CONSTITUTIONAL LAW—SENTENCING INDIGENTS—THE VALIDITY OF IMPRISONMENT IN LIEU OF PAYMENT OF A FINE. *Williams v. Illinois*, 399 U.S. 235 (1970)—Willie E. Williams, an indigent, was convicted in an Illinois court for petty theft and received the maximum sentence of one year's imprisonment and a $500 fine,[1] plus $5 in court costs. The judgment provided that if Williams was in default of the payment of the fine and costs at the end of his one-year sentence, he should stand committed to satisfy them at the rate of $5 per day of imprisonment.[2] A postconviction petition[3] to vacate that portion of the judgment, filed on the grounds of Williams' indigency was denied by the sentencing judge. On direct appeal to the Illinois Supreme Court, the order was affirmed[4] over the allegation that it deprived Williams of equal protection of the law. In an 8-0 decision, Associate Justice Harlan concurring, the U. S. Supreme Court reversed.[5] Writing for the majority, the Chief Justice said:

> We conclude that when the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay. . . .[6]

Prior to *Williams*, courts generally did not consider default imprisonment as part of the prescribed penalty, but simply as a means of executing the monetary portion of the sentence.[7] However, established law in this area was subjected to increasingly successful attack on a variety of theories, especially when the unpaid fine resulted in confinement beyond the statutory maximum prescribed for the offense itself.[8] The constitutional basis for the decision in *Williams*, however, was a

---

[1] ILL. REV. STAT. ch. 38, § 16-1 (Supp. 1970) defines theft and provides in part: "A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both."

[2] ILL. REV. STAT. ch. 38, § 1-7(k) (Supp. 1970) provides in part: "A judgment of a fine imposed upon an offender may be enforced in the same manner as a judgment entered in a civil action; provided, however, that in such judgment imposing the fine the court may further order that upon nonpayment of such fine, the offender may be imprisoned until the fine is paid, or satisfied at the rate of $5.00 per day of imprisonment; provided, further, however, that no person shall be imprisoned under the first proviso hereof for a longer period than 6 months."

OHIO REV. CODE § 2947.20 (Supp. 1970) provides: "Where a fine may be imposed in whole or in part, in punishment of a misdemeanor, including the violation of an ordinance of a municipal corporation and the judge or magistrate has authority to order that the defendant stand committed to the jail of the county or municipal corporation until the fine is paid, the court may order that such person stand committed to such jail or workhouse until such fine is paid or secured to be paid, or he is otherwise legally discharged. Persons so imprisoned shall receive credit upon such fine at the rate of ten dollars per day."

[3] Civil Practice Act § 72, ILL. REV. STAT. ch. 110 § 72 (1968). Relief from judgment and decrees.

[4] "[T]here is no denial of equal protection of the law when an indigent defendant is imprisoned to satisfy payment of the fine." People v. Williams, 41 Ill. 2d 511, 244 N.E.2d 197, 200, *vacated*, 399 U.S. 235 (1970).

[5] Williams v. Illinois, 399 U.S. 235 (1970) [hereinafter cited as *Williams*].

[6] *Id.* at 240-41.

Unless otherwise indicated in the text, law applicable to nonpayment of a fine is also applicable to nonpayment of court costs. *Id.* at 239 & n.20.

[7] *E.g.*, People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966); Xenia v. Smith, 34 Ohio L. Abs. 620, 39 N.E.2d 191 (Ct. App. 1941), *appeal dismissed* 139 Ohio St. 169 (1941).

[8] *E.g.*, Strattman v. Studt, 20 Ohio St. 2d 95, 253 N.E.2d 749 (1969) (concurring opinion) (violates due process); Sawyer v. District of Columbia, 238 A.2d 314 (D.C. Ct. App. 1968)

denial of equal protection caused by operation of the Illinois work-off statute,[9] the effect of which was to impose different sanctions on convicted defendants on the basis of their wealth.

Because " '[t]he Constitution does not require things which are different in fact . . . to be treated in law as though they were the same. . .' legislation may [legitimately] impose special burdens upon defined classes in order to achieve permissible ends."[10] Hence, judicial review of legislation under the equal protection clause properly has two related areas of inquiry. One examines the rationality of the classification drawn,[11] while the other ensures ". . . that all persons . . . within the classification are treated with equality."[12]

With respect to the first area of inquiry, ". . . the classifications drawn by any statute . . . [cannot] constitute an arbitrary and invidious discrimination."[13] Thus, Illinois may properly single out persons convicted of petty theft for treatment different from that accorded to other citizens; but having determined the sanctions for petty theft, the legislature could not thereafter impose additional sanctions upon a particular class of petty thieves unless there was "some rationality" for that decision.[14] Furthermore, not only must there be some rationality for the decision, but if it were based on "highly suspect" criteria[15] or if it affects a ". . . fundamental right . . . , [the decision] must be judged by the stricter standard of whether it promotes a *compelling* state interest."[16] The Illinois petty theft statute could not directly impose an additional term of imprisonment upon indigent offenders simply for being poor, for that would clearly be a denial of equal protection. *Williams* holds that what the state could not accomplish directly by its petty theft law may not be achieved indirectly by operation of the work-off statute.[17]

To punish citizens for petty theft satisfies the first test of equal protection because petty theft is a rational basis for legislation. Once convicted, equal proection also

---

(abuse of judge's discretion); People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966) (work-off statute can be applied only to those defendants who are able but unwilling to pay); People v. Johnson, 24 App. Div. 2d 577, 262 N.Y.S.2d 431 (1965) (violates ban on excessive fines); People v. Collins, 47 Misc.2d 210, 261 N.Y.S.2d 970 (1965) (violates equal protection). *See generally* ANNOT. 31 A.L.R.3d 926 (1970); Note, *Imprisonment of Indigents for Nonpayment of Fines*, 31 OHIO ST. L.J. 342 (1970).

[9] "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 399 U.S. at 241, *citing* Griffin v. Illinois, 351 U.S. 12, 19 (1956). *See also* Burns v. Ohio, 360 U.S. 252 (1959) (right to appeal without payment of docket fee); Douglas v. California, 372 U.S. 353 (1963) (right to free counsel on appeal regardless of the appellate court's pre-hearing estimation of the merits of the appeal).

[10] Rinaldi v. Yeager, 384 U.S. 305, 309 (1966), *citing* Tigner v. Texas, 310 U.S. 141, 147 (1940). *Accord*, Stebbins v. Riley, 268 U.S. 137, 142 (1925).

[11] ". . . [T]he classification drawn must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . ." Royster Guano v. Virginia, 253 U.S. 412, 415 (1920).

[12] Stebbins v. Riley, 268 U.S. 137, 142 (1925).

[13] Loving v. Virginia, 388 U.S. 1, 10 (1967).

[14] Rinaldi v. Yeager, 384 U.S. 305, 308-9 (1966).

Habitual offender statutes are examples of a permissible postconviction distinction. Spencer v. Texas, 385 U.S. 554 (1967), *rehearing denied*, 386 U.S. 969 (1967) (consistent with due process); Graham v. West Virginia, 224 U.S. 616 (1912) (consistent with equal protection).

[15] McDonald v. Bd. of Election Commissioners, 394 U.S. 802, 807 (1969).

[16] Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

[17] "A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly." 399 U.S. at 243.

guarantees that all offenders will be "treated with equality."[18] This is the second subject of equal protection inquiry. Within this category,

> . . . [s]entencing judges are vested with wide discretion in . . . determining the appropriate punishment. . . . The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences.
>
> . . . .
>
> [However,] the Equal Protection Clause of the Fourteenth Amendment requires that the *statutory ceiling* placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status (emphasis supplied).[19]

Therefore, when state action extends imprisonment beyond the statutory ceiling, it treats one petty theft offender differently from another in an impermissible manner.

As noted earlier, whether the state chose to extend this confinement directly or indirectly is immaterial, for the fact remains that the offender has been denied equal protection. The thrust of the argument for Illinois, however, was that the method chosen to extend imprisonment, the work-off statute, was rationally related to the accomplishment of legitimate state goals to deter crime and collect revenue.[20] In effect, that statute established a second legislative category based on the offender's ability to pay his fine, *i.e.* wealth.

Unlike petty theft, wealth is a "highly suspect" classification and, for equal protection purposes, must be evaluated according to the compelling state interest test.[21] A simple rational relationship between the goals of legislation and the means chosen to accomplish them is not enough when dealing with a classification based on wealth. The means chosen must be *necessary* to promote the state's interests.[22] Illinois contended that without default imprisonment the goals of its penal statutes, both in deterring crime and collecting revenue, would be weakened by prohibitive administrative costs if it were forced to adopt other methods of collecting fines. The Court recognized the additional administrative burden, but termed it ". . . minimal, since . . . [repayment] could be reached through the ordinary processes of garnishment. . . ."[23] Thus, the existence of feasible alternatives to default imprisonment denied the state the ability to resort to a legislative classification based on wealth.

Note, however, that in speaking of "aggregate imprisonment" and "statutory maximum" for the substantive offense, the Court was not dealing with any potential denial of equal protection inherent in the mechanics of the work-off statute. In fact, the claim that every instance of default imprisonment violates the equal protection clause was advanced, but the Court found it "unnecessary to reach or decide" that issue[24] because it chose to dispose of the case on much narrower grounds —that the appellant was denied equal protection under the petty theft law. Aggregate imprisonment refers to confinement imposed by the sentencing judge plus that imposed by operation of the work-off statute. The limit is the maximum allowed by the substantive statute. Thus, a state may still *confine* a convicted defend-

---

[18] Stebbins v. Riley, 268 U.S. 137, 142 (1925).

[19] 399 U.S. at 243-44.

[20] Brief for Appellee at 14, Williams v. Illinois, 399 U.S. 235 (1970).

[21] Cases cited notes 14 & 15 *supra.*

[22] 399 U.S. 235, 244-45 (by implication); In Re Antazo, 3 Cal. 3d 100, 473 P.2d 999, 1006, 89 Cal. Rptr. 255, 262 (1970).

[23] 399 U.S. at 245, *citing* Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

[24] 399 U.S. at 238 & n.7.

ant solely by reason of his indigency,[25] but it cannot *extend* his imprisonment beyond the statutory maximum for the substantive offense.[26] A state is required to use alternative methods of collection only for that portion of the fine remaining unsatisfied after imprisonment.

Supporting that interpretation of *Williams* is the court's disposition of *Morris v. Schoonfield*,[27] where indigent traffic offenders were required to work out their fines for a period less than the maximum which could have been imposed upon them for the offenses. Focusing on the Maryland work-off statute,[28] the district court held that it could not

> . . . be applied constitutionally to an indigent defendant unless he is given the opportunity to tell the judge that he is financially unable to pay the fine before he is committed for nonpayment, so that the judge . . . may then tailor the fine to the situation of the particular defendant, by allowing him to pay the fine in installments or by reducing the fine. . . .[29]

The Supreme Court set argument for *Morris v. Schoonfield* together with *Williams*,[30] but later vacated the district court's action and remanded the case ". . . in light of . . . intervening legislation and [the] holding in *Williams v. Illinois*. . . ."[31] The Court thereby declined the opportunity to consider a situation in which the defendants were not denied the right to *limit* their confinement, but rather were denied the opportunity to *avoid* confinement entirely, an option which would have been available to them but for their poverty. By focusing attention upon the substantive criminal statute instead of the work-off procedure, *Williams* seeks to limit the use default imprisonment rather than to equalize the conditions under which it may be imposed.

Although the Court carefully narrowed *Williams* by resting its analysis on the substantive criminal statute, it nevertheless assigned the equal protection clause as the constitutional basis for its final decision. In contrast, the disposition of *In re Antazo*[32] by the Supreme Court of California offers a different equal protection analysis of default imprisonment by focusing directly upon the California work-off procedure instead of the substantive criminal statute.

The facts of *Antazo* presented a particularly poignant case for equal protection. Two defendants, one solvent, the other indigent, were convicted for basically the same offense. The imposition of sentence on both was suspended for three years and their probationary release was conditioned on the payment of fines amounting to $3,125 in lieu of which they were to remain in the county jail one day for each

---

[25] *Williams* changes nothing with respect to offenders who are able but refuse to pay their fines. *Id.* at 242, n.19. *But see* Strattman v. Studt, 20 Ohio St. 2d 95, 253 N.E.2d 749 (1969) (concurring opinion) where the low rate of daily credit was attacked as a denial of due process for both indigents and for solvent offenders who refused to pay.

[26] ". . . [O]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum *solely by reason of their indigency.*" 399 U.S. at 241-42 (emphasis supplied).

[27] 301 F. Supp. 159 (D.Md. 1969), *vacated* 399 U.S. 508 (1970).

[28] MD. ANN. CODE Art. 38, §§ 1, 4 (1957).

[29] 301 F. Supp. at 163.

[30] 397 U.S. 960 (1970).

[31] 399 U.S. at 508. The intervening legislation was ch. 147, Laws of Maryland, enacted April 15, 1970, which eliminated imprisonment for nonpayment of court costs and limited confinement for nonpayment of fines and penalties to the statutory maximum for the substantive criminal offense.

[32] 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

$10 unpaid. The solvent defendant paid his fines and was immediately released, while Antazo, his indigent accomplice, began working off his fines pursuant to the court order. In granting a writ of habeus corpus, the California Supreme Court concluded that, in so applying CAL. PENAL CODE sections 1205, 13251,[33] the sentence amounted to a ". . . discrimination based upon poverty. . . [which is unconstitutional unless it] is 'necessary to promote a *compelling* governmental interest. . . .' "[34] Neither rehabilitation nor coercing the payment of fines from one unable to pay were sufficiently compelling state interests ". . . because there existed alternative and less-intrusive means . . ."[35] of accomplishing them, making confinement unnecessary.

Note that by concentrating the equal protection analysis on default imprisonment rather than the substantive criminal statute, the California Supreme Court enabled the indigent defendant to avoid default imprisonment entirely rather than simply limit it to the statutory maximum. The court said:

> . . . Penal Code sections 1205 and 1203.1 may not be applied in such a way as to foreclose to the indigent offender the opportunity *to obtain his freedom* which is implicit in a sentence or probation order providing for payment of a fine. . . . [O]ur holding is simply that an indigent who would pay his fine if he could, must be given an option comparable to an offender who is not indigent (emphasis supplied).[36]

A third method of examining the constitutionality of default imprisonment is suggested by Justice Harlan's concurring opinion in *Williams*, in which he registered a strong dissent to the use of the equal protection clause to dispose of the issues in that case. His fundamental objection is that, under the guise of examining legislative classifications for suspect criteria and invidious discriminations, the Court is really ". . . preoccup[ied] with 'equalizing' rather than analyzing the *rationality* of legislative distinction[s] in relation to legislative purpose."[37] Given that preoccupation:

> If [the] equal protection implications of the Court's opinion were to be fully realized, it would require that the consequence of punishment be comparable for all individuals; the State would be forced to embark on the impossible task of developing a system of individualized fines, so that . . . the marginal disutility of the last dollar taken, would be the same for all individuals.[38]

Thus, if *Williams* requires that all offenders be given the "equal opportunity for

---

[33] CAL. PENAL CODE § 1205 (West 1970), the work-off statute; CAL. PENAL CODE § 13521 (West 1970), imposition of a penalty on criminal fines.

[34] 3 Cal. 3d 100, 473 P.2d 999, 1006, 89 Cal. Rptr. 255, 262 (1970).

[35] 3 Cal. 3d 100, 473 P.2d 999, 1008, 89 Cal. Rptr. 255, 264 (1970).

[36] 3 Cal. 3d 100, 473 P.2d 999, 1009, 89 Cal. Rptr. 255, 265. CAL. PENAL CODE § 1203.1 (West 1970) authorizes the imposition of a probationary sentence.

[37] 399 U.S. 260. *See also* cases cited notes 10 & 11 *supra*, and Katzenbach v. Morgan, 384 U.S. 641, 660-61 (1966) (dissenting opinion) (citations omitted), where Justice Harlan stated:

> It is suggested that a different and broader equal protection standard applies in cases where 'fundamental liberties and rights are threatened,' which would require a State to show a need greater than mere rational policy to justify classifications in this area. No such dual-level test has ever been articulated by this Court, and I do not believe that any such approach is consistent with the purposes of the Equal Protection Clause, with the overwhelming weight of authority, or with well-established principles of federalism which underlie the Equal Protection Clause.

[38] *Id.* at 261.

limiting confinement"[39] and *Antazo* goes a step further in requiring they be given the equal opportunity to avoid confinement,[40] then it is only logical that the size of a fine should be geared to make it equally as distasteful to the rich and the poor offender alike. Conceding this to be a ". . . desirable and enlightened . . . theory of social and economic equality . . . , [Justice Harlan contends] it is not a theory that has the blessing of the Fourteenth Amendment."[41] Equal protection of the law is different from social and economic equality. Therefore, the standards for judging legislative distinctions must be different too.

Equal protection should ensure "that all persons . . . within the [legislative] classification are treated with equality."[42] However, an examination of the rationality of the classification drawn, a function which the majority ascribed to equal protection, is properly the province of the due process clause. The only exceptions to this analytical division are racial classifications, ". . . for historically the Equal Protection Clause was largely a product of the desire to eradicate legal distinction founded upon race."[43] Due process standards focus upon:

> . . . the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternate means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen.[44]

Thus, equal protection cases whose inquiries are properly attributable to the due process clause[45] tend to "blur analysis"[46] for the sake of "equalizing."

Justice Harlan nevertheless concurred in the result of *Williams* because, as a matter of due process, the legislature "affected an individual right . . . in an arbitrary fashion."[47] Unlike the majority, he identified the individual interest affected as the "right to remain free,"[48] which is considerably broader than the right to limit confinement to the statutory maximum and requires an analysis of the work-off statute as well as the substantive criminal law.

Legislation is usually accorded a "presumption of constitutionality."[49] Thus, in the ordinary case the state will not be required to ". . . demonstrat[e] the existence of a rational connection between [the] means and ends . . ."[50] of its statutes. But, where a "basic liberty" such as the right to remain free is affected, the state is no longer relieved of that burden.[51] Having prescribed a jail term and a fine for

---

[39] *Id.* at 242.

[40] 3 Cal. 3d 100, 473 P.2d 999, 10009, 89 Cal. Rptr. 255, 265 (1970).

[41] 399 U.S. at 261.

[42] Stebbins v. Riley, 268 U.S. 137, 142 (1925).

[43] Shapiro v. Thompson, 394 U.S. 618, 659 (1969) (dissenting opinion).

[44] 399 U.S. at 260.

[45] *E.g.*, Williams v. Rhodes, 393 U.S. 23 (1968) (state law which made it nearly impossible for minority political party candidates to be placed on the ballot discriminated on the basis of political allegiance); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax discriminated on basis of wealth); and cases cited notes 13 & 43 *supra.*

[46] 399 U.S. at 260.

[47] *Id.* at 262.

[48] *Id.* at 263 & n. at 265.

[49] *Id.* at 262.

[50] *Id.*

[51] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (sterilization of habitual offenders unconstitutional).

petty theft, the Illinois legislature implicitly declared that its penological interests with respect to the fine could be satisfied without imprisonment. If the state thereafter imposes imprisonment for nonpayment of the fine, it must demonstrate a rational relationship between this procedure, the means, and the ends it seeks to accomplish. Considering the nature of the individual interest, administrative convenience is an unacceptable justification, especially "given the existence of less restrictive alternatives."[52] Neither does default imprisonment ". . . evinc[e] the belief that jail is a rational and necessary trade-off to punish [indigent offenders] . . . , since the substitute sentence provision . . . [is not] discretionary . . . , but rather equates days in jail with a fixed sum."[53] Justice Harlan concludes:

> . . . [W]hen a State declares its penal interest may be satisfied by a fine or a forfeiture in combination with a jail term the administrative inconvenience in a judgment collection procedure does not, as a matter of due process justify *sending to jail or extendinng the jail term* of individuals who possess no accumulated assets (emphasis supplied).[54]

The result reached in *Williams* is open to question both as to the use of the equal protection clause and the particular statute upon which the majority based its analysis. In fact, either alternative to the majority's position is more desirable because both confront the problem of default imprisonment directly. The Court might have been reluctant to apply the equal protection clause directly to a criminal procedure outside the adjudicative process because to do so would have set a broad precedent for equal protection examination of other non-adjudicative practices such as bail, which are also denied the indigent because he cannot afford to pay their cost.[55] But, despite its limitations, the opinion should be read mindful of the fact that before *Williams*, "[m]ost states permit[ed] imprisonment beyond the maximum term allowed by law, and in some there [was] no limit on the length of time one [might] serve for nonpayment."[56]

Kurt Schultz

CONSTITUTIONAL LAW—THE EQUAL PROTECTION CLAUSE AS APPLIED TO REVERSIONS OF CHARITABLE TRUSTS—*Evans v. Abney*, 396 U.S. 435 (1970)—*Evans v. Abney*[1] was the second time the Supreme Court of the United States had to consider the will of Senator A. O. Bacon of Georgia which conveyed property in trust to the City of Macon, Georgia, for the creation of a public park with the condition that it be used by white people only. The Supreme Court had previously ruled in *Evans v. Newton*[2] that the park could not be operated by the City on a racially discriminatory basis.

---

[52] 399 U.S. at 264.

[53] *Id.* at 265.

[54] *Id.*

[55] Illinois used this argument as one justification for upholding default imprisonment, Brief for Appellee at 18, Williams v. Illinois, 399 U.S. 235 (1970). *See also* Comment, *Indigent Court Costs and Bail: Charge Them to Equal Protection*, 27 MD. L. REV. 154, 165-68 (1967); Note, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394, 410-12 (1964).

[56] 399 U.S. at 239.

Subsequent to the writing of this article, the Supreme Court in *Tate v. Short*, 39 U.S.L.W. 4301 (March 2, 1971), held that the equal protection clause prohibits a state from imprisoning an indigent for the nonpayment of a fine but does not prevent confinement for those who are able to pay.

---

[1] 396 U.S. 435 (1970).

[2] 382 U.S. 296 (1966).

The facts surrounding this litigation begin with a will executed in 1911 by United States Senator Augustus O. Bacon in which he devised to the Mayor and Council of the City of Macon, Georgia, a tract of land of about 100 acres to be set up as a park for the "sole, perpetual and unending use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon."[3] The will provided that the control and management of the park was to be in the hands of a Board of Managers consisting of seven persons (all white) selected and appointed by the Mayor and Council of the City of Macon. The Board of Managers was given the authority, in their discretion, to admit to the use of the park white men and white persons of other communities. Although the Senator limited use of the park to white people only he asserted:

> . . . I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, . . . I am, however, without hesitation in the opinion that in their social relations the two races . . . should be forever separate and that they should not have pleasure or recreational grounds to be used or enjoyed, together and in common.[4]

The City of Macon obtained possession of the park area in February, 1920, by virtue of an agreement between the City and the trustees under the will. This agreement was entered into with the written consent of all of Senator Bacon's heirs. The park was opened and operated on a segregated basis, but in 1963, the City, realizing it could no longer legally enforce racial segregation, allowed Negroes to use the park facility. Individual members of the Board of Managers then instituted a suit to remove the City of Macon as trustee and have new trustees appointed to whom title to the park could be transferred. The City answered that it could not legally enforce racial segregation. The other "defendants" in the action, trustees of certain residuary beneficiaries of Senator Bacon's estate, admitted the allegation and requested that the City be removed as trustee. Thereupon, some Negro citizens of Macon intervened and contended that the racial limitation was contrary to the laws of the United States and asked that the court refuse to appoint private trustees. The City, by resolution, resigned as trustee and amended its answer praying that its resignation be accepted by the court. The heirs of Senator Bacon also intervened to request that the property revert to the Bacon estate in the event that the court fail to grant the plaintiffs' request to appoint new trustees. The Georgia court accepted the resignation of the City as trustee, and appointed three new trustees, finding it unnecessary to decide the request of the other heirs. On appeal, the Supreme Court of Georgia affirmed.[5]

The Supreme Court of the United States in *Evans v. Newton* reversed the judgment of the Georgia Supreme Court and held that the public character of Baconsfield "requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law."[6] The case was then sent back to the Georgia courts with instructions to the effect that the park could no longer be operated on a racially segregated basis. The Court did not decide the question of whether the trust was to be terminated due to the Court's decision making it illegal for the trustees to effectuate Senator Bacon's racial restriction.

---

[3] Evans v. Abney, 396 U.S. 435, 441 (1970).

[4] *Id.* at 442.

[5] Evans v. Newton, 220 Ga. 280, 138 S.E.2d 573 (1964).

[6] Evans v. Newton, 382 U.S. 296, 302 (1966).

The Georgia Supreme Court, after consideration of the matter, reasoned that even new trustees would be compelled to operate the park on a non-discriminatory basis and this ". . . would be contrary to and in violation of the specific purpose of the trust property as provided in the will. . . ."[7] Therefore they were of the opinion that "the sole purpose for which the trust was created has become impossible of accomplishment and has been terminated."[8] The case was remanded to the Georgia trial court which adhered to the opinion of the Georgia Supreme Court. In so doing the trial court gave effect to a Georgia statute that provided ". . . where a trust is expressly created, but its uses . . . fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs."[9] The petitioners urged that the *cy pres* statutes[10] of Georgia would allow the Georgia courts to delete the racially restrictive clauses from Senator Bacon's will, but the trial court was of the opinion that the racial restriction was indispensable. The Georgia Supreme Court affirmed[11] and, on a writ of certiorari,[12] the United States Supreme Court affirmed.[13]

The holding of *Evans v. Abney* was that the fourteenth amendment[14] does not require a state court to apply the *cy pres* doctrine to prevent termination of a trust that failed because the testator's sole purpose in establishing an all-white park was unconstitutional. The Court's decision rested on the ground that the question of applying the *cy pres* doctrine is one of state law. Justice Black, speaking for the majority, stated that the equal protection clause of the fourteenth amendment is not violated when a state court, in applying "neutral and nondiscriminatory state trust laws," denies both whites and Negroes the use of the park.[15]

In *Evans v. Newton*, the Supreme Court found "state action" when a city operated park was racially segregated in violation of the equal protection clause. In *Evans v. Abney*, however, a reversion of the same park ordered by the Georgia courts was not declared to be in violation of the equal protection clause. The facts that tended to show the involvement of the City and that were so persuasive in *Evans v. Newton* were not even discussed by the majority. Rather, the majority was con-

---

[7] Evans v. Newton, 221 Ga. 870, 871, 148 S.E.2d 329, 330 (1966).

[8] *Id.*

[9] "*Trusts implied, when.*—Trusts are implied—

* * *

4. Where a trust is expressly created, but no uses are declared, or are ineffectually declared, or extend only to a part of the estate, or fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs." GA. CODE ANN. § 108-106(4) (1959).

[10] "*Cy pres.*—When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will nearly as possible effectuate his intention." GA. CODE ANN. § 108-202 (1959).

"*Charitable devise or bequest. Cy pres doctrine, application of.*—A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator." GA. CODE ANN. § 113-815 (1959).

[11] Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).

[12] Evans v. Abney, 394 U.S. 1012 (1969).

[13] Evans v. Abney, 396 U.S. 435 (1970).

[14] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[15] Evans v. Abney, 396 U.S. 435, 446 (1970).

cerned with the issue of whether the decision of the Georgia court was violative of the fourteenth amendment, an issue very similar to the one presented in *Shelley v. Kraemer*.[16] The Court, in reaching the decision it did, distinguished *Shelley v. Kraemer*, and therein lies a significant aspect of this case.

Justice Brennan and Justice Douglas dissented. Justice Douglas pointed out that Senator Bacon had provided that " 'all remainders and reversions and every estate in the same of whatsoever kind' "[17] in Baconsfield be left to the City of Macon. The majority, accepting the opinion of the Georgia Supreme Court, indicated that this language did not relate in any way to what should happen upon a failure of the trust but was relevant only to the initial vesting of the property in the City.[18] Douglas also pointed out that a reversion of the trust did more damage to Senator Bacon's intentions than would continuation of the use of the park on an integrated basis. The property would still serve a public purpose and whites would certainly be admitted. Finally, Justice Douglas indicated that for many purposes to which the land could be put, it would be impossible to give effect to Senator Bacon's desire for segregation of the races in social relations.

Justice Brennan began his dissent by stressing that public money was used to purchase Baconsfield and employees of the Works Progress Administration, a Federal agency, were used to improve the park area.[19] The majority did not discuss these points. Also, Justice Brennan was disturbed by the idea that a "city park is [being] destroyed because the Constitution require[s] it be integrated. . . ."[20] Justice Brennan pointed out three elements upon which a state action argument could be founded. Justice Brennan first pointed out that Macon's acceptance of the gift of Baconsfield was state action because the ". . . State's involvement in the creation of such a right is also involvement in its enforcement."[21] The right created was the private right to compel or enforce the reversion of the public facility. Also, there was state involvement and state action when the City resigned as trustee rather than continue to operate the park on a non-segregated basis in accordance with the equal protection clause.

The second ground for a finding of state action, Brennan argued, was required by *Shelley v. Kraemer*, which held that state court enforcement of a restrictive covenant in a deed to private property barring sale to Negroes, which was valid under the state common law, was state action violative of the fourteenth amendment. Brennan pointed out that both the City of Macon and the State of Georgia, realizing the impossibility of keeping the park segregated, were more concerned about keeping Baconsfield open to the public rather than excluding Negroes. Thus, the state court decision to enforce the racial restriction prevented "willing parties from dealing with one another."[22] Brennan probably regarded the willing parties as the City, the Negro citizens of Macon, and the white citizens of Macon who preferred to see the park integrated rather than lose the park altogether.

The third element for a state action argument was based on the Georgia statute[23]

---

[16] 334 U.S. 1 (1948).

[17] 396 U.S. 448 (1970).

[18] *Id.* at 443 n.2.

[19] *Id.* at 451.

[20] *Id.* at 453.

[21] *Id.* at 455.

[22] *Id.* at 457.

[23] "*Gifts for public parks or pleasure grounds.*—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use

that allowed Senator Bacon to establish a racially segregated public park. Senator Bacon had written his will only six years after the enactment of this statute which permitted persons to devise property as parks and recreational facilities to municipal corporations and to provide that the use of such park could be limited to use by the "white race . . . or . . . colored race"[24] only. Justice Brennan felt this situation paralleled the situation in *Reitman v. Mulkey*[25] where the act of the California legislature in adopting a statute was held to be in violation of the equal protection clause when, in effect, the statute encouraged racial discrimination even though the State did not impose or compel it. Justice Brennan used the words of Justice White in *Evans v. Newton* to express his argument.

> [T]he State through its regulations has become involved to such a significant extent in bringing about the discriminatory provision in Senator Bacon's trust that the racial restriction must be held to reflect . . . state policy and therefore to violate the Fourteenth Amendment.[26]

Petitioners, some Negro citizens of Macon, Georgia, advanced the argument that the Georgia courts had a constitutional obligation to resolve any doubt about the testator's intent in favor of preserving the trust.[27] Senator Bacon, himself, did not make any express provision in regard to the park in the event that this discriminatory clause would not be enforced. Thus, the Georgia courts were left with two options: (1) apply the *cy pres* doctrine and allow the park to remain in operation or (2) reversion. Both options would in some way have effectuated the purposes of Senator Bacon's will. As it became a matter of choice since either option could have been construed as the major purpose, the selection of the latter option could have been regarded as unconstitutional state action since the selection gave effect to a racially discriminatory clause while selection of the first would not have. However, the Court did not view things that way. The Court expressed it thusly:

> . . . the Constitution imposes no requirement upon the Georgia court to approach Bacon's will any differently than it would approach any will creating any charitable trust of any kind. Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and nondiscriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust.[28]

The Court distinguished *Shelley v. Kraemer*, in these words:

> Similarly, the situation presented in this case is also easily distinguishable

---

as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property. (Acts 1905, p. 117)." GA. CODE ANN. § 69-504 (1967).

[24] *Id.*

[25] 387 U.S. 369 (1967).

[26] 396 U.S. 458 (1970).

[27] *Id.* at 446.

[28] *Id.*

> from that presented in *Shelley v. Kraemer*, 334 U.S. 1 (1948), where we held unconstitutional state judicial action which had affirmatively enforced a private scheme of discrimination against Negroes. Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park's facilities had it continued.[29]

The distinction is further explained in examining the specific language employed in *Shelley*.

> . . . [A]ction of state courts in enforcing a substantive common-law rule formulated by those courts *may* result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. (Emphasis added).[30]

The use of the word *may* implies that state courts do not always deny fourteenth amendment rights when they enforce a substantive common law rule. The majority felt that that is precisely what happened in *Evans v. Abney*. It is clear that in *Shelley v. Kraemer*, the state court had enforced a racially restrictive covenant. Such was not the case in *Evans v. Abney*. Here the Georgia court did not order enforcement of the racially restrictive clause. The Georgia court felt obliged to grant a reversion due to the existence of the provision for segregation, but in so doing the Supreme Court felt the Georgia court did not deny any rights guaranteed by the fourteenth amendment.

It is significant that the Court did not distinguish *Shelley v. Kraemer* on the basis that there was no state action involved. Indeed, the language used to distinguish *Shelley v. Kraemer* implies that there was state action. What was of greater concern to the Court was the consequence of the state court decision. Thus, we are left with the notion that even though there may be state action as a result of a state court decision, that decision must affect an inequality resulting from enforcement of a racially restrictive clause before the Supreme Court will strike down the decision of the state court as unconstitutional state action.

There are some compelling reasons why a charitable trust created for the benefit of the general public should not revert to the heirs of the grantor. A charitable trust with a racially restrictive clause that has just been established presents a stronger case for reversion than does a trust that has been operating for the public benefit for almost fifty years. A reason for not granting reversion of a long standing trust is the fact that heirs who may be unknown to the grantor receive a windfall while the general public loses property that had for years served a useful purpose, a purpose that may be needed in the future even more. It is unfair to the taxpaying public that a trust that has been operated by public officials for a considerable length of time and improved at the expense of the public should revert to the heirs of the grantor leaving nothing to the public for their investment of tax monies. Public officials would be justified in relying on the existence of the trust facility in not making plans for a duplicate facility. If they did go ahead and make such plans, this would subject them to criticism for unnecessary work and expenditures. And, if, after a period of time, the trust did fail, it would be much more difficult and expensive to obtain the necessary land to carry out the development of a new facility.

---

[29] *Id.* at 445.

[30] 334 U.S. 1, 17 (1948).

Further, reversion of charitable trusts adversely effects the development of the community. One court has been farsighted enough to take note of the deleterious effects of building and lease restrictions on real property devised in trust and to hold the restrictions illegal as against the community interest since they hampered the normal development of the surrounding neighborhood.[31]

After consideration of the policy reasons for not declaring a reversion and the state action arguments mentioned by Justice Brennan, it would appear as if the Court had ample basis for reversing the decision of the Georgia courts. However, it chose not to. In going beyond the "equal loss does not violate the equal protection clause" concept in looking for other possible reasons behind the decision, some specific language used by the Court indicates that the Court was concerned with another consideration.

> More fundamentally, however, the loss of charitable trusts such as Baconsfield is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death. This aspect of freedom of testation, like most things, has its advantages and disadvantages.[32]

One scholar has indicated that the term "state action" was one that, in its application, required two elements: (1) governmental action in fact, and (2) governmental action in a context of sufficiently grave social implication to persuade the Supreme Court of the necessity of federal action.[33] The language quoted above can be construed as the Court's reasoning in dealing with the second element. It is possible to interpret this reasoning as representing a shift in emphasis in the state action decision making process from the first element to the second element.

To make a positive determination in this regard, it is necessary to consider the import of the use of this language for possible application of this rationale of this decision to future cases. The quoted language itself and the Court's emphasis on neutral and non-discriminatory state trust laws indicates that the Court was limiting its application to the unique situation of a reversion of a charitable trust. This situation is unique because, as the Court felt, the inclusion of the racially restrictive clause in the trust caused a reversion which resulted in an equal denial, a result unlike the results obtained by enforcement of a racial discrimination in housing or public eating places. Further, immediately following the above quote, the Court stated:

> The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.[34]

This indicates that the Court was concerned only with constitutional proscriptions and not social policy. Thus, the Court's decision does not represent a shift in the state action decision making process. It stands for the notion that though there may be governmental action, such action is not violative of the fourteenth amendment if an equal denial is the result of such action.

As a practical matter, however, the "equal loss" result is subject to criticism on the basis of social policy reasons. It is regrettable that the Court was not more concerned with social policy. Justice Brennan presented a sound argument for

---

[31] Colonial Trust Co. v. Brown, 105 Conn. 261, 135 A. 555 (1926).

[32] 396 U.S. 435, 447 (1970).

[33] Clark, *Charitable Trusts, The Fourteenth Amendment and The Will of Stephen Girard*, 66 YALE L.J. 979, 1002 (1957).

[34] 396 U.S. 435, 447 (1970).

concern with social policy. He was reminded of the situation in *Brown v. Board of Education*.[35]

> Its closing for the sole and unmistakable purpose of avoiding desegregation, like its operation as a segregated park, 'generates [in Negroes] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.' *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).[36]

A decision based on social policy reasons could have caused a continuation of the park facility, a more reasonable result that would have been just as defensible as reversion. Even more significantly, such a result would not have been violative of the Constitution either.

It is noteworthy that the Court tempered the effect of the decision with these words. "Nothing we have said here prevents a state court from applying its *cy pres* rule in a case where the Georgia court, for example, might not apply its rule."[37] The language used does not prevent the Supreme Court from reversing a state court decision of a similar matter where the Supreme Court feels that state court has not correctly applied the laws of its own state or has not correctly interpreted the major intention of the testator.

Evans v. Abney exemplifies the cross purposes and problems involved in defining the scope of the fourteenth amendment. The Court was of the opinion that an equal denial did not conflict with the constitutional proscriptions contained in the fourteenth amendment. The other alternative, continuation of the park, would have been a more justifiable result and could and should have been obtained by stressing the social and public reasons against the reversion. It remains to be seen how this decision will affect the holding of *Shelley v. Kraemer* in future cases. The Court was careful to distinguish *Shelley v. Kraemer* on the basis of the resultant effect of the state court decision. It is submitted that *Evans v. Abney* will not serve as precedent in future cases involving racial limitations in other than charitable trusts since the basis of the decision was, as termed by the Supreme Court an "equal loss," a highly unlikely result in situations other than a reversion of a charitable trust.

William A. Morse

EVIDENCE—CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT—*California v. Green*—399 U.S. 149 (1970)—Melvin Porter, a minor 16 years old, was arrested for violating the California Health and Safety Code[1] after he had sold quantities of marijuana to an undercover officer for the Los Angeles Police Department. While in custody and being interrogated by Officer Barry Wade, Porter explained that John Green, 24 years old and an acquaintance of some four years, had called him at his home and had asked him to sell some "stuff" or "grass." Porter agreed and Green allegedly personally delivered the marijuana in a brown shopping bag, admonishing Porter to keep one bag for himself and to sell the rest. Based upon Porter's statement and corroborating information from Officer Dominguez, an undercover agent, who had participated in a previous encounter with Green concerning

[35] 347 U.S. 483 (1954).

[36] 396 U.S. 454 (1970).

[37] *Id.* at 447.

[1] CAL. HEALTH AND SAFETY CODE section 11530.5 (West 1964). This provision punishes offenses dealing with the possession of marijuana for sale.

drugs,[2] Green was arrested and charged with violating section 11532 of the California Health and Safety Code.[3]

At the preliminary hearing for Green on February 8, 1967, Porter testified under oath that instead of personally delivering the marijuana Green had showed him where the bag containing the narcotic was hidden behind some bushes at Green's parents' house. Porter explained that the arrangement between Green and him required that he sell the 29 "baggies" and pay the money over to Green as the sales progressed. Porter then told the committing magistrate that he had retrieved the bag, had sold some "baggies" and had handed money over to Green before the rest of the supply was stolen. The last "baggie" was purchased by Officer Dominguez. The preliminary hearing, attended by Green who was represented by counsel, offered a full opportunity for cross-examination which was utilized extensively. On the basis of Porter's and Officer Wade's testimony, Green was committed to stand trial.

Green pleaded not guilty and stood trial before a court sitting without a jury approximately two months after the preliminary hearing. (Porter was then on probation after pleading guilty to his offense.) At that time Porter, key witness for the prosecution, became ". . . markedly evasive and uncooperative on the stand."[4] He admitted that he had received a quantity of marijuana after Green had called him about some "stuff," selling a portion and the rest being stolen from him; but he asserted that he was uncertain how he had obtained the narcotic. Porter declared that his uncertainity rested on the fact that he had taken "acid" (LSD)[5] before the phone call preventing him from effectively distinguishing between fact and fantasy for an indefinite period of time afterwards. At that point the prosecution, relying upon section 1235 and section 770 of the California Evidence Code,[6] began

---

[2] Officer Dominquez testified at the trial that when he attempted to purchase marijuana from Porter a second time Porter told him that he would have a supplier named "John" contact him. He thereafter received a phone call from Green who arranged a meeting. The negotiations broke off after Green insisted that Dominquez take "narcotics" (a bottle of liquid containing a powdery substance identified as LSD and an unproduced marijuana cigarette) as a show of good faith. However, both Porter and Green testified at the trial, explaining that the scene was staged by Green as a favor for his friend Porter to expose Dominquez as an undercover agent. The trial court carefully limited admission of Dominquez's testimony to show that Green and Porter were acquainted and had previous associations. People v. Green, 70 Cal.2d 654, 657-58, 451 P.2d 422, 424, 75 Cal. Rptr. 782,784 (1969); People v. Green, 71 Cal. Rptr. 100, 101-02 (Ct. App. 1968).

[3] CAL. HEALTH AND SAFETY CODE section 11532 (West 1964). The section reads in part:

> Every person of the age of 21 years or over who hires, employs, or uses a minor in unlawfully . . . selling . . . any marijuana, or who unlawfully sells, furnishes, administers, gives . . . or who induces a minor to use marijuana in violation of the law, is guilty of a felony punishable by imprisonment in the state prison from 10 years to life and shall not be eligible for release upon . . . parole . . . until he has served not less than five years in prison.

[4] 70 Cal. 2d at 657, 451 P.2d at 423, 75 Cal. Rptr. at 783. Both the presiding judge at the trial and the prosecutor commented upon the undependability, worthlessness, and lack of veracity of Porter. Two witnesses also testified at the trial as to Porter's bad reputation in the community. Brief for Respondent at 3-4 n.2, California v. Green, 399 U.S. 149 (1970).

[5] d-lysergic acid diethylamide. This hallucinogenic drug disrupts and distorts sensory stimulation going to the central nervous system, causing behavioral changes and mixed sensory messages, exhibited in the psychological phenomenon of synesthesia. A person under the influence of the drug suffers from a general disorientation of mind to body and mind to environment, characterized by a failure to distinguish fact from fantasy. BUREAU OF NARCOTICS AND DANGEROUS DRUGS, U.S. DEPARTMENT OF JUSTICE, LSD-25: A FACTUAL ACCOUNT 11-12 (1969).

[6] CAL. EVID. CODE section 1235, section 770 (West 1966). The sections read as follows:

> Section 1235. Inconsistent statement. Evidence of a statement made by a witness is

to read selected portions of Porter's preliminary hearing testimony, not only to refresh his failing memory, but also to submit those statements as substantive evidence for the truth of the matter asserted therein. Porter continued his testimony (his memory "refreshed") being substantially the same story that he had given at the preliminary hearing and being prompted by the prosecutor several times. On cross-examination Porter indicated that his memory of the preliminary hearing testimony was mostly refreshed by the prosecutor but that recall of the actual events surrounding the procurement of the marijuana was unclear. Officer Wade, another witness for the prosecution, testified about Porter's statements to him. His testimony was also admitted as substantive evidence. Porter then testified that he had made the preliminary hearing testimony and the statements to Officer Wade, believing both to be the truth at the time that he made them, but at the trial the truth was that he could not remember the actual events. Finally, Green took the witness stand in his own defense, completely denying that he had been involved with drugs or that he had asked Porter to sell drugs for him.[7] At the end of the trial the court convicted Green of the charged offense and sentenced him to five years in prison, suspending the prison term and placing him on probation conditioned upon spending one year in the county jail.

Green brought a timely appeal basing his argument for reversal on three separate grounds: 1) the evidence was insufficient to support the judgment; 2) the prosecution suppressed evidence; and 3) certain remarks by the prosecutor constituted prejudicial misconduct.[8] The court of appeals, however, reversed the conviction on the basis of the California Supreme Court's holding in the *People v. Johnson*[9] that section 1235 of the Evidence Code unconstitutionally denied the defendent in a criminal trial the right to confront witnesses testifying against him as guaranteed by the sixth amendment,[10] applied to the states through the fourteenth amendment.[11] Admitting the evidence of Porter's preliminary hearing and Officer Wade's statement was, therefore, reversible error under the standard as set out in *Chapman v. California*.[12] The California Supreme Court, on appeal by the state, affirmed the reversal, feeling impelled by several recent United States Supreme Court decisions[13]

---

not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

Section 770. Evidence of inconsistent statement of witness. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

(a) The witness was so examined while testifying as to give him an opportunity to explain or deny the statement; or

(b) The witness has not been excused from giving further testimony in the action.

[7] In his testimony Green revealed a possible motive for Porter to implicate him in drug traffic. He testified that he had sold an automobile to Porter, but that he had to repossess it when Porter failed to make the payments. People v. Green, 71 Cal. Rptr. 100,102 (Ct. App. 1968).

[8] *Id.*

[9] 68 Cal.2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), *cert. denied*, 393 U.S. 1051 (1969).

[10] U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him. . . ." Almost every state constitution has a similar provision, *see* 5 J. WIGMORE, EVIDENCE [hereinafter cited WIGMORE] section 1397 127-30 n.1 (3d ed. 1940). Although the California constitution Article I, section 13 clause 8 does not seem to explicitly guarantee the right of confrontation, it has been interpreted to insure the confrontation rights of the accused. People v. Dozier, 236 Cal. App. 2d 94, 45 Cal. Rptr. 770 (1965).

[11] Pointer v. Texas, 380 U.S. 400 (1965).

[12] 386 U.S. 18 (1967).

[13] Pointer v. Texas, *supra* note 11; Douglas v. Alabama, 380 U.S. 415 (1965); Barber v. Page,

that the exception to the hearsay rule created by section 1235 infringed upon a defendant's right to be confronted. The California court followed closely its decision in the *Johnson* case in which it declared that subsequent cross-examination at trial of previous inconsistent statements did not alleviate the hearsay dangers that the confrontation right was designed to diminish or put the ultimate trier of fact in as good a position to judge credibility of witnesses as did timely or contemporaneous cross-examination.[14] The court emphasized the sixth amendment confrontation clause was satisfied only by the opportunity of cross-examination of the witness immediately following direct examination before the ultimate trier of fact.[15] The Supreme Court of the United States on *writ of certiorari* from the State of California in the case of *California v. Green*[16] upheld the constitutionality of section 1235 of the California Evidence Code declaring it not to be in conflict with the right of confrontation guaranteed by the sixth amendment.

Traditionally, the right of confrontation and the common law hearsay rule with its exceptions have been directed toward the same ultimate goal: ". . . [maximization of] the probability that the truth will emerge. . . ."[17] Their historical development was directed toward judicial concerns of trustworthiness and reliability of evidence that was being used to convict people.[18] The hearsay rule forbids the use of extra-judicial statements, as credible substantive evidence on the theory that since the statements were made out of court by an absent person, not subject to cross-examination, the reliability of the statements were suspect due to the possible existence of failing memory and perception, insincerity, and faulty narration.[19] Inherent within the protection that the hearsay rule provided was the right of the accused to cross-examine any witness testifying adversely to him. At common law, the hearsay rule was thought to consist of the essential and indispensable literal right of confrontation.[20] The right of confrontation, though, came to mean primarily the opportunity to cross-examine with the incidental advantage of the observation of the witnesses' demeanor.[21] Cross-examination being the creature and keystone of the adversary system imposed a testing of damaging testimony in which the accused could discredit the statement totally or qualify it.[22] The right to cross-examination at common law was never devoid of the imposition of the hearsay exceptions. Some legal commentators were led to consider that the *constitutional* right of confronta-

---

390 U.S. 719 (1968); Berger v. California, 393 U.S. 314 (1969); Bruton v. United States, 391 U.S. 123 (1968).

[14] People v. Johnson, *supra* note 9.

[15] *Id.* at 660, 441 P.2d at 120-21, 68 Cal. Rptr. at 608-09.

[16] 399 U.S. 149 (1970).

[17] Semerjian, *The Right of Confrontation*, 55 A.B.A. J. 152, 153 (1969).

[18] *See* 5 WIGMORE section 1364; C. MCCORMICK, EVIDENCE [hereinafter cited MCCORMICK] sections 223-25 (1954); 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 177-87, 214-19 (3d ed. 1944); 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, 216-33, 324-427 (1883); Morgan, *The Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 179-83 (1948); Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 746-47 (1965).

[19] MCCORMICK section 224 at 458; 5 WIGMORE sections 1362-63; Morgan, *supra* note 18, at 218.

[20] 5 WIGMORE section 1362 at 4. The literal right of confrontation appears to be traceable to the abuses that accompanied the trial of Sir Walter Raleigh for treason in 1603. HELLER, THE SIXTH AMENDMENT 104 (1954).

[21] MCCORMICK section 19 at 40; 5 WIGMORE section 1365 at 27.

[22] *See* 5 WIGMORE sections 1367, 1370.

tion was merely a codification of the hearsay rule with all of its exceptions.[23] However, it seems that, although the constitutional right of confrontation and the hearsay rule, with its exceptions, considerably overlap as to protection of similar values and utilization of the same testing vehicle (cross-examination), the two are not concurrent; and the distinction between them seems to be that the right of confrontation is more basic and broad and cannot be narrowly subjected to the specifics of the common law hearsay rule and its exceptions.[24]

At common law prior statements of a witness, not included in trial testimony, were only considered admissible if characterized under one of the recognized exceptions to the hearsay rule. Under the "orthodox rule" prior inconsistent statements of a witness, testifying at trial, were accordingly considered inadmissible as hearsay.[25] Generally, this exclusion centered upon the idea that extra-judicial statements given without the oath requirement and not subject to cross-examination, at the time given, were not reliable as to the truth of the facts. That theory was supported by the idea that the effectiveness of subsequent trial cross-examination eroded as a consequence of the time lapse giving the declarant an opportunity to either harden his previous false testimony or manufacture new evidence.[26] Prior inconsistent statements, though, were allowed limited use to impeach the credibility of a witness on the stand.[27]

Contrary to the "orthodox" view is the idea that prior inconsistent statements made by a witness subject to cross-examination at trial can be admitted for the truth of the matter asserted therein. The theory has been proposed by many legal commentators[28] and adopted in a few jurisdictions.[29] This minority position would allow admission of such statements when a declarant is a witness at the subsequent trial. Such a contingency would satisfy the purpose of the hearsay rule because the witness should be under oath, subject to cross-examination, and scrutinized by the court to determine the truth or falsity of present or past statements. Furthermore, the prior inconsistent statement is closer to the actual events and the inconsistency could be explained by reference to the time that has elapsed between the occurrence of the events and the trial.[30] The trustworthiness and reliability of such evi-

---

[23] 5 WIGMORE section 1397 at 127; Comment, *Federal Confrontation; A Not Very Clear Say on Hearsay*, 13 U.C.L.A. L. REV. 366 (1966).

[24] *See* note, *Preserving the Right of Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 747 (1965); 15 WAYNE L. REV. 874, 881 (1969).

[25] *See*, MCCORMICK section 39; 3 WIGMORE section 1018 688 n.3 (cases decided under the orthodox theory); *accord*, Bridges v. Wixon, 326 U.S. 135 (1945) (decided upon a federal evidentiary standard); Ellis v. United States, 138 F.2d 612, 616-21 (8th Cir. 1943); Goings v. United States, 377 F.2d 753 (8th Cir. 1967) (decided upon common law evidentiary rules); State v. Saporen, 205 Minn. 358, 361-62, 285 N.W. 898, 900-01 (1939); Fawcett v. Miller, 85 Ohio L. Abs. 443, 172 N.E.2d 328 (Ct. App. 1961).

[26] 205 Minn. 385, 361-62, 285 N.W. 898, 900-01 (1939); MCCORMICK section 39 at 81; 15 WAYNE L. REV. 874, 878 (1969).

[27] *See generally* 3 WIGMORE sections 1017-46.

[28] *E.g.*, 3 WIGMORE section 1018; MCCORMICK section 39; Morgan, *supra* note 18; Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43, 48-55 (1954); MODEL CODE OF EVIDENCE rule 503(b) (1942); UNIFORM RULES OF EVIDENCE 63(1); The Preliminary Draft of the Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 8-01(c)(2) (1969).

[29] Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969); Gelhaar v. State, 41 Wis.2d 230, 163 N.W.2d 609 (1969); United States v. DeSisto, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964).

[30] CAL. EVID. CODE section 1235 Comment—Law Revision Commission (West 1964).

dence, that the confrontation right and the hearsay rule is designed to protect, seems satisfactorily fulfilled by the admission of prior inconsistent statements.

The adoption of section 1235 of the California Evidence Code represents an attempt to expand the horizon of admissible evidence by creating a statutory exception to the common law hearsay rule. Reliance on the trustworthiness of such evidence stems from the arguments alluded to in the minority opinion. Read in conjunction with section 770, section 1235 allows the admission of any prior inconsistent statement of a declarant who becomes a witness at the subsequent trial. If the witness was not allowed to explain or deny the statement or was excused from testifying further, then the evidence may only be admissible if the "interests of justice" require it. The consitituional validity of this statute has been tested twice by the California Supreme Court.[31] That court in each instance felt that its decision sustaining the constitutional challenge was dictated by the recent decision of the Supreme Court of the United States interpreting the right of confrontation.

The constitutional definition of the right to confrontation continuously has been in terms of the opportunity to cross-examine an adverse witness. The Supreme Court has stated several times:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . testing the recollection and sifting the conscience of the witness . . . compelling him to stand face to face with the jury in order that they may look at him, and judge . . . whether he is worthy of belief.[32]

In *Pointer v. Texas*[33] testimony of the victim of a robbery at a preliminary hearing, where the accused was present, but not represented by counsel, and did not cross-examine, was used to convict the defendant. The Court declared that the evidence admitted from the preliminary hearing testimony violated the defendant's right to confront the witness because he was not given an opportunity to cross-examine.[34] The Court, though, went further to observe that the outcome of the case might have been different if the previous testimony had been taken under conditions offering the defendant ". . . a complete and adequate opportunity to cross-examine."[35] Decided on the same day, *Douglas v. Alabama*[36] held that the confronation clause denied the use of a confession of a co-defendant that implicated Douglas when the co-defendant effectively thwarted Douglas' right to cross-examine by refusing to answer any questions on the stand, declaring his right against self-incrimination.

In the cases after *Pointer* and *Douglas* the Court has not furnished an explicit standard to define the outer limits of the Constitution's confrontation clause—how much confrontation is minimally necessary to be within the constitutional sanction. Cases that were decided before *Pointer* recognized that certain exceptions to the common law hearsay rule, dying declarations[37] and testimony at a previous trial,[38]

---

[31] People v. Johnson, *supra* note 9; People v. Green, 70 Cal.2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969).

[32] Mattox v. United States, 156 U.S. 237, 242-43 (1895). *E.g.*, Salinger v. United States, 272 U.S. 542 (1926); Douglas v. Alabama, 380 U.S. 415, 418 (1964).

[33] 380 U.S. 400 (1964).

[34] *Id.* at 407.

[35] *Id.*

[36] 380 U.S. 415 (1965).

[37] Robertson v. Baldwin, 165 U.S. 275 (1897); Snyder v. Massachusetts, 291 U.S. 97 (1934).

[38] Mattox v. United States, 156 U.S. 237 (1895).

were admissible within the constitutional mandate of confrontation. The Court, however, seemed uncertain whether the confrontation clause's guarantee contained just the exceptions at common law or whether those exceptions could be enlarged from time to time.[39] Thus, in *Barber v. Page*[40] the Court, faced with a conviction based upon the preliminary hearing testimony of one Woods, who was incarcerated in a different jurisdiction, declared the testimony inadmissible because the prosecution had made no good faith effort to obtain the witness to testify at trial. Although there was traditionally an unavailability exception to confrontation arising from necessity, the Court asserted that the exception was deprived of validity because of the facilities available to secure the attendance of witnesses. Like the majority opinion in *Pointer*, the Court went further than the actual decision in the case to observe:

> Moreover, we would reach the same results on the facts of this case had petitioner's counsel actually cross-examined Woods at the preliminary hearing. . . . The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists. . . . While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not . . . such a case.[41]

In the subsequent case of *Bruton v. United States*,[42] holding that limiting instructions did not cure the denial of confrontation rights, the Court implied that there was little difference as far as constitutional confrontation was concerned between the use of prior inconsistent statements as substantive evidence and the use of prior inconsistent statements for impeachment purposes. The Court, however, explicitly declared that it was intimating no view whatever concerning the constitutionality of any recognized exception to the hearsay rule.[43] This rather checkered outline was to provide the California Supreme Court with a course of action in first *Johnson* and then *Green*.

Faced in *Johnson* with a conviction based primarily upon evidence provided by grand jury testimony, the Supreme Court of California asserted that the primary interest guarded by the confrontation clause was not only cross-examination but contemporaneous or timely cross-examination before the ultimate trier of fact during the actual trial.[44] Only cross-examination, taken immediately after the direct examination elicited at trial, could satisfy constitutional confrontation. That decision seemed to rely basically upon the language in *Barber v. Page*,[45] that stressed the right of

---

[39] "[T]he privilege of confrontation at [no] time [has] been without recognized exceptions. . . . The exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule." Snyder v. Massachusetts, 291 U.S. 97, 107 (1934). *But see* Salinger v. United States, 272 U.S. 542, 548 (1926) (the purpose of the constitutional provision is to preserve the right of confrontation at common law and not broaden or disturb its exceptions).

[40] 390 U.S. 719 (1968).

[41] *Id.* at 725.

[42] 391 U.S. 123 (1968).

[43] *Id.* at 128 n.3.

[44] People v. Johnson, *supra* note 9.

[45] 390 U.S. 719 (1968).

confrontation (the right to cross-examine) as a trial right. Similarly, the California court in *Green* saw the right of confrontation satisfied only by the ultimate trier of fact being able to observe the witness subjected to direct examination and contemporaneous cross-examination. The operative language that the decision turned on again came from *Barber v. Page* and stressed the differences between a preliminary hearing and a trial, concluding that the same results would have been reached if the accused had had effective cross-examination at the preliminary hearing. This conclusion was buttressed by the subsequent declaration from the United States Supreme Court in *Berger v. California*[46] that the most important object of the confrontation right was to guarantee the trier of fact an opportunity to judge the credibility of a witness. These seemingly adequate justifications for the results in *Johnson* and *Green* overlooked the implications of the statements in *Pointer* with reference to the possibility of sufficient protection if the witness' statements had been taken at a full-fledged hearing giving the accused an opportunity for adequate confrontation.[47] That signpost in *Pointer* became the rationale for decision in *California v. Green*.[48]

In the *Green* case the United States Supreme Court attempted to clarify the thread of decision in the recent confrontation clause cases. Its difficult task was to elucidate a standard of value, meaningful and consistent enough to be constitutional but flexible enough to allow jurisdictions to change their common law evidentiary rules to a limited extent without producing new rules that violated the right to confrontation. In the course of the decision, the Court attacked the problem by first solving the question of the admissibility of Porter's prior inconsistent statements and then by providing a guidepost in which to solve future litigation involving the interrelation between the hearsay rule and the right to confrontation.

At the outset the Court recognized that the confrontation clause of the sixth amendment did not represent a constitutional codification of the common law hearsay rule and its exceptions, but rather that the constitutional guarantee could be violated by recognized hearsay exceptions and not violated by evidence admitted in violation of the common law hearsay rule. However, the overlapping of similar values of the confrontation right and the hearsay rule emphasized the same factors for creating reliability in evidence: the implications surrounding the oath requirement, cross-examination, and observation of the declarant's demeanor while on the stand.[49] Of the three, the bedrock principle of paramount importance was the opportunity for adequate and effective cross-examination. Such a probing of testimony, given in court or out of court, created an implication of legitimacy upon the truth of the facts asserted. The Court upon weighing the advantages and disadvantages of admitting extra-judicial inconsistent statements relied heavily upon the arguments for admissibility of prior inconsistent statements as espoused in the minority position. Their conclusion asserted that as long as the declarant was "available" for cross-examination at trial the dangers of admitting even unsworn and untested extra-judicial statements diminished to the point that the confrontation mandate was satisfied. The sixth amendment, interpreted in that manner, did not invalidate the constitutionality of section 1235, and Porter's preliminary hearing statements could be used as substantive evidence so long as Porter was available at trial for cross-examination by Green's counsel. That result seemed to follow from the recent

---

[46] 393 U.S. 314 (1969).

[47] Pointer v. Texas, *supra* note 34.

[48] 399 U.S. 149 (1970).

[49] *Id.* at 158.

line of confrontation cases which stressed that the right was violated basically by the lack or ineffectiveness of cross-examination at trial.[50]

After the Court affirmed the constitutional sufficiency of section 1235 and the effectiveness of subsequent cross-examination of prior inconsistent statements at trial, it proceeded to map the consequences of the unavailability of a declarant upon the admissibility of prior inconsistent statements.[51] The point developed in the latter part of the decision asserted that the Porter preliminary hearing testimony was admissible under the constitutional standard, notwithstanding Porter's availability or unavailability to be cross-examined at trial. Since under the facts in the case, the testimony was taken under conditions closely approximating a trial setting (i.e. the oath requirement, judicial tribunal, written record), the constitutional guarantee would be satisfied if Green's counsel was afforded full and effective cross-examination (as he could expect at a trial) and if the declarant was *actually* unavailable to testify at trial.[52] The language of the decisions in *Pointer* and *Barber*, referring to the possibility of a different result in those cases, had the previous testimony been taken at a full-fledged hearing, supported the Court's conclusion. Hence, the availability issue's effect upon the evidentiary significance of Porter's prior statements at the preliminary hearing is inconsequential "[w]hether Porter . . . testified in a manner consistent or inconsistent with his preliminary hearing testimony, claimed a loss of memory, claimed his privilege against compulsory self-incrimination, or simply refused to answer. . . ."[53] Porter's statements were sufficiently tested and reliable under the Constitution to be admissible at trial for the truth of the matter asserted therein.

The two parts of the decision read together create a priority of values within the constitutional confrontation standard as created by the Court. At the top of the hierarchy, and most desirable for the purpose of determining reliability and trustworthiness of evidence, is the present testimony given in court before the ultimate trier of fact, followed by contemporaneous cross-examination. Next in descending priority, the use of a witness' prior inconsistent statements for substantive evidence at trial, whether they were subjected to cross-examination at the time given or not, would not be as reliable as present testimony given in court but would be constitutionally valid for purposes of confrontation if the witness was present at trial and available for direct and cross-examination. If a witness is actually unavailable at trial for testimony and cross-examination, but he has been subjected at the time of the prior statement to a full and effective cross-examination, the prior statement may be admitted as substantive evidence because the prior cross-examination has fulfilled the confrontation requirement of the Constitution. The sanction of the confrontation clause could still exclude prior statements, given at a prior time not subject to full and effective cross-examination and used at trial for substantive evidence, where

---

[50] Pointer v. Texas, 380 U.S. 400 (1964); Douglas v. Alabama, 380 U.S. 415 (1965); Barber v. Page, 390 U.S. 719 (1968); Berger v. California, 393 U.S. 314 (1969); Bruton v. United States, 391 U.S. 123 (1968).

[51] The availability issue concerning the ability to cross-examine Porter at trial about his preliminary hearing testimony was fully briefed by counsel for Green. However, the Court felt that it was unnecessary to pass upon a constitutional standard for availability in regard to cross-examination of extrajudical statements at trial because of the assertion in part III of Mr. Justice White's majority opinion.

[52] The Court declares that availability is not constitutionally relevant if the prosecution has made a good-faith effort to produce a witness at trial. 399 U.S. 167 n.16. Wilson v. Bowie, 408 F.2d 1105 (9th Cir. 1969), indicates that the prosecution may have the burden of proof to show the actual unavailability of a witness to testify at trial.

[53] 399 U.S. at 167-68.

the declarant is unavailable for cross-examination. This analysis must be qualified by the fact that the Supreme Court has recognized the validity of some statements made at a time not subject to cross-examination and in a situation where the declarant was actually unavailable for testimony at trial, such as a dying declaration. However, this exception to the theory that the opportunity to cross-examine is the basic tool of the confrontation right seems to be extraordinary. The basic theory underlying its validity has been in modern times suspect.[54] The Court, acknowledging that some hearsay exceptions may be suspected of violating the confrontation right, has left an explicit analysis of the right's effect to particular cases as they may arise. Whatever standard that may be extrapolated from the recent confrontation decisions must be read with regard for the Court's desire for flexibility in the area of evidentiary law.[55]

There was one issue that the Court felt unripe for decision since the California Supreme Court had not passed upon it. Porter's conversation with Officer Wade was taken at a time when Green was not present or represented by counsel and Porter was not subject to cross-examination. Wade had testified to what had been said, but the crucial testimony and cross-examinations were Porter's. The Court had indicated in the first part of its decision that subsequent cross-examination of a declarant who was not cross-examined at the time when he made previous statements satisfied the confrontation requirement. If Porter's lapse of memory at trial made him "actually" unavailable to be cross-examined about his statements to Officer Wade then the confrontation guarantee would be violated because Green's counsel would be thwarted in attempting to test the validity of those statements. The Court points out, though, that if the California court would find Porter to be actually unavailable, the error of admitting Wade's testimony as substantive evidence may fall within the category of the harmless error standard elucidated in *Chapman v. California*.[56] However, if the California court should find Porter actually unavailable for testimony at trial, not only because of his lapse of memory, but also due to the fact that he was under the influence of a hallucinatory drug at the time of the events, then Porter's availability as a proper witness for cross-examination at the preliminary hearing would be suspect. Such a contingency would result in a reversal of the conviction based on the analysis by the Court.

On remand the California Supreme Court has the problem of deciding through which alternative channel it should proceed to terminate this litigation. Since section 1235 has been constitutionally validated on its face, the conviction could be sustained upon deciding the unripe issue in favor of the availability of Porter at trial. If the California court were to find Porter available at the preliminary hearing but unavailable at the trial, the error of admitting Wade's testimony may be harmless. Of course, if the error is not harmless, then the conviction should be reversed.

---

[54] "The explanation advanced for the contrary conclusion seems to be that where the witness is dead or otherwise unavailable, the State may in good faith assume he would have given the same story at trial. . . . And the 'assumption' that the witness would have given the same story if he had been available at trial, is little more than another way of saying that the testimony was given under circumstances that make it reasonably reliable—there is nothing in a witness' death by itself, for example, which would justify assuming his story would not have changed at trial." 399 U.S. at 167 n.16. *See also* Note, *Preserving The Right of Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741,747 (1965) (calling for a constitutional evaluation of each hearsay exception to preserve the basic right); 6 SAN DIEGO L. REV. 92,97 (1969).

[55] *See* California v. Green, 399 U.S. 149 (1970) (concurring opinion of Mr. Chief Justice Burger).

[56] 386 U.S. 18 (1967).

However, even if the constitutional validity of the admissibility of all previous statements is sustained, the original grounds for appeal have not been passed upon by the California courts. Furthermore, there may be a question of interpretation of the meaning of *inconsistent* in section 1235 as applied to the specialized facts of Porter's seemingly three different statements. Beyond the construction of the statute to the facts in *Green* and the sufficiency of evidence question, there lies the gloss of California's own provision for confrontation as guaranteed in its constitution. The decision in *California v. Green* provides a margin of state control in operating a system of evidentiary rules.

Other jurisdictions besides California will have to deal with the impact of the *Green* decision. It allows states and lower federal court jurisdictions to experiment, within limitations, with their own rules of evidence.[57] The advantages of modernizing and streamlining the cumbersome hearsay rule and its exceptions is obvious. But the disadvantages should also be known. As Mr. Justice Brennan points out in his dissenting opinion, the entire nature and structure of preliminary hearings could be changed; so that the case is in reality tried at the preliminary hearing with the trial as a mere formality.[58] Beyond that possibility is the question of the standard of adequateness that a preliminary hearing must meet. Such a standard has only been articulated in very broad terms with no indication of how limited the questioning must be in a preliminary hearing before it is not full and adequate. Finally, there is the problem of the validity of each of the exceptions to the hearsay rule that have been put into question by this decision. The disposition of many of them under the constitutional confrontation standard would appear to be foretold; but to many exceptions, that have their rationalization in the history of the development of the hearsay rule, the right to confrontation as guaranteed by the constitution and as articulated in *California v. Green* may prove to be their demise.

David A. Gradwohl

COLLEGES AND UNIVERSITIES—EFFECT OF HOUSE BILL NO. 1219 ON CONTROLLING CAMPUS DISORDERS—*Ohio Revised Code Sections 2923.61, 3345.22—3345.26*—Chaos plagued Ohio's campuses in the spring of 1970. Several large universities closed their doors in the wake of violence witnessed by the presence of National Guardsmen and local authorities trying to quell the disorders. Ohio legislators responded to the student unrest by enacting House Bill No. 1219. This bill was introduced into the House of Representatives on May 26, 1970.[1] After several modifications, the final compromise ended in an affirmative vote on June 5, 1970,[2] eleven days after its introduction. This new bill added six sections to the Ohio Revised Code. Section 2923.61 provides for a new crime of disruption, whereas the remaining five sections (3345.22—3345.26) create administrative procedure to process student suspension and dismissal in the event of an arrest for certain listed crimes. These later sections also enumerate Board of Regents and university presidential power in emergency situations. A mechanical operation and interaction of

---

[57] *See* The Preliminary Draft of the Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 8-01 159-71 (1969).

[58] 399 U.S. at 199. *See also* Comment, *Hearsay, The Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651,670 (1970).

[1] H.R. JOUR. Ohio 108th General Assembly, May 26, 1970 at 15.

[2] *Id.*, June 5, 1970 at 24; S. JOUR. Ohio 108th General Assembly, June 5, 1970 at 13.

the code sections is discussed below followed by an interpretation of some interesting and problem areas of the statutory language. Finally, the constitutional implications of House Bill No. 1219 are set forth in light of United States Supreme Court and lower federal court decisions.

I. Operation of House Bill No. 1219

The first section of House Bill No. 1219 describes the new crime of disruption for which conviction can result in a fine up to $100 and/or thirty days in jail for the first offense.[3] A subsequent offense can be penalized up to $500 and/or six months in jail.[4] The bill provides that in circumstances which create a substantial risk of disrupting the orderly conduct of lawful activities of the university, no person shall willfully or knowingly act as follows: 1) enter the campus or refuse to leave the campus when requested without a reasonable excuse,[5] 2) violate a restriction of access, curfew or assembly imposed when an emergency has been declared,[6] 3) engage in conduct which encourages or incites another person to commit the proscribed acts if there is a clear and present danger that such acts might be committed.[7] Finally, one is guilty of disruption if he intentionally uses force or violence to disrupt the orderly conduct of lawful activities of a college or university,[8] or if he engages in conduct which could result in a serious injury to persons or property at a college or university.[9]

Following the disruption statute, the bill sets forth administrative procedure to cope with student suspension and dismissal. A four-step process occurs before there is a hearing. First, there must be an arrest for one of the crimes enumerated in Section 3345.23(D).[10] The arresting authority provides the second phase by notifying the university of the arrest, who in turn informs the Chancellor of the Board of Regents.[11] The final stage is the appointment of a referee for a discipline hearing which is to be held within five days after the arrest, but a continuance is allowed for good cause up to ten days.[12] Also, the hearing is held in the county of the university in question.[13] The hearing officer, who must be an attorney admitted to practice law in Ohio, must immediately notify the student of the time and place of the hearing.[14]

The referee has considerable authority before and during the hearing. He can administer oaths, issue subpoenas to witnesses and for evidence as well as use contempt proceedings in the common pleas court as provided by law.[15] Furthermore, he can separate witnesses and bar any person whose presence is not essential to the proceedings except that he cannot bar members of the news media.[16]

---

[3] Ohio Rev. Code Ann. § 2923.61(C) (Page Supp. 1970).
[4] *Id.*
[5] *Id.* § 2923.61(A)(1).
[6] *Id.* § 2923.61(A)(2).
[7] *Id.* § 2923.61(A)(3).
[8] *Id.* § 2923.61(B)(1).
[9] *Id.* § 2923.61(B)(2).
[10] *Id.* § 3345.22(A).
[11] *Id.* § 3345.22(B).
[12] *Id.* § 3345.22(A).
[13] *Id.* § 3345.22(B).
[14] *Id.*
[15] *Id.* § 3345.22(C).
[16] *Id.* § 3345.22(D).

The hearing is adversary in nature, but the formalities of a criminal proceeding are not required by the statute.[17] The arrested person is to receive a fair and impartial hearing and is afforded the following rights: 1) representation by counsel but one need not be furnished, 2) cross examination of witnesses who testify against the accused, 3) testify and present evidence on his own behalf, 4) testimony obtained cannot be used in a subsequent criminal proceeding if the arrested person does not waive compulsory self-incrimination.[18]

After the evidence is presented on both sides, if the hearing officer finds by a preponderance of the evidence that the person has committed the crime for which he is charged, he can suspend that person unless he feels the good order and discipline of the college or university will not be prejudiced or compromised if there were no suspension.[19] If the hearing officer permits a student to return to campus before the criminal trial, such student is under strict disciplinary probation which means a dismissal will result for noncompliance of any probationary term.[20] Failure to appear before the hearing officer also results in suspension.[21]

A suspension can be terminated in two ways. The person may be readmitted by approval of the Board of Trustees after the lapse of one year and then only on strict probation.[22] Also, if a subsequent judicial determination results in an acquittal or no conviction, the suspension is automatically terminated and the record is expunged.[23]

An appeal of an order of a referee can be made to the common pleas court if the appeal is filed within twenty days after the order.[24] This appeal is on law and fact, and the court can readmit a person to the college or university on strict discipline if the court finds the college would not be prejudiced.[25]

Dismissal is automatically effected if a person is convicted of the crime for which he was suspended.[26] The court notifies the university of the conviction; thereafter, the Board of Trustees directs the president or other administrator to notify the person of dismissal by a written notice sent by certified mail to both the address of the person as given on the court's record and on university records.[27] Dismissal runs from the date of suspension if the person was not allowed to return to campus.[28] While a person is under suspension or is dismissed, he cannot 1) receive any degrees or honors, 2) receive any instructional credit or grades, 3) receive student assistance, scholarship funds, salaries or wages.[29] Furthermore, he cannot enter or remain upon the land or premises of the university from which he was suspended or dismissed without the approval of the Board of Trustees or the president.[30] A dismissal can be terminated in the same manner as a suspension.

The bill is explicit that the above procedure applies notwithstanding any uni-

---

[17] *Id.*

[18] *Id.*

[19] *Id.* § 3345.22(E).

[20] *Id.*

[21] *Id.* § 3345.22(H).

[22] *Id.* §§ 3345.22(E), 3345.23(A).

[23] *Id.* § 3345.22(F).

[24] *Id.* § 3345.22(G).

[25] *Id.*

[26] *Id.* § 3345.23(A).

[27] *Id.* § 3345.23(B).

[28] *Id.* § 3345.23(A).

[29] *Id.* § 3345.23(C).

[30] *Id.* § 3345.25.

versity rule or regulation, but affirms the university's authority and obligations in student disciplinary actions.[31] Furthermore, the bill authorizes the Board of Trustees or the president of a state funded university to declare a state of emergency if a clear and present danger of disruption of the university exists through riot or mob action.[32] To cope with such a situation, the president can 1) limit access to university property and facilities by any person or persons, 2) impose curfews, 3) restrict the right of assembly by groups of five or more persons, 4) provide reasonable measures to enforce limitations on access, curfew, and restrictions on the right of assembly.[33] However, notice of these actions must be posted or published in such a manner so that all persons affected are notified.[34] Again, these sections are not to limit the existing authority to operate the university.[35]

II. Problems of Construction and Application

After a reading of House Bill No. 1219, it is obvious that its language is subject to varied and widespread interpretation. The Select Committee to Investigate Campus Disturbances discovered that "The Act is commonly misconstrued as providing a complete substitute for, rather than a supplement to, established university disciplinary authority with respect to the enumerated crimes, whether or not arrest for criminal offense is involved."[36] This is only one area in which the bill has been misconstrued. The following discussion sets forth several other areas likely to create construction and application problems.

One area of possible misconstruction relates to the scope of the disruption statute as compared to the scope of the hearing statutes. The disruption statute refers to colleges and universities without any qualification,[37] whereas, the hearing statutes condition their application to state funded colleges and universities.[38] Therefore, any person on any Ohio campus can be arrested for disruption and subject to its penalties; however, only persons affiliated with state funded colleges and universities are subject to a hearing as provided by the bill.

The scope of the term *arresting authority* might also raise problems. This term is used in hearing statutes, but no insight is provided in the bill concerning who can be an arresting authority.[39] However, other statutes suggest that this authority can be special campus police, or any other duly authorized police officer of local, county, or state government concerned with the enforcement of state law.[40]

Compensating the hearing officer is of concern under this bill since no provision is made as to how the officer is to receive remuneration and who provides the funds.[41] It is doubtful that the bill will fail because of the absence of such a pro-

---

[31] *Id.* § 3345.24.

[32] *Id.* § 3345.26(A).

[33] *Id.*

[34] *Id.* § 3345.26(B).

[35] *Id.* § 3345.26(C).

[36] Select Committee to Investigate Campus Disturbances to the 108th Ohio General Assembly, Interim Report at 7 (1970).

[37] Ohio Rev. Code Ann. § 2923.61(A) (Page Supp. 1970).

[38] *Id.* § 3345.22(A).

[39] *Id.* § 3345.22(B).

[40] *Id.* § 3345.04 (Page 1953).

[41] *See Id.* § 3345.22 (Page Supp. 1970).

vision, but legal questions might arise if the hearing officer is compensated in a manner that results in a pecuniary interest to himself.[42]

The application of the administrative hearing sections of the bill also raises a problem because of a possible harsh result. An arrested student is subject not only to a criminal proceeding, but he must also confront two administrative hearings, one under House Bill No. 1219[43] and the other under the rules and regulations of the college or university.[44] It is not inconceivable that one hearing officer would release the student pending the outcome of the criminal trial, but the second hearing officer might suspend or even dismiss the student whether or not he is convicted of the crime for which he was arrested. The bill does not provide for an exemption from the dual hearings, but rather, at one instance reinforces the obligation of the university to utilize its own disciplinary proceedings.[45]

A final, and very important, area of the bill that might be difficult to construe concerns the enumerated offenses for which an arrest would result in a hearing. The exact language in question says that "[a] student . . . arrested for any offense covered by division (D) of section 3345.23 of the Revised Code shall be afforded a hearing. . . ."[46] Nineteen offenses[47] are listed in the above-mentioned section, and on the face of the statute it appears that an arrest for one of these offenses initiates the administrative procedures without any regard to where or when the offense occurred. This would mean that if a student were arrested in his home town on a weekend or vacation, he would be subject to a hearing to determine a suspension on a campus that could possibly be several hundred miles away. This interpretation, however, does not appear to have any relevance to the scope and purpose of the bill to control campus disorders. Therefore, another interpretation of this section, and possibly a more appropriate one, is that the entire context of section 3345.23(D) must be read into the language quoted above. Reading the section in this manner limits the occasion for a hearing to an arrest for one or more of the nineteen offenses, but only if the offense occurs on the campus or affects persons or property on the campus.[48] The latter interpretation would certainly have more relevance to controlling campus disorders.

III. CONSTITUTIONAL IMPLICATIONS OF HOUSE BILL NO. 1219

Although many constitutional questions might be raised under House Bill No. 1219, the scope of this section discusses only a few issues raised by the first amend-

---

[42] *See* Tumey v. Ohio, 273 U.S. 510 (1927) where it was contrary to due process for a judge to have a pecuniary interest in reaching a conclusion against the plaintiff.

[43] OHIO REV. CODE ANN. § 3345.22 (Page Supp. 1970).

[44] *See Id.* § 3345.24.

[45] *Id.*

[46] *Id.* § 3345.22(A).

[47] The offenses listed in section 3345.23(D) of the Ohio Revised Code are cited by code number. They include: § 2901.23—Intentional cutting, or stabbing; § 2901.25—Assault and battery and making menacing threats; § 2901.252—Assault and battery upon law enforcement officers and firemen; § 2907.02—Arson; § 2907.021—Manufacture, distribution, and possession of fire bombs; § 2907.05—Burning property of another person; § 2907.06—Attempt to burn property; § 2907.08—Malicious injury to property; § 2907.082—Intentional injury or damage to public or private property; § 2907.01—Malicious destruction of property; § 2909.09—Injury to or committing nuisance in buildings; § 2909.24—Destruction of public utility fixtures; § 2923.01—Carrying a firearm or similar weapon; § 2923.012—Carrying other concealed weapons; § 2923.43—Interference with authorized persons at emergency scenes; § 2923.52—Second degree riot; § 2923.53—First degree riot; § 2923.54—Inciting to riot; § 2923.61—Campus disruption.

[48] OHIO REV. CODE ANN. § 3345.23(D) (Page Supp. 1970).

ment, due process, and equal protection. Furthermore, the discussion merely points to the issue in light of case language and makes no attempt to draw conclusions.

A. *Overbreadth and the First Amendment*

The exclusionary basis chosen by the Ohio legislators to control campus disorder has a definite and possibly a far-reaching effect on the first amendment freedoms of speech and assembly. These freedoms are regulated under the bill by preventing entry onto a campus,[49] requesting withdrawal from the campus,[50] suspending university affiliates from the campus,[51] and returning arrested persons to the campus under strict disciplinary probation.[52] Although the freedom of speech and assembly can be regulated, the regulation must be narrowly drawn and must not contain broad language that could throttle protected conduct and result in a coercive effect, "[s]ince rather than chance prosecution people will tend to leave utterances unsaid even though they are protected by the Constitution."[53]

In *Tinker v. Des Moines Independent Community School District*,[54] the United States Supreme Court pointed out that trouble *may* be caused by a departure from absolute regimentation and that "[A]ny word spoken, in class, in the lunchroom, or on the campus . . . may start . . . a disturbance. But our Constitution says we must take this risk. . . ."[55] If the risk of disturbance must be taken, then there is issue whether the bill attempts to circumvent the risk by preventing entry or requesting withdrawal of people from the campus when there exists a "substantial risk of disrupting" the lawful activities of the university.[56] Also, the bill is in question as to whether it could have been more narrowly drawn to achieve the result of controlling disorder. In *Soglin v. Kauffman*,[57] the district court said that "[w]hen the end can be more narrowly achieved, it is not permissible to sweep within the scope of a prohibition activities that are constitutionally protected free speech and assembly."[58] Therefore, application of House Bill No. 1219 will have to confront the issue of overbreadth to determine whether the bill takes the risk of possible disturbance and whether the language could have been more narrowly drawn.

B. *Due Process and House Bill No. 1219*

The constitutional standards of due process are in question in three instances under House Bill No. 1219. First, there is question whether there is a lack of fair warning and a standard for the adjudication of guilt under the disruption statute. The standard of proof needed to determine a suspension from the university also raises a due process issue. A final procedure question surrounds the rights afforded the student who appears before a hearing officer.

Two Supreme Court decisions are relevant to the due process question raised by

---

[49] *Id.* § 2923.61(A)(1).

[50] *Id.*

[51] *Id.* § 3345.22(A).

[52] *Id.* § 3345.22(E).

[53] *See* Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 76 (1960); Collins, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 219 (1954).

[54] 393 U.S. 503 (1969).

[55] *Id.* at 508.

[56] OHIO REV. CODE ANN. § 2923.61(A) (Page Supp. 1970).

[57] 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969).

[58] *Id.* at 993.

the disruption statute. In 1926, Justice Sutherland while reviewing a new criminal statute said:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[59]

A more recent test of due process was provided in *Giaccio v. Pennsylvania*[60] when the Court said:

> [A] law fails to meet the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.[61]

The proscribed conduct of the disruption statute is not to intentionally enter a campus or refuse to leave a campus upon request.[62] Furthermore, one cannot intentionally disrupt the lawful activities of a university, or engage in conduct that might result in an injury to persons or property.[63] However, the issue is whether this language is explicit so that a person is aware that his conduct will subject him to criminal penalties. It is difficult to determine from the bill what are the lawful activities of a university and when a substantial risk of disruption exists so that a person has sufficient notice to avoid conduct resulting in an arrest. If the person affected by the statute cannot determine the proscribed conduct or standard, then the judge and jury must decide guilt or innocence without any fixed legal standards.[64]

A second due process issue is raised by the "preponderance of the evidence" standard used by the hearing officer to suspend a university affiliate from the campus.[65] It is possible that a person could be under suspension for a considerable length of time. The bill recognizes this fact by providing for a possibility of reentry into the campus community after a period of one year if his criminal proceeding has not ended.[66] Such reentry is gained only by permission and then only under strict disciplinary probation.[67] Therefore, a suspension for a year is a hardship on the student, and in some instances, probably more harsh than the criminal penalty.[68] In light of this hardship plus the fact that the criminal proceeding could end in non-

---

[59] Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

[60] 382 U.S. 399 (1965).

[61] *Id.* at 402-03.

[62] OHIO REV. CODE ANN. § 2923.61(A).

[63] *Id.* § 2923.61(C).

[64] *See* note 61 *supra.*

[65] OHIO REV. CODE ANN. § 3345.22(E) (Page Supp. 1970).

[66] *Id.*

[67] *Id.* § 3345.23(A).

[68] I take notice that in the present day, expulsion from an institution of higher learning, or suspension for a period of time substantial enough to prevent one from obtaining academic credit for a particular term, may well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding. Soglin v. Kauffman, *supra* note 57, at 988. *See also,* Seavey, *Dismissal of Students: Due Process,* 70 HARV. L. REV. 1406, 1407 (1957).

conviction, due process might require a higher standard of proof. If this hearing procedure can be compared to a juvenile proceeding, two recent decisions are in point. *In re Agler*[69] held that a preponderance of the evidence was not a sufficient standard for juveniles, but instead of applying the criminal standard of "beyond a reasonable doubt," the court compromised on clear and convincing evidence. However, thereafter, in *In re Winship*,[70] proof beyond a reasonable doubt became the standard for juvenile proceedings. If the argument of similarity can be met, then due process might require a higher standard of proof.

The rights and guarantees that are afforded a student before a disciplinary hearing are also subject to due process standards. Here, the issue can be formulated in two ways. One approach questions what are the safeguards afforded a student who must face a disciplinary hearing. A second approach questions whether due process requires more safeguards as the nature of the proceeding becomes more formal and adversary. Two cases are relevant to the first approach. *Koblitz v. Western Reserve University*[71] is an Ohio decision which described student due process in disciplinary proceedings as follows:

> [T]hat in determining whether a student has been guilty of improper conduct that will tend to demoralize the school, it is not necessary that the professors should go through the formality of a trial. They should give the student whose conduct is being investigated, every fair opportunity of showing his innocence. They should be careful in receiving evidence against him; they should weigh it; determine whether it comes from a source freighted with prejudice; determine the likelihood, by all surrounding circumstances, as to who is right, and then act upon it as jurors with calmness, consideration and fair minds. When they have done this and reached a conclusion, they have done all that the law requires of them to do. They are not trying the accused for a criminal offense as a civil court. They are helpless to pronounce the judgment of the civil authorities upon him. They are trying only the question whether it is detrimental to the good discipline and the good morals of the school to allow the person whose conduct is being examined, to remain in the school; and, if they find he is guilty, they determine the degree and pronounce a judgment that is fair under the circumstances. That may be a private reprimand. It may be a reprimand before the school. It may be suspension; it may be expulsion; it may be any penalty that the authorities over the school may see fit to impose.[72]

A more recent decision, *Esteban v. Central Missouri State College*,[73] enumerated the safeguards as follows:

> (1) a written statement of the charges to be furnished each plaintiff at least 10 days prior to the date of the hearing; (2) the hearing shall be conducted before the President of the college; (3) plaintiffs shall be permitted to inspect in advance of such hearings any affidavits or exhibits which the college intends to submit at the hearing; (4) plaintiffs shall be permitted to have counsel present with them at the hearing to advise them; (5) plaintiffs shall be afforded the right to present their version as to the charges and to make such showing by way of affidavits, exhibits, and witnesses as they desire; (6) plaintiffs shall be permitted to hear the evidence

---

[69] 19 Ohio St. 2d 70 (1969).

[70] 397 U.S. 358 (1970).

[71] 21 Ohio C.C.R. 144 (8th Cir. Ct. 1901).

[72] *Id.* at 157.

[73] 277 F. Supp. 649 (W.D. Mo. 1967).

> presented against them, and plaintiffs (not their attorney) may question at the hearing any witness who gives evidence against them; (7) the President shall determine the facts of each case solely on the evidence presented at the hearing therein and shall state in writing his finding as to whether or not the student charged is guilty of the conduct charged and the disposition to be made, if any, by way of disciplinary action; (8) either side may, at its own expense, make a record of the events at the hearing. (Footnotes omitted)[74]

This language compared to the statutory hearing reveals the presence of these safeguards such as notice, counsel, cross examination, freedom from self-incrimination, and even review.[75] But, the disciplinary hearings of the above cases do not have the same character as the statutory hearing which raises the second approach to this issue. Since the university has no voice in the operation of this law, the state and not the university is directly affecting the interests of the student. Also, the bill's procedure is utilized only when there has been a criminal arrest.[76] Furthermore, the formality of this hearing and the powers given to the hearing officer make the proceeding more adversary than a university hearing.[77] Therefore, in light of the nature of the statutory hearing, it is possible that due process requires more safeguards than provided in the bill.

C. *Equal Protection and House Bill No. 1219*

A final constitutional question raised by the bill concerns the automatic one year dismissal from the university if convicted of one or more of the enumerated crimes.[78] Two important factors constitute the basis of this question. First, the additional punishment of one year dismissal is applied only to those people who are convicted of an enumerated crime and are affiliated with a state funded university.[79] Therefore, the person who is affiliated with a university not receiving state funds and the nonstudent receive no additional punishment even though they might have been arrested for identical crimes under similar circumstances. Secondly, the one year dismissal is applied without any consideration given to the crime that has been committed. The criminal sanctions, however, vary from a low of a $10 fine for intentional injury or damage to public or private property,[80] to a high of a $10,000 fine or 1-20 years in prison for malicious injury to property.[81] Therefore, the issue raised is whether legislators can constitutionally single out persons affiliated with state funded universities and make them subject to a fixed, additional punishment for designated crimes without regard to the degree of the criminal sanction.

IV. CONCLUSION

House Bill No. 1219 was enacted by Ohio legislators to control campus disorder. To accomplish this goal, the bill provides for a new crime of disruption and administrative procedure to suspend affiliates of state funded universities under certain circumstances. Although the bill appears to be very detailed, it will cause problems

---

[74] *Id.* at 651-52.

[75] OHIO REV. CODE ANN. § 3345.22(D) (Page Supp. 1970).

[76] *Id.* § 3345.22(A).

[77] *Id.* § 3345.22(C).

[78] *Id.* § 3345.23(A).

[79] *Id.*

[80] *Id.* § 2907.082 (Page Supp. 1969).

[81] *Id.* § 2907.08.

of construction and application particularly in the area of the scope of both the disruption statute and the hearing process which could lead to suspension and dismissal. Finally, the bill will be subject to constitutional criticism particularly since its operation tends to exclude people from the campus community possibly affecting their first amendment freedoms. Furthermore, there is question as to whether the disruption statute provides sufficient standards for notice and adjudication under due process. Also in question under due process is the quantum of proof necessary for suspension and the safeguards afforded in disciplinary hearings.

Ronald L. Rowland

LANDLORD AND TENANT—NO REPAIR RULE—*Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970)—On April 8, 1966 a landlord, First National Realty Corporation, filed separate actions in the Landlord and Tenant Branch of the Court of General Sessions in Washington D.C. seeking possession of rented apartments in a three-building apartment complex in northwest Washington known as Clifton Terrace. In this action the landlord alleged that the tenants, Ethel Javins et. al. had defaulted in the payment of rent due for the month of April. The tenants admitted that they were in default but alleged as an equitable defense of claims by way of recoupment or set-off in an amount equal to the rent claim[1] that there were approximately 1500 violations of the Washington D.C. Housing Regulations in the building where the defendants resided. The Landlord and Tenant Branch ruled that proof of the Housing Code violations was inadmissable in defense to an action for nonpayment of rent. Adhering to the common law no—repair rule the District of Columbia Court of Appeals upheld that ruling in *Saunders v. First National Realty Corp.*[2], stating: "we find nothing in the Housing Regulations expressly or necessarily implying that a contractual duty is imposed on the landlords to comply with the Regulations."[3] The *Saunders* court distinguished *Brown v. Southall Realty*,[4] a 1968 District of Columbia Court of Appeals case holding for the tenant in an action for possession for nonpayment of rent by saying:

> Our holding in *Southhall* was that where the owner of dwelling property, knowing that Housing Code violations exist on the property which render it unsafe and unsanitary, executes a lease for the property, such lease is void and cannot be enforced. We did not hold and we now refuse to hold that violations occuring after the tenancy is created void the lease.[5]

In *Javins v. First National Realty Corp.*, Judge Skelly Wright speaking for a unanimous court reversed the *Saunders* decision and held that the Housing Regulations implied a warranty of habitability, measured by the standards which they set out, into leases of all housing that they cover.[6] Judge Wright's well reasoned opinion represents a significant and long overdue departure from the doctrine prevailing at common law regarding leasehold transactions. The common law view was summarized in a 1892 Massachusetts decision:

> It is well settled, both in this commonwealth and in England, that one

---

[1] Javins v. First National Realty Corp., 428 F.2d 1071, 1073 (D.C. Cir. 1970).

[2] 245 A.2d 836 (D.C. App. 1969).

[3] *Id.* at 838.

[4] 237 A.2d 834 (D.C. App. 1968).

[5] Saunders v. First National Realty Corp., 245 A.2d 837-38 (D.C. App. 1969).

[6] Javins v. First National Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir. 1970).

> who lets an unfurnished building to be occupied as a dwelling house does not impliedly agree that it is fit for habitation. * * * In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it for a term, however short, takes it as it is, and determines for himself whether it will serve the purposes for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants.[7]

As the aforementioned suggests the leasehold has been traditionally looked upon as a conveyance of an interest in land. Once premises were leased it was felt there were no further unexecuted acts to be performed by the landlord and there could be no failure of consideration.[8] The tenant, therefore, as been saddled with the albatross of *caveat emptor* working to frustrate any attempts to redress grievances with regard to the condition of the leased premises. The assumption was that the tenant had availed himself of the opportunity to inspect the premises thereby vitiating any implied warranties. In the agrarian setting which gave rise to this body of law this doctrine seemed appropriate since the subject matter of primary interest to the tenants of that time was the land itself and not the simple building that may have been standing thereon. The *Javins* Court has recognized that the reason for the ancient rules have passed with the conditions which brought them into existence, and squarely faced the problem of landlord exploitation with a new frame of reference disabused of the static real property law approaches.

Perhaps the most important notion laid down by the *Javins* decision is that leases should be treated on the same basis as any other contract. Having made that determination it is not difficult to understand that the protection of the modern day tenant should not be less than that afforded to the consumer of today. Sellers in today's market are held by operation of law to market products that are safe and fit for the ordinary purposes for which such goods are used,[9] notwithstanding lack of agreement to that effect. A lease in essence is a sale as well as a transfer of an estate in land and is, more importantly, a contract relationship from which a warranty of habitability and fitness is a just and necessary implication.[10] The question is thus raised why landlords shouldn't be held to impliedly warrant that the premises they place on the market are safe and reasonably fit for habitation? No satisfactory reason for denying tenants the protection bubbles to the surface. Traditionally tenants have had to rely on such judicial legerdemain as the constructive eviction to avoid the payment of rent under a lease when the landlord allowed defects to exist on the premises. A tenant has not been able to prevail on the theory of constructive eviction unless he abandoned the premises within a reasonable time. A failure so to do would result in the tenant's having waived the defects. It has been said that "A tenant cannot claim uninhabitability and at the same time continue to inhabit."[11] Truly this type of approach fails to take into account the housing shortages that confront contemporary tenants in many of our cities nevermind the inconvenience and expense the tenant must bear especially if he fails to move out within a "reasonable" time. In *Majen Realty Corp. v. Glotzer*,[12] the court suggested that the requirement of abandonment to sustain the defense of constructive eviction had to be relaxed when a scarcity of living accommodations existed. The court also recognized that New York Housing Law had placed a duty on the owners of multiple dwellings to

[7] Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).

[8] *See* 6 S. WILLISTON, CONTRACTS § 890 (3d ed. 1962).

[9] UNIFORM COMMERCIAL CODE § 2-314.

[10] Lemle v. Breeden, —— Hawaii ——, 462 P.2d 470, 474 (1969).

[11] Two Rector Street Corporation v. Bein, 226 App. Div. 73, 76, 234 N.Y.S. 409, 412 (1929).

[12] 61 N.Y.S.2d 195, 196-97 (Mun. Ct. 1946).

keep their premises and all parts thereof clean and in good repair.[13] In *Majen* the landlord failed to restore the apartment to a fit and habitable condition and the New York court concluded that the consideration the landlord had bargained to provide in return for the rent had diminished and the tenant was allowed to remain and have the rent abated.[14] It seems reasonable that the duty to repair should fall on the landlord since the tenant of today has only a transitory interest in the property, whereas the landlord exercises a far more lasting concern.[15] The tenant of today has neither the inclination nor the expertise to spot deficiencies in the large apartment buildings that populate our cities. Neither is the tenant predisposed to expend the great sums that would be required to cause repairs to be made nor is he equipped to make the repairs himself. To compound the problem, the tenant is not in a position to secure express warranties necessary for his protection. The *Javins* court stated:

> The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock. (footnotes omitted)[16]

The form lease like the form contract is ordinarily a writing expressing the seller's terms as foisted upon the buyer or tenant. These contracts of adhesion or take-it-or-leave-it contracts have been stricken in other areas,[17] and the implied warranty of merchantability brought to the aid of the consumer. The Supreme Court of New Jersey in *Henningson v. Bloomfield Motors*,[18] stressed that an automobile is a necessity for many persons and stated: "It is apparent that the public has an interest not only in the sale and manufacture of automobiles, but also, as shown by the Sales Act, in protecting the rights and remedies of purchasers, so far as it can be accomplished consistent with our system of free enterprise."[19] It cannot be said with impunity that a necessity as basic as shelter should receive less protection. One who rents out a horse or an automobile for example, or any other bailor for hire, or otherwise for his own economic advantage, is required not only to disclose to the bailee defects of which he has knowledge, but also to exercise affirmative care to inspect and prepare the chattel, so that it is safe for its intended use.[20] Correspondingly, to imply a warranty of habitability or compliance with the Housing Regulations any hidden defects would be covered regardless of knowledge of them on the part of the landlord.[21] In that regard the *Javins* opinion concluded: "In our judgment, the old no-repair rule cannot co-exist with the obligations imposed on

---

[13] *Id.* at 197.

[14] *Id.*

[15] McNally v. Ward, 192 Cal. App. 2d 871, 878, 14 Cal. Rptr. 260, 264 (1961).

[16] Javins v. First National Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir. 1970).

[17] Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 554 (1966).

[18] 32 N.J. 358, 161 A.2d 69 (1960).

[19] *Id.* at 387, 161 A.2d at 85.

[20] W. PROSSER, TORTS § 95 (3d ed. 1964).

[21] Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 526 (1966).

the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability."[22]

Prior to the comprehensive *Javins* decision other states had considered the doctrine of implied warranty of habitability and reached similar conclusions to that of *Javins*. In 1961 the Wisconsin Supreme Court in *Pines v. Perrssion*,[23] held that the legislative enactment of building and health codes put new duties on the landlord, and for the first time that court imposed an implied warranty of habitability generally on landlords. The court stated:

> Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, *caveat emptor*. Permitting landlords to rent 'tumble down' houses is at least a contributing cause of such problems as urban blight, juvenile deliquency and high property taxes for conscientious land owners.[24]

It is interesting to note that this same Wisconsin Court recently decided *Posnanski v. Hood*,[25] and determined that the provisions of the housing code were designed to be enforced administratively and not by terms implied in a lease since the code contained "general" terms. That court relied on the ascribed intent of the legislature and the reasoning employed in the *Saunders* decision. The Wisconsin court in *Posnanski* did not cite or distinguish the *Pines* decision.

In 1967 a lower appellate court in California decided *Buckner v. Azulai*,[26] and seemed to accept the notion of implied warranty of habitability in an action by a tenant for damages alleged to have been caused by infestation by vermin. The lease in *Buckner* contained a waiver provision regarding duties imposed on the landlord by the California Civil Code[27] to put his premises in a condition for occupancy and maintain such condition. The California court held the waiver invalid where the housing regulations were adopted to preserve the health and safety of the community. The *Javins* decision clearly outlaws waivers of the type suggested stating: "The duties imposed by the Housing Regulations may not be waived or shifted by agreement if the Regulations specifically place the duty on the lessor."[28] In *McNally v. Ward*,[29] a Californa decision construing an Alameda, California Building Code, took the following position: "The purpose of the ordinance is the establishment of a general duty, not a coterie of specialized ones, and we should effectuate the legislative objective."[30] If the courts continue to take that approach

---

[22] Javins v. First National Realty Corp., 428 F.2d 1071, 1076-1077 (D.C. Cir. 1970).

[23] 14 Wis. 2d 172, 174 N.W.2d 258 (1970).

[24] *Id.* at 595-596, 111 N.W. 2d at 412-13.

[25] 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

[26] 251 Cal. App. 2d Supp. 1013, 90 Cal. Rptr. 806 (1967).

[27] Cal. Civil Code § 1941 (West 1873). "The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation and repair all subsequent dilapidations thereof which render it untenantable. . . ."

[28] Javins v. First National Realty Corp., 428 F.2d 1071, 1081-82 (D.C. Cir. 1970).

[29] 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1961).

[30] *Id.* at 877, 14 Cal. Rptr. at 264.

housing codes will not be narrowly interpreted when the duty of repair isn't specifically placed on the landlord. If the courts allow the tenant to assume the risk of the landlord's violation of Housing regulations waiver clauses will begin to appear in leases with montonous regularity and thwart the manifest objectives of the legislative enactments. In other areas

> There have been certain statutes, . . . which are clearly intended to protect the plaintiff against his own inability to protect himself, including his own lack of judgment or inability to resist various pressures. Such for example are the child labor acts, and various safety statutes for the benefit of employees, as to which the courts have recognized the inequality of bargaining power which has induced the passage of the legislation. Since the fundamental purpose of such statutes would be defeated if the plaintiff were permitted to assume the risk, it is generally held that he cannot do so, either expressly or by implication.[31]

Such should be the view of the courts regarding housing regulations henceforth.

In 1969 the New Jersey Supreme Court decided *Reste Realty Corp. v. Cooper*,[32] where a tenant signed a lease saying that she would repair and redecorate and that she had examined the premises. In this case improper grading of a driveway resulted in the premises being flooded with up to five inches of water during rainy weather. The tenant vacated before expiration of the term and was sued for rent remaining due under the lease. This court held that an implied warranty against latent defects existed at the inception of the original lease, breach of which justified the tenant's departure and relief from the obligation to pay rent. The opinion seemed to look upon the implied warranty as being equal to constructive eviction or breach of the covenant of quiet enjoyment but nevertheless found an implied warranty that the premises would conform to local housing codes. The *Javins* opinion simply abandons the old common law notions and concludes: "that the old common law rule imposing an obligation upon the lessee to repair during the lease term was really never intended to apply to residential urban leaseholds."[33] The doctrines of constructive evictions and breach of quiet enjoyment are alluded to in *Javins* as a remedy for tenants only to honor their demise.

In 1959 The Supreme Court of Hawaii decided *Lemle v. Breeden*,[34] where a lessee sued to recover a deposit and rent payment. The lessee inspected the premises prior to occupancy and the dwelling was said to be available for immediate occupancy. After taking possession the tenant discovered rats and vacated three days later. The plaintiff was allowed to recover the amount paid on execution of the lease. Although *Lemle* dealt with a furnished apartment, as did *Pines*, the court did not fall back on the traditional exception to the no repair rule noted in *Ingalls v. Hobbs*.[35] In *Ingalls* the court pointed out that historically the lessor's duty to repair was different in a lease of a furnished apartment for immediate occupancy than it was for an unfurnished dwelling. The distinction was said to be justified by the landlord's understanding that the purpose of the hirer was to use the premises as a habitation and that an important part of what the hirer paid for was the opportunity to enjoy the dwelling without delay and without the expense of preparing it for use.[36] The *Lemle* court recognized that no sound basis for such a distinc-

[31] W. PROSSER, TORTS § 67 (3rd ed. 1964).

[32] 53 N.J. 444, 251 A.2d 268 (1969).

[33] Javins v. First National Realty Corp., 428 F.2d 1070, 1080 (D.C. Cir. 1970).

[34] —— Hawaii ——, 462 P.2d 470 (1969).

[35] 156 Mass. 348, 31 N.E. 286 (1892).

[36] *Id.*

tion exists today and stated: ". . . it is clear that if the expectations of the tenant were the operative test, the exception would soon swallow up in the general rule."[37] And citing *Bowles v. Mahoney*,[38] *Lemle*, quoted: "(i)t is fair to presume that no individual would voluntarily choose to live in a dwelling that had become unsafe for human habitation."[39] The *Lemle* court found an implied warranty of habitability by focusing on contemporary housing realities. Shortly after the *Lemle* decision the Hawaii Supreme Court decided *Lund v. MacArthur*,[40] where an action was brought by a landlord against former tenants to recover damages including an amount for the time the house was vacant. Although the case was remanded to determine whether the defects claimed by the tenant were serious enough to amount to a breach, the court nevertheless held that an implied warranty of habitability existed in unfurnished as well as furnished apartments. On June 6, 1969 a New York district court[41] found that a landlord had breached an implied warranty of habitability. The landlord sought a judgment against a tenant for rent in arrears together with a claim for use and occupancy to the date the tenant vacated. The tenant introduced evidence that the landlord had intermittently deprived the tenant of adequate heat and water and the court found that the tenant should be awarded the full rent already paid for the months in which the breach occurred. As the *Reste* court had done, this court seemed to equate the implied warranty with constructive eviction. In a February, 1970 Colorado county court case, *Bonner v. Beechem*,[42] the tenant there entered into possession under an oral lease, and becoming dissatisfied with the condition of the premises and receiving no satisfaction from the landlord, stopped paying rent. The landlord brought an action to evict the tenant and to recover a judgment for back rent. The court noted that the Colorado Supreme Court had never considered the conflict between the minimum standards for housing and the common law. But the court found no precedent in Colorado to the effect that the old common law rule should prevail over legislative policy and found for the tenant citing *Pines*. This court found the breach of implied warranty amounted to a failure of consideration.

The 1968 District of Columbia Court of Appeals case of *Brown v. Southall Realty*,[43] held that no rent was due under a lease when the landlord knew at the time he entered into the lease that violations of the District of Columbia Housing Regulations existed on the leased premises prior to the lease agreement. This reasoning was extended by *Javins* to include the notion that the landlord's implied warranties of habitability cover defective conditions that did not exist prior to or contemporaneous with the signing of the lease but rather developed during the lease term. The court stated: "Since the lessees continue to pay the same rent, they were entitled to expect that the landlord would continue to keep the premises in their beginning condition during the lease term."[44] The *Javins* court used the *Brown* decision as well as the 1922 New York tort case of *Altz v. Lieberson*,[45] to lend weight to the argument that the District's Housing Code required a warranty of habitability to be implied in the leases of all housing it covered even though

[37] Lemle v. Breeden, —— Hawaii ——, 462 P.2d 470, 473 (1969).

[38] 91 U.S. App. D.C. 155, 202 F.2d 320 (1952) (Bazelon, J., Dissenting).

[39] Lemle v. Breeden, —— Hawaii ——, 462 P.2d 470, 473 (1969).

[40] —— Hawaii ——, 462 P.2d 470, 482 (1969).

[41] Sayko v. Bishop, CCH POV L. REP. ¶ 10, 789 (N.Y. Dist. Ct. Nassau County, 1969).

[42] Bonner v. Beechem, CCH POV. L. REP. ¶ 11, 098 (Colo. County Ct., Denver 1970).

[43] 237 A.2d 834 (D.C. App. 1968).

[44] Javins v. First National Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir. 1970).

[45] 233 N.Y. 16, 134 N.E. 703 (1922).

the Regulations did not explicitly provide for private remedies. The *Javins* decision cited Judge Cardozo's language in *Altz* interpreting the 1922 New York Housing Code where he stated in part: The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect."[46] The court then asserted that *Brown*, stood for the proposition that the basic validity of every housing contract depended upon substantial compliance with the housing code at the beginning of the lease term.[47] To extend *Brown* to cover defects during the term of the lease the court stated the conclusion that the housing code by its terms[48] applied to maintenance and repair during the lease, and *Brown* held illegal a lease contract made in violation of the code, so it would be untenable to find that the landlord had not assumed a continuing obligation. The court then came full circle by stating that it would follow the holding of an Illinois court in *Schiro v. W.E. Gould and Co.*,[49] which held that a buyer of a house was provided with a remedy when a builder violated provisions of the Illinois Building Code. The suggestion in *Schiro* was that it is implicit in every contract that the parties will act in conformity with duly promulgated legislative enactments. One might doubt the soundness of the logic that was employed by the court to achieve the result reached. But be that as it may, the conclusions announced by the *Javins* court are nevertheless preferable to the fictions the courts have clung to so tenaciously in the development of landlord and tenant law to provide less than satisfactory remedies for aggrieved tenants.

The *Saunders* and *Posnanski* courts were unwilling to expand the respective housing regulations with which they dealt to include a private remedy within their scope and chose instead to focus on the possibility that housing code enforcement procedures might be circumvented by implying the housing code regulations into lease agreements. The court in *Posnanski* indicated that orders to initiate enforcement of the regulations would be forthcoming from the judiciary instead of the Housing Commissioners and that judicial definitions would supplant administrative regulation.[50] The *Saunders* opinion noted that there would be no standard for differentiating between consequential violations if the regulations were not enforced by trained personnel.[51] It is clear that the *Javins* decision has not completely answered the questions raised by *Posnanski* and *Saunders* but it is to the credit of the *Javins* court that it addressed itself to the countervailing problems of landlord violation of housing codes and concomitant exploitation of tenants rather than be stopped at the threshold by what amounts to a question of fact. The court did allude to a test of "substantial compliance with the Housing Regulations,"[52] and in footnote the court directed that "The jury should be instructed that one or two minor violations standing alone which do not affiect habitability are *de minimis* and would not entitle the tenant to a reduction in rent."[53] Of necessity the traditional notions of reason-

---

[46] *Id.* at 19, 134 N.E. at 704.

[47] Javins v. First National Realty Corp., 428 F.2d 1071, 1081 (D.C. Cir. 1970).

[48] Washington D.C. Housing Regulations § 2501 (1956). "Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of the Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe."

[49] 18 Ill.2d 538, 165 N.E.2d 286 (1960).

[50] 46 Wis. 2d 172, 182, 174 N.W.2d 528, 533 (1970).

[51] Saunders v. First National Realty Corp., 245 A.2d 836, 839 (D.C. App. 1969).

[52] Javins v. First National Realty Corp., 428 F.2d 1071, 1081 (D.C. Cir. 1970).

[53] *Id.* at 1082 n. 63.

ableness will, no doubt, be invoked to determine what violations are tantamount to rendering a dwelling uninhabitable. Other opinions that have dealt with the implied warranty of habitability are of some aid in predicting what standard will be required. Some examples of those defects, which courts have found to breach the implied warranty of habitability, have already been noted, viz: rat infestation; inadquate heat and water;[55] improper grading of driveway;[56] obstructed commode, broken railing and insufficient ceiling height in basement;[57] filth, defective heating, wiring and plumbing systems;[58] bug infestation;[59] and fire damage.[60]. One court has indicated that courts should take into account the age of the structure and its general suitability for housing in the particular area in determining whether housing violations exist of a kind sufficient to render the premises unsafe and unsanitary.[61] It has also been suggested that the condition does not have to interfere permanently, per se, as long as there is substantial interference.[62] The court in *Lund v. MacArthur*,[63] spoke in terms of a "material breach" and stated that the seriousness of the defects in rented dwellings and the length of time during which they persist are both relevant factors to be considered in determining materiality of the breach of implied warranty of habitability.[64] Most courts have suggested that the question of whether housing code violations exist sufficient to render the premises uninhabitable will be one for the trier of fact, and that conclusion seems inescapable but the aforementioned may offer some guidelines to aid in the determination. A District of Columbia court[65] has held that code violations need not be certified by city code inspectors in order to form the basis of a claim of breach of implied warranty or illegal contract[66] However, such a certification would seem to be advisable from an evidentiary point of view.

Some have expressed the fear that tenants will abuse the defense of violations of housing codes to flood the dockets with frivolous claims. However, at least one New Jersey court[67] has indicated its lack of undue concern about such a notion by responding: "It is not easy to assume that litigants will assert and the Bar will perpetuate issues to be tried for impermissable motives."[68] Since the *Javins* court holds that breach of the implied warranty gives rise to the usual remedies for breach of contract[69] it can be assumed that the court has synthesized the remedies that have been allowed on the basis of a contract notion in the cases leading up to *Javins*: recission and vacation of premises,[70] reformation,[71] specific performance[72] and

[54] Lemle v. Breeden, —— Hawaii ——, 462 P.2d 470 (1969).

[55] Sayko v. Bishop, CCH Pov. L. Rep. ¶ 10, 789 (N.Y. Dist. Ct. Nassau County, 1969).

[56] Reste Realty Corp. v. Cooper 53 N.J. 444, 251 A.2d 268 (1969).

[57] Brown v. Southall Realty, 237 A.2d 834 (D.C. App. 1968).

[58] Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[59] Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).

[60] Majen Realty v. Glotzer, 61 N.Y.S.2d 195 (Mun. Ct. 1946).

[61] Reese v. Diamond Housing Corp., 259 A.2d 112 (D.C. App. 1969).

[62] Reste Realty Corp. v. Cooper, 53 N.J. 444, 458-59, 251 A.2d 268, 275-77 (1969).

[63] Lund v. MacArthur, —— Hawaii ——, 426 P.2d 482 (1969).

[64] *Id.* at 484.

[65] Diamond Housing Corp. v. Robinson, 257 A.2d 492 (D.C. App. 1969).

[66] *Id.* at 494.

[67] Academy Spires v. Jones, 108 N.J. Super. 395, 261 A.2d 413 (1970).

[68] *Id.* at 402, 261 A.2d at 417.

[69] Javins v. First National Realty Corp., 428 F.2d 1071, 1073 (D.C. Cir. 1970).

[70] Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).

[71] Lemle v. Breeden, —— Hawaii ——, 462 P.2d 470 (1969).

damages where the proper measure of damages would be the difference between the rental value of the property with and without the breach.[73] Perhaps the easiest and most convenient approach for the tenant, yet the one fraught with the most difficulty, is rent withholding. The *Brown* decision held that no rent was due when violations were present prior to the signing of the lease.[74] This was a case, however, where the tenant had already moved out and was not interested in continuing to occupy the premises. In *Diamond Housing Corp. v. Robinson*[75] possession was an issue and that court held that a tenant who successfully asserts the defense of illegal contract does not become a trespasser but a tenant at sufferance who is entitled to thirty days notice. The *Pines* decision which dealt with violations occuring after the lease agreement held that the tenant would not be liable for the agreed but rather for the "reasonable rental value of the premises during the time of actual occupancy."[76] The court in *Reste*, suggested that equitable principles would permit the tenant to remain in possession and have the court fix the reasonable rental value during the period of occupancy.[77] The *Reste* court also suggested that the tenant might have the defective condition repaired and offset the cost against the agreed rent as long as the expenditure was reasonable in light of the value of the leasehold.[78] Although somewhat unclear, the *Javins* opinion at first held that the obligation to pay rent was dependent on the landlord's obligations, including his warranty to maintain the premises in habitable condition,[79] and then went on to imply that in determining what portion of the rent would be due would be dependent on the breaches proved, and that a judgment for possession would not be forthcoming if the tenant agreed to pay any partial amounts found to be due.[80] It would seem that the resolution of the problem in *Javins* is thus manifestly inconsistent. To say that the duty or obligation to pay rent is dependent on the landord's successful execution of his obligation to keep the premises in a habitable condition and then to proceed to allow the rent to be fixed, depending upon the breaches shown, seems to frustrate the premise. Although it is recognized that significant valuation problems abound in this determination, it is suggested that on the basis of the original premise no rent should be due if the breaches are found to render the premises uninhabitable and an apportionment would only appear justified if the breaches are found to be more than de minimis and less than a breach or breaches that render the premises uninhabitable. In the *Bonner* case, that court found that no rent would be due where the landlord breached the implied warranty of habitability and failed to maintain the housing code standards since that would amount to a failure of consideration; failure to pay rent could not be ground for eviction since no rent was due.[81] A similar result was reached in *Sayko v. Bishop*[82] except that the tenant was awarded full rent already paid. In *Marini v. Ireland*,[83] decided by the

---

[72] Javins v. First National Realty Corp., 428 F.2d 1071, 1082 n.61 (D.C. Cir. 1970).

[73] Charles E. Burt Inc. v. Seven Grand Corporation, 340 Mass. 124, 163 N.E.2d 4, 8 (1969).

[74] Brown v. Southall Realty, 237 A.2d 834, 837 (D.C. App. 1968).

[75] 257 A.2d 492 (D.C. App. 1969).

[76] Pines v. Perssion, 14 Wis. 2d 590, 593-94, 111 N.W.2d 409, 412-13 (1961).

[77] Reste Realty Corp. v. Cooper, 53 N.J. 444, 462 n.1, 251 A.2d 268, 277 n.1 (1969).

[78] *Id.* at 463; 251 A.2d at 277.

[79] Javins v. First National Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir. 1970).

[80] *Id.* at 1083.

[81] Bonner v. Beechem, CCH POV. L. REP. ¶ 11, 098, 11, 099 (Colo. County Ct., Denver, 1970).

[82] Sayko v. Bishop, CCH POV. L. REP. ¶ 10, 789 (N.Y. Dist. Ct. Nassau County, 1969).

[83] Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

New Jersey Supreme Court eleven days after the *Javins* decision, the court held that a tenant in a duplex could cause repairs to be made to remove defects impairing the habitability of the dwelling and deduct the cost of such reasonable repairs from the rent due—provided the action was preceded by timely and adequate notice to the landlord.[84] That court also stated that its holding was not to be interpreted to mean that the tenant was relieved from payment of the rent so long as the landlord failed to repair but that the tenant had only the alternative remedies of making the repairs or removing from the premises.[85] In *Academy Spires v. Brown*[86] also decided after *Javins* that court extended *Marini* to allow diminution in rent along with the removal from premises and repair.[87] *Academy Spires*, dealt with a 400 unit multi-dwelling complex and the court noted the impracticability of a tenant undertaking to repair such things as a heating unit in such a structure.

So it is that the *Javins* decision has prescribed an approach to the landlord and tenant law that deals with reality and rejects the judicial myopia that has pervaded the law of leasehold agreements. Perhaps the caveat of *Lemle*, that "The law of landlord-tenant relations cannot be so frail as to shatter when confronted with modern urban realities and a frank appraisal of the underlying issues,"[88] will be received in the spirit of *Javins* in future cases. If the comparison of landlord and tenant law with that of the consumer protection cases is carried forward those notions would seem to demand the type of result reached in *Javins*.

> It is thus that the mores, the considered notions as to what makes for human welfare and survival are formed, to be constantly verified or altered in new cases, forever hammered on the anvil of life experience.[89]

Having made the observation that the *Javins* decision is one to be applauded as a matter of general policy and suggesting that the court is to be commended on its development of the common law of real property it remains to be discussed what the effect of the decision will be as a practical matter. To be sure one result that will not come to pass is that landlords who presently rent "substandard" housing will take immediate steps to correct the deficiencies that may exist on the property they rent. Even if such steps were taken, basic economic considerations would indicate that whatever sums are spent by landlords for improvement of their property will be ultimately passed on to tenants in the form of rent increases. The result would be that many families in the lower income brackets would not be able to obtain standard housing at prices they could afford. It is therefore quite possible that no real headway will be made to alleviate the problem of substandard housing absent governmental subsidization or assistance. As a general rule investors can be expected to direct their funds to the most remunerative real estate projects among which will *not* be the refurbishing of substandard housing to be leased for moderate rent. It must be recognized that the outcome in Javins was substantially dictated by lack of freedom of choice on the part of the tenant and it is suggested that while *Javins* does take steps to ameliorate the situation it can only be substantially improved by action from the public sector.

Stephen Warren King

---

[84] *Id.* at ——, 265 A.2d at 535.

[85] *Id.*

[86] 111 N.J. Super. 477, 268 A.2d 556 (1970).

[87] Academy Spires v. Brown, 111 N.J. Super. 477, 268 A.2d 556, (1970).

[88] Lemle v. Breeden, —— Hawaii ——, 462 P.2d 470, 475 (1969).

[89] A. CORBIN, CONTRACTS, § 1375 (1 Vol. ed. 1952).

FEDERAL INCOME TAXATION—JOINT RETURNS AND JOINT AND SEVERAL LIABILITY—*Betty Bell Wissing (Formerly Betty Bell Huelsman) v. Commissioner*, 54 T.C. 1428 (1970)—Petitioner and her husband filed joint income tax returns for the years 1963, 1964 and 1965. The returns failed to report as income funds which petitioner's husband had embezzled from his business associates.[1] Petititioner had no knowledge of and had received no benefit from the embezzled money. Nevertheless, the Commissioner, pursuant to section 6013(d)(3) of the Internal Revenue Code of 1954,[2] assessed income tax deficiences against petitioner for the three years in question. The Commissioner's determination was affirmed by the Tax Court in *Betty Bell Huelsman*.[3] Petitioner then appealled to the sixth circuit where the case was remanded for further development of the factual circumstances surrounding the preparation and signing of the returns. The circuit court recognized that fraud, duress or trickery might have nullified the petitioner's signature.[4]

On remand, the Tax Court found no evidence of duress and held that the husband's non-disclosure did not rise to the level of fraud or trickery in the execution of the returns.[5] To hold otherwise would, in the opinion of the Tax Court, ". . . open a Pandora's box to avoidance of liability on joint returns."[6] While recognizing the harshness of its finding, the Tax Court felt constrained by the language of section 6013(d)(3).

> We would welcome a rule which would grant relief to a victimized spouse who has no knowledge of or reason to have knowledge of, and does not benefit from, unreported income, at least where that income is the fruit of a crime. But we regretfully see no way in which this Court can or should engraft such a 'doing equity' rule on the language of section 6013(d)(3). We think such a result should properly be accomplished by ameliorating legislation.[7]

When viewed against the historical background of this area of the law, the *Wissing* opinion, though regretfully unjust, is not surprisingly unjust. Joint returns were first permitted by the Revenue Act of 1918.[8] In *Frida H. Cole*,[9] decided some fifteen years later, joint and several liability was first introduced. The Board of Tax Appeals found that, since income is reported as a unit and the joint return contains no data upon which the separate income of the two spouses can be computed, it was perfectly clear that the liability for the tax on a joint return should be joint and several. *Frida H. Cole* was reversed, however, in *Cole v. Commissioner*[10] on the ground that there was no specific statutory provision in the revenue acts to support the finding of joint and several liability. *Cole v. Commissioner* was followed until a

---

[1] Petitioner's husband was indicted and convicted for embezzlement in 1965 and again in 1966.

[2] INT. REV. CODE OF 1954, section 6013(d)(3) provides: "if a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several."

[3] Paragraph 68,095 P-H Memo T.C.

[4] Huelsman v. Commissioner, 416 F.2d 477 (6th Cir. 1969).

[5] Betty Bell Wissing (formerly Betty Bell Huelsman) v. Commissioner, 54 T.C. 1428 (1970).

[6] *Id.* at 1432.

[7] *Id.*

[8] Revenue Act of 1918, ch. 18, section 223, 40 Stat. 1074. For a history of joint and several liability on joint returns see Ritz, *The Married Woman and the Federal Income Tax*, 14 TAX L. REV. 437 (1959).

[9] 29 B.T.A. 602 (1933).

[10] 81 F.2d 485 (9th Cir. 1935).

statutory basis for joint and several liability was provided in section 51(b) of the Revenue Act of 1938.[11] The only reason given for writing joint and several liability into the 1938 Code was that, "[I]t is necessary, for administrative reasons, that any doubt as to the existence of such liability should be set at rest, if the privilege of filing such joint returns is continued."[12] Cases after 1938 indicated that the law in this area was well settled.[13] The concept of joint and several liability has been followed without question despite its admittedly harsh results. Moreover, there is little indication that the reasons for introducing joint and several liability have ever been subjected to any detailed analysis. The traditional justification for the imposition of such liability has been that there are tax advantages which are gained from the use of a joint return.[14] However, neither the reason given by the House Report mentioned above nor the traditional justification adequately rationalizes the imposition of liability on an innocent spouse, with little or no income of her own, who unknowingly assumes that liability by signing a joint return.

The courts have allowed some exceptions to the rule of joint and several liability. A spouse might avoid liability if she is able to show that she signed the joint return under duress[15] or by mistake.[16] Trickery or fraud also may be a valid defense if the spouse's signature is shown to be a product of such conduct.[17] Such defenses, however, do not afford adequate relief for the innocent spouse. There are various procedural and substantive obstacles in defending any assessment. Moreover, the standards of proof required to be met in order to escape liability are difficult to attain. For example, in *Hazel Stanley*[18] the Tax Court found that petitioner frequently had been beaten by her husband, that he threatened to kill her, to break her legs and to have her committed to a mental institution. When petitioner's husband presented joint income tax returns for her signature, she signed them ". . . just as she would comply with any other directions he gave her."[19] Petitioner was found not to have signed the joint returns in question under duress.

The *Wissing* decision is significant in that it marks an unexpected continuation of the harsh reasoning of the Tax Court as exemplified in *Hazel Stanley*. Such continuation was unexpected because the sixth circuit opinion remanding the *Wissing* case suggested a more flexible interpretation of section 6013(d)(3). The sixth circuit was ". . . not convinced . . . that the statute is so inflexible that an innocent wife who has been victimized by a dishonest husband must be subjected to an additional appallingly harsh penalty by the United States Government."[20] Moreover, the

---

[11] Revenue Act of 1938, ch. 289, section 51(b), 52 Stat. 476. Section 51(b) has been carried forward in nearly identical language to section 6013(d)(3) of the 1954 Code.

[12] H.R. Rep. No. 1860, 75th Cong., 3rd Sess. 30 (1938).

[13] *See, e.g.*, Howell v. Commissioner, 175 F.2d 240 (6th Cir. 1949); Moore v. United States, 360 F.2d 353 (4th Cir. 1966); Horn v. Commissioner, 387 F.2d 621 (5th Cir. 1967).

[14] *See, e.g.*, Ervin, *Federal Taxes and the Family*, 20 So. CAL. L. REV. 243, 252 (1947); Comment, *Joint Income Tax Returns Under the Revenue Act of 1948*, 36 CALIF. L. REV. 289, 299-300 (1948).

[15] Hazel Stanley, 45 T.C. 555 (1966); Irving S. Federbush, 34 T.C. 740 (1960); Estate of Merlin H. Aylesworth, 24 T.C. 134 (1955); Furnish v. Commissioner, 262 F.2d 727 (9th Cir. 1958).

[16] Payne v. United States, 247 F.2d 481 (8th Cir. 1957).

[17] Nadine I. Davenport, 48 T.C. 921 (1967); Louise M. Scudder, 48 T.C. 36 (1967) *aff'd (rev'd) on other grounds*, 405 F.2d 222 (6th Cir. 1968), *rehearing denied*, 410 F.2d 686 (6th Cir. 1969).

[18] 45 T.C. 555 (1966).

[19] *Id.* at 558.

[20] Huelsman v. Commissioner, 416 F.2d 477, 480-81 (6th Cir. 1969).

circuit court asserted that, since the Tax Court apparently recognizes mistake and duress as valid defenses, and that these are generally considered to be equitable defenses, relief from trickery or fraud could just as well rely on the same principle. Not only did the sixth circuit indicate that the Tax Court had the power to afford equitable relief, it also indicated that that power should be used in the case at hand since ". . . petitioner was fraudulently induced to sign a return which she obviously would not have signed had the embezzled money been included in it. . . ."[21] By urging the Tax Court to find the equivalent of fraud, trickery or duress in the conduct of the spouse who proffers for signature a return which he knows substantially under-reports his income, the sixth circuit took the first step toward judicial relief for the distressed taxpayer. The holding of the Tax Court on remand, however, is contrary to what was expected by those who read the circuit court opinion as a sensible remedy through judicial initiative.[22]

If judicial relief is not forthcoming, ameliorating legislation is needed. Legislative action has been commenced which may provide some relief in this area. One bill has been introduced in Congress to amend section 6013(d)(3) of the Internal Revenue Code to provide that the spouse of an individual who derives unreported income from criminal activities, if such spouse had no knowledge of such activities or such income and derived no benefit or enrichment by the receipt by the erring spouse of such income, shall not be liabile for taxes with respect to such income even though a joint return is filed.[23] Such legislation, if adopted, would provide limited relief. It clearly would cover the situation presented by the *Wissing* case. What the proposed legislation does not accomplish is equally if not more important. The amendment would not, for example, provide relief for the innocent wife who signed a joint return which failed to report legitimately earned income of her husband. There is no logical reason for differentiating between unreported illegally derived income and unreported legally derived income when in either case the wife was ignorant of and did not benefit from that income. Another problem arises with regard to the amount of benefit received by the innocent spouse. If, for example, the wife received some small amount of enrichment from her husband's illegal activities, she would be liable for the entire amount of any deficiencies or penalties. A better solution would be to limit her liability to the value of the benefit she has received. The administrative difficulties involved in computing the value of benefit received could be eased by placing the burden of proof on the wife. It would be incumbent upon the wife in such instances to prove that she received something less than the full benefit from the monetary gain resulting from her husband's illegal activities. A further problem is encountered in relation to civil fraud penalties under section 6653(b) of the Internal Revenue Code of 1954.[24]

---

[21] *Id.* at 481.

[22] *See, e.g.*, 39 U. CIN. L. REV. 205 (1970); 22 SO. CAR. L. REV. 472 (1970); 83 HARV. L. REV. 1449, 1451 n.13 (1970).

[23] H.R. 16,799, 91st Cong., 2d Sess. (1970). In addition to the provisions stated above, the bill also provides that the innocent spouse would not be liable for income taxes on illegal income which constitutes community property income under applicable community property laws where the erring spouse filed a joint or separate return, and that the innocent spouse is not considered to have been enriched or benefited by the receipt of illegally obtained income solely by reason of its being community income. Correspondence with Congressman Jerry L. Pettis, a member of the House Ways and Means Committee who introduced the bill, indicates that it is likely that H.R. 16,799 will be favorably reported by that committee. Due to the brevity of the post-election session, however, it is unlikely that action will be taken during this Congress.

[24] INT. REV. CODE OF 1954, section 6653(b) provides: "If any part of any underpayment . . . of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. . . ."

Under present case authority and presumably under the proposed legislation, an innocent spouse would be liable for fraud penalties when a fraudulent joint return has been filed, even though the spouse had no knowledge of that fraud or intent to defraud.[25] The spirit if not the command of due process would require that the innocent spouse be absolved of any liability for fraud penalties when she had no intent to defraud.

Since the proposed legislation fails to accomplish the much needed comprehensive reform in this area of the law, some further solutions should be explored. Any comprehensive reform should seek to place the incidence of the tax in accordance with ability to pay. It has been suggested that one way to accomplish this end is to abolish joint and several liability on joint returns and replace it with liability proportioned to the contribution of income by each spouse.[26] The burden of proving the allocation of income would be placed on the parties. Only failure to sustain the burden of proof would result in each being liable for the entire tax. The spouse without income would be removed from participation in the tax collection process by allowing the husband the benefit of income-splitting without a requirement that the wife assume liability for taxes on the return.

A second proposal which would accomplish nearly the same result would be to allow either spouse to petition for the filing of a separate return after a joint return has been filed. The present law permits the filing of a joint return, after separate returns have been filed, anytime within three years after the last date prescribed for filing the return for the taxable year involved.[27] The provision does not apply, however, to instances in which a joint return has been filed and the taxpayers subsequently wish to file separate returns.[28] Amendment of the present law to provide the option of filing a separate return by either spouse, even after a joint return has been filed, would permit a victimized spouse to elect separate assessment of tax liability and thus avoid unexpected assessments.[29] The burden of proof of allocation of income would be placed on the spouse seeking separate assessment thus facilitating administration. Either of these alternative proposals would avoid the harsh results reached under the present law.

Corrective action, then, may come from either of two sources. Judicial initiative, as demonstrated by the sixth circuit's sensible and flexible approach in the interpretation and application of 6013(d)(3), could provide an immediate if only partial solution to the problem of joint and several liability under the present statutory law. The *Wissing* decision being contrary to that of the circuit court, should therefore be re-examined.[30] Any long term and comprehensive solution to the problem of joint and several liability, however, will have to come from the legislature. Only legislative action can provide major reform in the area of procedural and administrative remedies. Likewise, the legislature can provide reform which will not be subject to the vagaries of the various circuit courts and thus uniform through out the country. Of course, judicial initiative and legislative action are not mutually exclusive. The best solution would be a combination of remedies. The judiciary should provide the limited relief within its power while the legisla-

---

[25] Furnish v. Commissioner, 262 F.2d 727 (9th Cir. 1958).

[26] Ritz, *The Married Woman and the Federal Income Tax*, 14 TAX L. REV. 437, 448 (1959).

[27] INT. REV. CODE OF 1954, section 6013(b).

[28] Treas. Reg., section 1.6013-1(a)(1), (1969).

[29] The English tax laws provide for separate tax assessment. *See*, Income and Corporation Taxes Act 1970, sections 38-40.

[30] Petitioner filed a second appeal to the Sixth Circuit in October 1970.

ture undertakes major reform in the area of joint and several liability on joint income tax returns.

Robert Rauzi

CONSTITUTIONAL LAW—*Sturgis v. Attorney General*, —— Mass. ——, 260 N.E.2d 687 (1970); *Baird v. Eisenstadt*, 429 F.2d 1398 (1st Cir. 1970).—The Supreme Judicial Court of Massachusetts, in *Sturgis v. Attorney General*,[1] upheld the Commonwealth's so-called birth control statute.[2] Plaintiffs in *Sturgis* were registered physicians and specialists in the field of gynecology. It had been their practice in the past to prescribe contraceptive drugs and articles for their married patients. They wished to provide similar birth control services for their unmarried patients as well, but they were prohibited from doing so by the Massachusetts statute. The plaintiffs brought suit in county court for declaratory relief, contending, *inter alia*, that the statute was unrelated to a proper legislative purpose, and that it abridged their constitutional right to practice a profession and discriminated against the indigent. The justice of the county court reserved the question and reported the case to the supreme court of the state, which entered the following decree:

> . . . §§ 20, 21, and 21A, are constitutional in so far as they forbid a registered physician to administer contraceptives to or prescribe them for un-

---

[1] Sturgis v. Attorney General, —— Mass. ——, 260 N.E.2d 687 (1970).

[2] MASS. GEN. LAWS, ch. 272, § 20 (1966). Except as provided in section twenty-one A, whoever knowingly advertises, prints, publishes, distributes or circulates or knowingly causes to be advertised, printed, published, distributed or circulated, any pamphlet, book, newspaper, notice, advertisement or reference containing words or language giving or conveying any notice, hint or reference to any person, or to the name of any person, real or fictitious, from whom, or to any place, house, shop or office where any poison, drug, mixture, preparation, medicine or noxious things, or any instrument or means whatever, or any advice, direction, information or knowledge may be obtained for purpose of causing or procuring the miscarriage of a woman pregnant with child or of preventing, or which is represented as intended to prevent, pregnancy shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than two and one-half years or by a fine of not more than one thousand dollars. (As amended by Acts of 1966, c. 265, § 2.)

Section 21. Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article, shall be punished by imprisonment in the state prison for not more than five years or in jail or in the house of correction for not more than two and one-half years or by a fine of not less than one hundred nor more than one thousand dollars. (As amended by Acts of 1966, c. 265, § 3.)

Section 21A. A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

A public health agency, or registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device. (As added by Acts of 1966 c. 265, § 1.)

> married persons, and forbid a registered pharmacist to fill prescriptions for contraceptives for unmarried persons.[3]

As to the physicians' challenge that the statute was unrelated to a legitimate legislative purpose, the court concluded that since, ". . . some harm may conceivably attend the employment of contraceptive devices,"[4] a proper legislative purpose was being served by prohibiting the use of such materials by unmarried persons. The court disposed of the plaintiffs' claim that the statute interfered with the right of a physician to practice medicine in derogation of the fourteenth amendment, by noting that even a right as fundamental as the right to practice a profession is a limited right, subject to laws designed to protect the health of the public. Judge Reardon, for the majority, likewise found no merit in the plaintiffs' contention that the statute discriminated against the poor. He dismissed this argument, stating only: ". . . we find the record devoid of facts to overcome the presumption that the statute in fact deals fairly with the poorer elements of the population."[5]

One month after the decision in *Sturgis*, the United States Court of Appeals for the First Circuit reached a contrary conclusion as to the constitutionality of the Massachusetts statute.[6] In April, 1967, the petitioner in *Baird v. Eisenstadt*, pursuant to an invitation, addressed a group of students at Boston University on the subject of contraception. On a demonstration board, he exhibited various contraceptive devices, and at the close of his talk he invited the members of the audience to examine the samples and to help themselves to them. He personally handed a package of vaginal foam to an unmarried adult woman, and was thereupon arrested and charged with exhibiting and delivering a contraceptive article in violation of Massachusetts General Laws, ch. 272, section 21.

Following a trial in which the petitioner was found guilty on both counts (exhibiting and delivering), the superior court requested review by the Massachusetts Supreme Court as to the constitutionality of the statute. That court, by a four to three majority, upheld the constitutionality of the provision against delivery, but ruled that the conviction for exhibiting contraceptive articles violated Baird's first amendment rights.[7] Baird filed a petition for habeas corpus, which was dismissed by the federal district court,[8] and the first circuit issued a certificate of probable cause for appeal. Baird was thereafter released on bail.

The court of appeals rejected Baird's claim that the first amendment protected his right to deliver a contraceptive article. The act of delivery, in the court's estimation, went beyond "symbolic speech."[9] Nor did the court find supportable petitioner's contention that the judicial excision of the statutory provision relating to exhibition destroyed the statute as a whole. Rather, the first circuit characterized the issue before them as whether the statute "bears a real and substantial relation

---

[3] 260 N.E.2d at 691.

[4] *Id.* at 690.

[5] *Id.* at 691.

[6] Baird v. Eisenstadt, 429 F.2d 1398 (1st Cir. 1970), [hereinafter referred to as *Baird*].

[7] Commonwealth v. Baird, —— Mass. ——, 247 N.E.2d 574 (1969). [Hereinafter referred to as *Commonwealth v. Baird*].

[8] Baird v. Eisenstadt, 310 F. Supp. 951 (D. Mass. 1970).

[9] Judge Aldrich found the "symbolic speech" argument less persuasive than the defendant's claim in *United States v. O'Brien*, 391 U.S. 367 (1968), that he could dramatize his anti-war speech by burning his draft card. Judge Aldrich stated in *Baird*, at page 1399:

> The Supreme Court, as well as, in this respect, ourselves, was unimpressed by the argument that the right of free speech justifies the performance of an act which has been reasonably prohibited on independent substantive grounds.

to the public health, safety, morals, or some other phase of the general welfare."[10] The resolution of this issue was framed in terms of language employed in *Nebbia v. New York*[11] and in *Meyer v. Nebraska*.[12] That language requires that a statute bear "a reasonable relation to a proper legislative purpose," and be neither "arbitrary" nor "discriminatory."[13] Otherwise, the statute is violative of the due process clause of the fourteenth amendment. Working within the context of the *Nebbia* command, the court rejected any finding of proper legislative purpose and found the statute arbitrary and discriminatory.

The difference in outcome between *Sturgis* and *Baird* is traceable, in large part, to the conflicting views of the two courts on the issue of legislative purpose. The court in *Sturgis* accepted the Commonwealth's view that the medical uncertainty surrounding the use of contraceptives justified the enforcement of a statute designed to prohibit the use of contraceptives by unmarried adults. The court in *Baird*, however, rejected health as a proper legislative purpose on the strength of at least three observations: First, Judge Aldrich noted that prior to the 1966 amendment to the Massachusetts birth control statute,[14] health protection in the form of legislative enactment had no place, even for the married.[15] He discounted the presumption that the 1966 Amendment to the birth control statute indicated a turnabout in the thinking of the legislature. Rather, in his view, the enactment of the amendment reflected not a new interest in health but an effort on the part of members of the legislature to make "what it thought to be the precise accommodation necessary to escape the Griswold ruling."[16] The court observed, in the second place, that the statute as it is drawn presupposes that all contraceptives risk "undesireable [or] dangerous physical consequences."[17] This presumption the court found unwarranted.[18] The failure of the statute to distinguish between those contraceptives which are possibly harmful and those which are undeniably safe made it impossible for the court to find that protection of the public health required prohibition of the use of all contraceptives by single persons. The court observed, finally, that were the statute truly intended to protect health, the legislature would have required prohibition of the use of birth control materials by all citizens, rather than by but one class of citizens.

The *Baird* court found equally without support the Commonwealth's claim that the statute served the further purpose of protecting public morals. Although the court conceded the statute was cast in terms of morals (the statute was contained in a chapter dealing with various "Crimes Against Chastity, Morality, Decency, and Good Order,") it stated that denial of contraceptives to single persons would not have a deterrent effect on the commission of fornication and other immoral acts. Noting that fornication is a misdemeanor in Massachusetts, punishable by a thirty

---

[10] Sperry and Hutchinson Co. v. McBride, 307 Mass. 408, 30 N.E.2d 269, 275 (1940).

[11] 291 U.S. 502 (1934).

[12] 262 U.S. 390 (1923).

[13] 291 U.S. at 537.

[14] MASS. GEN. LAWS, ch. 272, § 21A (1966).

[15] Commonwealth v. Gardner, 300 Mass. 372, 15 N.E.2d 222 (1938).

[16] Baird v. Eisenstadt, 429 F.2d 1398, 1401 (1st Cir. 1970); Griswold v. Connecticut, 381 U.S. 479 (1965) [hereinafter *Griswold*], overturned a Connecticut law forbidding the use of contraceptives or advice as to their use (for violation of which the medical and executive directors of a New Haven planned-parenthood center were convicted) on the basis that the law interfered with "a right of privacy older than the Bill of Rights."

[17] *Id.*

[18] *Id.*

dollar fine or three months in jail[19] while violation of the birth control statute is a felony in that state, Judge Aldrich remarked:

> We find it hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor.[20]

Thus, the court's observations on the question of legislative purpose led it to the conclusion that "any finding of proper purpose would be mere pretense."[21]

From contrary findings as to the question of legislative purpose, the courts in *Sturgis* and *Baird* arrived at different conclusions with respect to the question whether the statute could be found to bear a reasonable relation to a proper legislative purpose. The *Sturgis* court answered this question in the affirmative, having found that the statute served the purpose of protecting health and morals. In the view of that court, the statute proscribing dissemination of contraceptives to the unmarried was substantially related to the legislative purpose, and therefore, valid. But the higher court, in *Baird*, reasoned that even assuming, arguendo, that there existed a legitimate statutory purpose, the Massachusetts statute still could not be shown to bear a reasonable relation thereto. The court's conclusion was that the statute was arbitrary and discriminatory in its total exclusion of unmarried persons from the section which permits physicians to prescribe birth control drugs and devices for married persons (section 21A). The court cited language from the dissenting opinion of Justices Whittamore and Cutter in *Commonwealth v. Baird* to the effect that: "If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons."[22] It could find no valid basis for presuming that contraceptives posed a greater threat to single persons than to married persons, nor could it find evidence that a doctor would endanger the health of an unmarried woman by prescribing such articles but would not endanger the health of a married woman. In short, since it could see no difference in the physical characteristics and individual responses to contraceptives between married and unmarried women, it could not support a statute which allowed a physician to administer to the needs of one group and forced him to ignore the needs of the other.

As noted at the outset, the court in *Sturgis* rejected not only the claim that the Massachusetts statute did not bear a reasonable relation to a proper purpose but two other claims as well (neither of which was specifically raised in *Baird*). The plaintiff-physicians had contended that the statute interfered with their right to practice their profession in derogation of the fourteenth amendment. That right, they argued, was guaranteed by their state constitution as well. Citing *Sperry and Hutchinson Co. v. McBride*,[23] they maintained that legislation of the kind invoked against them is constitutional only if it constitutes a valid and reasonable exercise of the police

---

[19] MASS. ANN. LAWS, ch. 272, § 18 (1966).

[20] Baird v. Eisenstadt, 429 F.2d 1398, 1401 (1st Cir. 1970).

[21] *Id.* at 1402. But note that the court's use of the legislative purpose test in *Baird*, as a means by which to judge the constitutionality of a statute, may be susceptible to attack, especially in light of *United States v. O'Brien*, 391 U.S. 376 (1968), in which the Supreme Court refused to strike down a statute on the basis of an allegation of improper purpose. The first circuit noted this decision, but distinguished it as a case involving a statute constitutional on its face and one, therefore, which the supreme court could not invalidate on the basis of improper legislative purpose alone. *See* Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887 (1970).

[22] 247 N.E.2d 574, 581.

[23] 307 Mass. 408, 30 N.E.2d 269 (1940).

power of the state. They urged that this standard must be even more rigorously applied when the legislation seeks to exercise the police power over a profession such as medicine. Again, the supreme court was not persuaded, by this line of reasoning, to hold that the right of doctors to practice medicine had been violated by the birth control statute. Apparently, the court felt that the statute was a valid limitation on that right and one which existed to protect the public's well being.

As to the plaintiffs' final challenge that the statute descriminated against the indigent, the Commonwealth noted that transportation costs were not so high as to prevent most persons from traveling to neighboring states in order legally to obtain contraceptive materials. The supreme court must have accepted this proposition, for it rejected the plaintiffs' challenge without discussion.

The physicians' challenges that the statute infringed on their right to administer to their patients and discriminated against the poor are worthy of comment at this point. First, it must be noted that the right of a professional person to render his professional opinion and to give advice based on his best judgment with due regard for the best interests of those to whom he is responsible is well established in this country.[24] Interference by the state with a physician's ability to carry out his duty to his patients seems an appropriate situation for the protection of the fourteenth amendment. The right of a doctor to advise and administer to his patients was defended by Mr. Justice Douglas in a dissenting opinion in the well known decision of *Poe v. Ullman*:[25]

> The State has no power to put any sanctions of any kind on [the physician] for any views or beliefs that he has or for any advice he renders. These are his professional domains into which the State may not intrude.[26]

In view of these considerations, the plaintiff's claim in *Sturgis* that the Massachusetts statute infringed on their right to exercise their best medical judgment with respect to unmarried persons appears to be of some merit.

Equally worthy of comment is the claim of the doctors that the statute discriminated against the indigent. The equal protection clause of the fourteenth amendment limits the power of the state to discriminate among its citizens. Although that clause does not prohibit all types of discrimination, it does strike down any law in which the basis of classification is arbitrary or discriminatory.[27] Furthermore, the equal protection clause forbids a state to draw a line which constitutes an invidious discrimination against a particular class.[28] The *Sturgis* plaintiffs, armed with these well established principles, contended that, although the Massachusetts statute did not discriminate against the rich and poor on its face, its practical operative effect was, in fact, to discriminate between these classes.[29] They argued that

---

[24] *See* Thomas v. Collins, 323 U.S. 516 (1945), and Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[25] 367 U.S. 497 (1961).

[26] *Id.* at 515.

[27] See especially, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), where Mr. Justice Douglas said, at 670:

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized. . . .

[28] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and Levy v. Louisiana, 391 U.S. 68, 71 (1968).

[29] *Compare, National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958), where the Supreme Court struck down an order, nondiscriminatory on its face, for the handing over of a list of members when it found that the production of such a list might

those unmarried persons resident in Massachusetts who want contraceptives need only cross the state line to obtain them, provided, of course, they can afford such a trip. (Four neighboring states, Maine, Vermont, New Hampshire, and Rhode Island, have no statute specifically applicable to contraceptive drugs or articles.) The statute thus affects only those unmarried persons who are too poor to make the trip to another state. As to those persons who are not indigent, then, the statute serves as a minor inconvenience only.

The conclusion of the court in *Baird* that the statute discriminates against the unmarried is likely to find support, though it cannot be predicted when that support will come. Examination of the legal battle over contraception waged in Massachusetts over the years suggests that the *Baird* decision will not go unchallenged. Perhaps on the theory that it is best to stick with a winner, those who will attack the Massachusetts birth control statute in the future would be best advised to use *Griswold v. Connecticut*,[30] to an even fuller extent than it was used in *Baird*. This approach is justified, despite the treatment of *Griswold* in *Sturgis*. The first curcuit noted that the Massachusetts Supreme Court, in *Sturgis*, had relied on the concurring opinion of Mr. Justice Goldberg, in support of its conclusion that the statute was valid.[31] The supreme court interpreted that concurring opinion to establish that the state has "beyond doubt, the right . . . to enact statutes regulating the private sexual lives of single persons."[32] This interpretation was incorrect in the view of the court of appeals and, furthermore, the supposed authority of the concurring opinion was thought to be questionable. Judge Aldrich concluded that *Griswold* "in no way establishes 'beyond doubt' that the present statute is constitutional."[33]

The decision in *Baird* reflects a willingness to broaden the scope of the "zones of privacy" created by the Bill of Rights (and given expression in *Griswold*). It indicates too, a willingness to extend the protection of *Griswold* to all persons, regardless of marital status, in the area of private sexual conduct. In recognizing and protecting the right of privacy of unmarried persons, the court of appeals went a step beyond *Griswold*, which did not explicitly recognize such a right. Yet, as Judge Aldrich suggests, this step beyond *Griswold* is entirely consistent with the spirit of that decision. Perhaps at the heart of both decisions is an awareness of the right not to give birth—a right which becomes more worthy of protection as the over-population crisis increases in magnitude. Certainly *Baird* is more in tune with *Griswold* than is *Sturgis*. The latter is another in a long line of cases which has sustained anti-birth control legislation in Massachusetts, despite the social and legal change in climate over the years. But *Sturgis* could also be the last in that line, especially in light of *Baird*—a decision which, rather than resting on the laurels of *Griswold*, seeks greater justice with its help.

Scott M. Lewis

---

result in "private community pressure" on the members, and *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

[30] 381 U.S. 479 (1965).

[31] 381 U.S. 479, 498-99 (1965). Mr. Justice Goldberg said:
"It should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct."

[32] 260 N.E.2d at 690.

[33] Baird v. Eisenstadt, 429 F.2d 1398, 1400 (1st Cir. 1970).