were 47,700 deaths and more than 4 million injuries. Automobile crashes are the 4th leading cause of death in the United States and are responsible for 1/3 of the hospitalizations for injuries. Nader accuses the \$25 billion automobile industry of ignoring safety in spending only 23¢ per car on safety research,¹ compared to \$700 per car on the annual model change, mostly styling.

¹In the absence of company figures, federal highway safety researchers

The author believes that the lack of safety information and the companies' failure to report available adverse safety information have made possible public acceptance of unsafe cars. He denies that all cars are equally safe. Until Nader's book, criticism of auto defects centered on the automobile in general without identifying particular models. A leading investigation, Cornell's Automotive Crash Injury Research, has only twice publicly compared companies, and then only companies, not models. In 1 case, publication of the facts had quick results: General Motors apparently redesigned its defective door latches, for within a year after a Cornell report showed General Motors cars to have 6 times more door loss than the next highest manufacturer, General Motors had reduced that loss to approximately that of the other manufacturers.²

What little automobile crash research there is results either from the small efforts of the manufacturers themselves or from federal and industry grants to universities. The effort is small: compare the \$53,000 spent to investigate each airplane death to the \$166 spent in highway traffic research for each automobile death.³ Nader wishes to change the researcher's present policy under which the manufacturers—but not the public—receive an analysis of model deficiencies. The author calls for the publication of these specific crash research data in order to expose the weaknesses of certain models. With knowledge of structural defects the car purchaser would—if rationality prevails—become more selective and the automobile manufacturers would be forced to compete in safety as well as styling.

The author cites many examples of insufficient spending for safety engineering. Particular attention is given to the first mass-produced American rear engine car, the Corvair, especially the 1960-63 models. He finds that the cost-cutting produced a car subject to oversteering and loss of control because of a poorly designed rear-end suspension system. General Motors is now a defendant in more than 100 law suits,

estimate that the automobile manufacturers allot a total of two million dollars a year to the design and evaluation of crash safety improvements. This amounts to about twenty-three cents for every car sold." p. 187.

²"On only two occasions has Cornell named the brands of cars involved in ACIR [Automotive Crash Injury Research] reports. In 1964 ACIR's B. J. Campbell reported that an analysis of door latch effectiveness on very late model cars showed little difference between General Motors, Ford and Chrysler." p. 136.

³"With some 1200 or less fatalities annually in civil aviation, the federal government spent between thirty-five and sixty-four million dollars each year from 1960 to 1965 on research and development for greater air safety. This was in addition to what was spent for safety work by the aircraft industry itself. Expenditure of sixty-four million dollars for 1200 fatalities means over fifty-three thousand dollars spent in safety research per fatality." p. 338.

totaling demands of \$40 million, involving these Corvairs. Without competitive safety, the industry has had no incentive to produce a safer car. The current request for an anti-trust exception for automobile manufacturers' safety programs shows that the car industry has learned little. In fact the Anti-Trust Division of the Justice Department is investigating agreements to cross-license car exhaust developments. Such agreements would seem to insure that no company would put forth a major inventive effort on car exhaust.

Nader seeks to alert the consumer to the hidden dangers in automobiles. Automobile designers have failed to protect the fragile human body from collision with the surrounding interior. He sees a car filled with danger from rigid steering columns and sprung glove compartments capable on impact of penetrating an occupant. The automobile manufacturers have generally omitted protective padding and have allowed door handles and instrument panels to project in a manner which can result in serious injury. According to Nader, numerous Wayne State University crash tests have found the standard windshield to be penetrable on sudden stop at speeds as low as 12½ mph. Nader notes that seat belts, optional in 1955, were not uniformly installed until 1964, when they were required by legislation.

The reformer-author's attempts to force out hidden facts and to move an indifferent society sometimes show frustration and anger. Loss of credibility, resulting from the author's emotional involvement with the subject, is heightened by his failure to cite research sources. The reliability of Nader's findings, however, has been supported by the Commerce Committee hearings. The success of this book can be measured by the increased public awareness of defective automobile design and of the obvious need for safety engineering. The book is well written and is recommended for lawyers and anyone who drives a car.

CONRAD M. CUTCLIFFE

CONTRACEPTION. John T. Noonan, Jr. Cambridge, Massachusetts: Harvard University Press, 1965. 533 pp., \$7.95.

In *Contraception*, the entire historical position of the Catholic Church on birth control from the first century of the Roman Empire to the latest Ecumenical Council has been analyzed and presented in language easily understood by laymen. The Catholic doctrine opposed to birth control is in a formal sense based on the Bible, thus Biblical passages are examined.

The Roman Catholic Church used Genesis 38:8-10, to provide a Biblical explanation for its condemnation of contraception:

Then Juda said to Onan, 'Go to your brother's wife, perform your duty as brother-in-law, and raise up seed for your brother.' Onan knew that the descendants would not be his own, so whenever he had relations with his brother's wife, he let (the seed) be lost on the ground, in order not to raise up seed for his brother. What he did displeased Yahweh, who killed him also.¹

Mr. Noonan considers the explanation a mere rationalization. The Catholic Church took the position that Onan was killed because he used a contraceptive method. Noonan contends Genesis 38:8-10 was misinterpreted and takes the position that Onan was slain because he broke a Mosaic Law which required Onan to propagate with his deceased brother's wife in order to furnish heirs. If Onan had first impregnated his brother's wife, birth control thereafter would not have violated Mosaic Law.

Mr. Noonan demonstrates that the Catholic Church adopted non-biblical ideas in order to increase its membership and thereby its influence. For example, the Church borrowed a Stoic doctrine which considered intercourse unlawful except for the purpose of creating children. This Stoic doctrine also condemned intercourse for pleasure because of an erroneous belief that during intercourse, but not otherwise, the female emitted a seed containing a soul.

Mistaken physiological concepts are examined after the predominant influence of secular philosophies is presented. The author discusses dozens of contraceptive methods based on incorrect biological assumptions and analyzes the various methods from the crude magical potions of the first century, the abortion methods of the Dark Ages, the menstrual cycle rhythm method, and the birth control pills available today. From Catholic documents, Mr. Noonan verifies the fact that the Church's opposition to most contraceptive methods stem from the ancient belief that the female emits a seed during intercourse. The Catholics then consider it homicide to disturb this seed. The next step in his investigation leads to a physiological study of the female. It has been proved that the female has no seed to emit during intercourse, but only an egg or ovum that ripens for fertilization between menstrual periods and is emitted as waste during menstruation. This has been substantiated from hundreds of medical books written after

¹The translation is from the La Sainte Bible. The Hebrew omits the words "his seed." Most English translations supply it.

1900. Thus, a combination of a secular philosophy and lack of scientific knowledge served as a rationalization of the Catholic doctrinal opposition to contraception.

It is Mr. Noonan's thesis that even without the Bible the Church would have opposed birth control. The very existence of the Church was threatened when the Gnostics and Manichees greatly increased their numbers with a resulting decrease in Catholic influence. The Gnostic heresy which opposed matrimony because Jesus did not marry was popular in the second century. In the fourth century the Manichean heretics proclaimed that "Procreation is the evil act of evil." (p. 111). These 2 sects opposed marriage and had a hedonistic attitude toward sex. *Contraception* explains how the clergy went outside the orthodox community and copied Stoic ideals in order to attract the multitudes. The Stoic philosophy, which allowed intercourse only for the purpose of creating children, had an immediate appeal for the Catholic Church, for it enabled the priests to differ with their heretical enemies, the Gnostics and Manichees, and at the same time increase their congregations.

Contraception will be controversial and should have a profound effect upon Catholic thinking. The materials are well documented and the author is unbiased in his presentation. The discussion of birth control is presented as a conflict within the Church. All viewpoints are examined and the issues precisely outlined. The socially-concerned person should certainly read this book, for it deals with a pressing social problem and is pertinent to both the Catholic and all other religious communities.

F. WILLIAM BURKE

BID FOR FREEDOM: U.S.S.R. v. TARASOV. C.L. Sareen. Englewood Cliffs, N.J.: Prentice Hall, Inc., 1966. 199 pp. \$3.95.

The phrase "international anarchy" is often used to describe the current status of international relations. The problem is that there is no supreme source of law in the international sphere; and in any international incident of consequence, political power rather than law decides the controversy. Recently, there has been substantial agitation by international legal authorities¹ for "depoliticization" of international disputes and increased emphasis on justice. *Bid For Freedom*, by C.L.

¹For example, 1 *The Strategy of World Order* (Falk & Mendlovitz ed. 1966); Clark & Sohn, *World Peace Through World Law* (2d ed. 1960).

Sareen, in describing the litigation resulting from a recent attempt by a Soviet national to defect, lends encouragement to the campaign for a "rule of law" to govern international relations.

Early on the morning of November 25, 1962, Vladislav Tarasov, a young Soviet naval mechanic, left his ship and slipped into the waters of Calcutta Bay to seek asylum aboard a United States merchant vessel moored nearby. The Soviet government discovered the escape almost at once and launched a recovery attempt which became an internationally publicized legal battle, matching the integrity of an independent Indian judiciary against the immense political power of the U.S.S.R.² C.L. Sareen, one of Tarasov's Indian attorneys, narrates the progression of events in the case that leads to a direct confrontation between principles of justice and international power.

On November 28, the Calcutta police took Tarasov from the United States ship, pursuant to a Soviet charge that he had stolen money before his escape. But a demand that he be turned over to the Soviet authorities was frustrated when the Calcutta magistrate, acting under a principle of international law by which each sovereign state has exclusive jurisdiction over crimes committed within its own territory,³ refused to relinquish custody of Tarasov. Subsequent attempts culminated in a Soviet demand for immediate extradition. The Indians refused to extradite except in accordance with the Indian Extradition Act of 1962,⁴ which requires that the party seeking extradition establish, to the satisfaction of an Indian magistrate, a *prima facie* case of the crime for which extradition is sought. On January 22, 1963, a formal hearing commenced in New Delhi, in which the Soviets attempted to establish a *prima facie* case.

Sareen's graphic description of the "courtroom environment" in New Delhi hardly seems to depict the appropriate setting for an international legal battle with far-reaching political repercussions:

Small, dusty and cramped, it was normally the scene of hearings for such crimes as beatings, thefts, rapes, customs violations, prohibition offenses and an infrequent murder. Except for the magistrates' bench on a raised platform and a crude wooden seat for

²This was considerable since India needed help in its border war against Red China. (p. 186.)

³It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation. *The Scooner Exchange v. M'Faddon*, 11 U.S. [7 Cranch] 478, 481 (1812).

⁴"But the principles of international law recognize no right to extradition apart from treaty." *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933).

reporters, the courtroom was barren of furniture. Butts of . . . cigarettes were scattered on the floor and the doorstep was stained red with splashes of pan spittle. Outside, ragged petty criminals squatted in the dust, and pigeons flew in and out of the unscreened windows to rest on the overhead ceiling fan, oblivious of the human activity below. (p. 56)

But, "a court is more than a courtroom" (p. 56), and on January 22, this dingy room began to fill with high-ranking diplomats, political observers, and correspondents from major newspapers all over the world.

At the hearing, the Soviet Union continued to exert maximum political pressure, but the presiding magistrate made it quite clear that the hearing would be conducted according to the principles of law, not politics. The entire incident reached its dramatic climax on March 29, 1963, when the magistrate announced a decision in favor of Tarasov before a packed courthouse of reporters, cameramen, and observers.

Narrating from personal experience, Sareen combines his legal expertise with a definite flair for dramatic writing, making this "accurate and extremely readable account of what was undoubtedly the most sensational case [in] of recent years" (p. iii) useful and interesting for both lawyer and layman. The techniques employed by Tarasov's attorneys are fascinating. For example, the use of cross-examination by J.G. Sethi, the brilliant criminal lawyer who served as Tarasov's head counsel, is an excellent example of the effectiveness of that tool when employed by an expert.

But, most important, this book carries significant implications for the future of international law and the preservation of individual freedom and dignity. On April 1, two days after the hearing, *The Statesmen* of New Delhi ran an editorial entitled "The Ways of Justice." The following excerpt, taken from that editorial, indicates the impact of the Tarasov Case in the international arena:

The assumption that a person is innocent until he is proved guilty is so fundamental to our system that it may seem incredible that a different system could exist and that people could be tried and condemned according to that system. . . . The difference obviously is not between two systems but between two ways of life. If the State becomes all-important and no limits are recognized to the demands it can make on the individual then it matters little what the demand is so long as it is made in the name of the State by a duly constituted authority. It is only where the

individual is considered to have certain inherent rights that the State's competence to curtail them in any way has to be established beyond reasonable doubt. This is accepted by most of us without question and the fact that a totally different system might collide with our own causes little concern. To the extent that it has corrected the perspective Tarasov's case should be useful, provided its implications are realized by public opinion.⁵

WILLIAM P. TEDARDS, JR.

⁵p. 185.