CONSTITUTIONAL LAW

NON-CRIMINAL RIGHTS

Excess Bond Levy—Three-fifths Majority Requirement

In *Thurston v. Greco*, 78 Wash. Dec. 2d 421, 474 P.2d 881 (1970), the Washington Supreme Court held constitutional the requirement that at least three-fifths of those voting authorize any property tax levy exceeding 40 mills on the dollar.[1]

The court rejected the argument of the plaintiffs, who contended that the equal protection clause of the fourteenth amendment requires that a simple majority of those voting on such a levy be sufficient to insure its passage. In dismissing the equal protection argument, the court noted that Washington's "Forty Mill Limit" provision does not contain a classification of voters, and that it excludes no one from voting because of a lack of some qualification. This lack of an unreasonable classification, coupled with the provision's constitutionally permissible purpose of limiting taxes against property and re-allocating a portion of the burden to other forms of taxable incidents, led the court to rule that the "Forty Mill Limit" did not deny any person equal protection of the laws.

Almost nine months after *Thurston* was decided, the United States Supreme Court ruled on the same question in *Gordon v. Lance*.[2] In holding an identical West Virginia constitutional requirement to be constitutional, the court said:

> We conclude that so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause.[3]

Although at first glance the *Thurston* and *Gordon* decisions may seem at odds with our traditional democratic electoral process, it must be remembered, as was pointed out in *Gordon,* that there is nothing in our history, our cases, or our Constitution that requires that a majority always prevail on every issue.

Obscene Material

In *State v. Cox,* 3 Wn. App. 700, 477 P.2d 198 (1970), a clerk in a Seattle magazine, book, and film store, was charged with violat-

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[1] WASH. CONST. art. 7, § 2 (1944).
[2] 91 S. Ct. 1889 (1971).
[3] *Id.* at 1892.

ing Wash. Rev. Code § 9.68.010,[4] by possessing obscene materials with the intent to sell them. The trial court, in finding him guilty, felt that the twelve magazines and films seized by the court were obscene. The court of appeals, due to the presence of constitutional issues of freedom of speech and of the press stated that it could not place its usual reliance upon the fact finding by a trial judge and therefore independently examined Cox's films and magazines to determine if his possession and right to sell were constitutionally protected.

After declaring that the motion pictures and magazines were "within the ambit of the guarantees of freedom of speech and of the press afforded by the unconditional language of the first amendment,"[5] the court noted that the protection can be forfeited if the material is "obscene." The problem confronted is that of maintaining the compromise between society's essential need to guarantee to all the right to speak freely, and society's asserted need to prohibit speech which may offend, or even harm, without offering any redeeming social value.

Looking primarily to the United States Supreme Court, the court of appeals recognized the constitutional test of obscenity as set forth in *Roth v. United States*, 354 U.S. 476 (1957). This test of obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[6] This test was augmented by the United States Supreme Court in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*[7] to include the requirement that the three following elements coalesce:

(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex;

(b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and

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[4] Wash. Rev. Code § 9.68.010 (1969) provides in part:

Every person who—

(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or

(2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;

Shall be guilty of a gross misdemeanor.

[5] 3 Wn. App. 700, 701, 477 P.2d 198, 199 (1970).

[6] *Id.* at 703, 477 P.2d at 200, *quoting* Roth v. United States, 354 U.S. 476, 489 (1957).

[7] 383 U.S. 413 (1966).

(c) the material is utterly without redeeming social value.[8]

The court of appeals noted that other considerations had been added since *Roth* was decided. *Ginzburg v. United States,*[9] decided the same day as *Memoirs,* added "pandering" or commercial exploitation for the sake of prurient appeal as a consideration in determining obscenity. Whether the seller's sole motive is to emphasize sexually provocative material for commercial gain may be considered to determine whether material is utterly without redeeming social value.

The later case of *Redrup v. New York*[10] is significant to the United States Supreme Court's holdings in that it held that the sale of flagrantly sexual magazines by magazine and book stores does not constitute an assault upon individual privacy, and hence is not "pandering." Thus another aspect was added to the original *Roth* considerations.

Following these holdings, the appellate court in *Cox* held:

> Without hesitation we find Cox's magazines and films to be intended to appeal to a prurient interest in sex. We find them to be patently offensive to contemporary community standards. By dictionary definition and by common understanding, the material is clearly pornographic.[11]

Seizure of Obscene Material—Prior Adversary Hearing

In *State v. Rabe,* 79 Wn. 2d 254, 484 P.2d 917 (1971), the Washington Supreme Court held that seizure of an allegedly obscene motion picture without a prior adversary hearing did not constitute a prior restraint on the defendant's first amendment right to freedom of speech.

Defendant exhibited the film "Carmen Baby" at his drive-in theatre in Richland, Washington. The screen was located so that it was visible to motorists on a nearby highway and to a number of residents of private dwellings in the area, as well as to any person standing outside the chain link fence surrounding the theatre. On two occasions a city police officer observed the film from outside the fence. He later appeared before a justice of the peace, and after describing some of the lewd portions of the film, informed the magistrate that young children were also watching from outside the theatre. A warrant for defendant's arrest was issued and executed. As an incident to the arrest, two reels of the film were seized for evidentiary

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[8] *Id.* at 418.
[9] 383 U.S. 463 (1966).
[10] 386 U.S. 767 (1967).
[11] State v. Cox, 3 Wn. App. 700, 710, 477 P.2d 198, 204 (1970).

purposes. The superior court found that the defendant had exhibited an obscene show contrary to Wash. Rev. Code § 9.68.010.[12]

The defendant's first point of appeal was that a prior adversary hearing directed to the issue of obscenity was required before the film could be seized. This contention was based on *Metzger v. Pearcy*,[13] which held that such a hearing was required before seizure of allegedly obscene material, including films.

Although the court recognized that *Metzger* and a host of other federal decisions have held that such a hearing is necessary,[14] the Washington justices were not persuaded that decisions of the United States Supreme Court have indicated that an adversary hearing is required in *every* such case. The Washington court noted that the Supreme Court has dealt with the specific issue of the necessity of a prior hearing in three cases: *Marcus v. Search Warrants of Property*,[15] *A Quantity of Copies of Books v. Kansas*,[16] and *Lee Art Theatre, Inc. v. Virginia*.[17]

In *Marcus* and *A Quantity of Copies of Books*, the Court held that an adversary hearing was required before seizure, but both those cases dealt with the seizure of a large and varied number of published materials, so the danger existed that non-obscene materials might be seized along with the obscene. In *Lee*, the Court relied on *Marcus* to reverse the conviction of a defendant for exhibiting obscene films. The Supreme Court pointed out that the warrant was issued solely on the basis of conclusory statements in a police officer's affidavit, a process that failed to satisfy the *Marcus* requirement of a procedure "designed to focus searchingly on the question of obscen-

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12 WASH. REV. CODE § 9.68.010 (1909) (amended 1969) then provided:

Every person who—

(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or

(2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;

Shall be guilty of a gross misdemeanor.

13 393 F.2d 202 (7th Cir. 1968).

14 Demich, Inc. v. Ferdon, 426 F.2d 643 (9th Cir. 1970); Astro Cinema Corp. v. Mackell, 422 F.2d 293 (2d Cir. 1970); Canbist Films, Inc. v. Duggan, 420 F.2d 687 (3d Cir. 1969); Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969); Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969); Carroll v. Orlando, 311 F. Supp. 967 (M.D. Fla. 1970); Bongiovanni v. Hogan, 309 F. Supp. 1364 (S.D.N.Y. 1970); Natali v. Municipal Court, 309 F. Supp. 192 (N.D. Cal. 1969).

15 367 U.S. 717 (1961).

16 378 U.S. 205 (1964).

17 392 U.S. 636 (1968).

ity . . . ."[18] The Washington court felt it highly significant that the Supreme Court did not suggest that such an inquiry requires an adversary hearing when dealing with a film. The primary test, as seen by the Washington court, "is whether the judicial inquiry leading to the seizure 'focused searchingly on the question of obscenity' and was sensitive to the accused's freedom of expression."[19]

The Washington court thus rejected Rabe's contention that a prior adversary hearing was required, and held that the procedure used in this case constituted a judicial inquiry that focused on the obscenity of the film in question. Not only does the decision appear to go against the great weight of authority,[20] but it would seem highly doubtful that a police officer describing portions of an allegedly obscene movie to a justice of the peace truly constituted a "judicial inquiry that focused searchingly on the question of obscenity and was sensitive to the accused's freedom of expression."

The defendant further argued that the trial court's finding that only certain portions of the film were obscene was not legally sufficient to support the judgment of obscenity. Though agreeing that the film would probably pass the definitional obscenity test[21] if viewed only by consenting adults, the supreme court ruled that the public nature of the film's exhibition constituted sufficient cause to support the lower court's finding. Relying primarily on *Redrup v. New York*[22] and *Close v. Lederle*,[23] the Washington court held that even movies which are obscene only in part may be constitutionally suppressed when the exhibition of the film is such that it intrudes upon the privacy of non-consenting citizens who as a practical matter cannot avoid being exposed to the film.

The First Amendment and Private Property

> When we balance the Constitutional rights of owners of property against those of the people to enjoy [first amendment freedoms] . . . as we must do here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men" and we must in all cases "weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of the rights."[24]

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18 *Id.* at 637 *quoting* Marcus v. Search Warrants of Property, 367 U.S. 717, 732 (1961).

19 State v. Rabe, 79 Wn. 2d 254, 260, 484 P.2d 917, 921 (1971).

20 Cases cited note 14 *supra*.

21 *See*, A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966).

22 386 U.S. 767 (1967).

23 424 F.2d 988 (1st Cir. 1970).

24 Marsh v. Alabama, 326 U.S. 501, 509 (1946) (Black, J.).

The issue presented in *Sutherland v. Southcenter Shopping Center, Inc.*, 3 Wn. App. 833, 478 P.2d 792 (1970) is whether the first and fourteenth amendments to the Federal Constitution preclude the owners of private property, used as a shopping center, from prohibiting the orderly solicitation of signatures for an initiative.[25]

The Washington Environmental Council attempted to obtain signatures for an initiative at two major "mall type" shopping centers in the Seattle area. The shopping centers requested that the Council stop soliciting on their property. The trial court denied the Council's request for injunctive relief and the Council appealed.

The Washington Court of Appeals, unable to find any exact precedent, discussed at length the two major Supreme Court cases dealing with freedom of speech and private property. In the first case, *Marsh v. Alabama*,[26] the Court upheld the right of a Jehova's Witness to pass out handbills on a street corner of a wholly owned company town. The company-owned street was the functional equivalent of a public street.

> The "business block" serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers . . . cannot curtail [first amendment freedoms] . . . by criminally punishing those who attempt to distribute religious literature. . . .[27]

The court noted that any statute which attempts to punish such conduct clearly violates the first and fourteenth amendments to the Constitution.

In the second case, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,[28] the Court upheld a union's right to picket a store located on the private property of a shopping center, where the pickets were exercising "their first amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put."[29]

Finding that the shopping center was the functional equivalent of the "business block," the Court then considered whether the act of signature procurement was "consonant" with the use and function of a shopping center. The court of appeals held that in *Logan Valley* the Supreme Court had "intended by its use of the word consonant

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[25] *See*, Diamond v. Bland, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied* 402 U.S. 988 (1971), where contemporaneously the California Supreme Court was faced with an identical problem.

[26] 326 U.S. 501 (1946).

[27] *Id.* at 508.

[28] 391 U.S. 308 (1968).

[29] *Id.* at 319-20.

to set the foundation for its discussion of its right to impose reasonable limitations on the exercise of first amendment privileges in shopping centers."[30]

Although private property owners do not have to provide a forum for the exercise of first amendment rights, where the property owners have in effect created the functional equivalent to the "business block," such property owners come under the ruling in *Marsh*. Thus the court in *Sutherland* held that the shopping center owners had infringed upon the first amendment rights of the Council and permanently enjoined them from prohibiting the Council from soliciting signatures. However, under the reservation of power found in *Logan Valley*, the court said that in the future "[t]he centers may impose such regulations on solicitors for the Council as are necessary to prevent '*undue* interference' with other members of the public with an equal right of access to the sidewalks."[31]

Municipal Corporations—Loans of Money or Credit

In *State ex rel. O'Connell v. Public Utility District No. 1 of Klickitat County*, 79 Wash. Dec. 2d 237, 484 P.2d 393 (1971), plaintiff alleged that the defendant, a municipal corporation, was in violation of Washington State Constitution article 8, section 7, which provides:

> No county, city, town, or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor or infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

Since December 1962 defendant, Public Utility District, has engaged in a limited "Installment Sales Program" whereby it purchases the vendor's interest in certain conditional sales contracts from electrical contractors and electrical equipment sellers. The conditional vendee in each of the contracts is a customer of the District.

The supreme court, in a five to four decision, reversed the holdings of the trial court and court of appeals[32] and held the transactions to be loans of money and therefore unconstitutional. The majority held that the word "loan" imports a present advancement of money in exchange for the right to receive future repayment, together with interest.[33]

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[30] Sutherland v. Southcenter Shopping Center, Inc., 3 Wn. App. 833, 844, 478 P.2d 792, 798 (1970).

[31] *Id.* at 848, 478 P.2d at 800 (emphasis added).

[32] 2 Wn. App. 366, 469 P.2d 922 (1970).

[33] Hefner v. Spaeth, 22 Wn. 2d 378, 384, 156 P.2d 408, 411 (1945).

Writing the dissent, Justice Hunter argued that a conditional sales contract is not a loan but a purchase and sale transaction and that the relationship created is not debtor-creditor but vendor-vendee.[34] And furthermore, the purchase of such vendor's interest is not a loan but a purchase of personal property with the added consideration of increased sales of electric energy.[35]

The court of appeals and Justice Hunter both discussed and relied upon *Washington Natural Gas Co. v. Public Utility District No. 1*,[36] where defendant District was held not in violation of article 8, section 7, when it agreed to install, at its expense, an underground electric distribution system on land owned by private developers. There, developers were given three years to pay $225 per lot at 6%, and if during this period an all electric house was built the cost was discounted to $150. The court held that this action was not a loan but a genuine exchange of measurable consideration. In *Berglund v. Tacoma*,[37] a 1967 case under the same article 8, section 7, the city was held not in violation when it established a fund to guarantee payment of warrants issued in financing a Local Improvement District outside the city to extend water service. Here the court stated that because the liability was contingent and indirect and the city would, within a reasonable time, become the owner of the water system, there was no loan. *State ex rel. O'Connell's* discussion of a debtor-creditor relationship appears to be inconsistent with these two cases. The majority opinion did not overrule nor attempt to distinguish these cases.

Article 8, section 7, was incorporated into the state constitution to prevent municipalities from using public funds to encourage railroads to extend service to their communities.[38] When the railroad lines proved unprofitable and ceased service the communities faced bankruptcy. The provision was successful in stopping this practice but since that time has caused endless confusion as to allowable financial relationships between municipal corporations and the private sector of the economy. The courts have not really helped; as the noted cases indicate, decisions under this article have been inconsistent and narrowly limited to the facts of each case. Legislative or judicial clarification is greatly needed.

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[34] *See, e.g.*, Oliver v. Electric Prods. Consol., 59 Wn. 2d 276, 367 P.2d 618 (1961); Lahn and Simmons v. Matzen Wollen Mills, 147 Wash. 560, 266 P. 697 (1928); Holt Manufacturing Co. v. Jaussaud 132 Wash. 667, 233 P. 35 (1925).

[35] Smith v. Sherwood and Roberts, Spokane, Inc., 92 Idaho 248, 441 P.2d 158 (1968); Schauman v. Solmica Midwest, Inc., 283 Minn. 437, 168 N.W.2d 667 (1969); General Electric Credit Corp. v. State Tax Commission, 231 Ore. 570, 373 P.2d 974 (1962).

[36] 77 Wn. 2d 94, 459 P.2d 633 (1969).

[37] 70 Wn. 2d 475, 423 P.2d 922 (1967).

[38] ANTIEU, MUNICIPAL CORPORATION LAW 358 (1965).

CRIMINAL RIGHTS

Criminal Collateral Estoppel

Criminal collateral estoppel is now unquestionably a part and parcel of the fifth amendment guarantee against double jeopardy.[39] However, in *State v. Harris*, 78 Wash. Dec. 2d 919, 480 P.2d 484, *rev'd*, 92 S. Ct. 183 (1971), the Washington Supreme Court ruled that the doctrine should not be applied where the issue previously decided had not been "fully litigated" in the first trial. The United States Supreme Court disagreed, at least on the facts as they existed in *Harris*.

State v. Harris was first noted by the *Gonzaga Law Review*[40] when Division Two of the Washington Court of Appeals issued a writ of prohibition against a second prosecution of Arnold Maxwell Harris.[41] Harris allegedly mailed a bomb to the residence of Ralph Burdick in Clark County, Washington. The bomb exploded killing Burdick, and the defendant's son, Mark Harris, and injuring the defendant's estranged wife, Laila Harris. The first trial was for the murder of Ralph Burdick; Harris was acquitted by a jury. He was then charged with the murder of his son, Mark, and the assault of his estranged wife, Laila. In asking for the writ of prohibition, the defendant claimed that the question of whether it was he who mailed the bomb, should not be relitigated and submitted to a second jury.

The Washington Supreme Court's contention that the issue was not "fully litigated" in the first trial was not totally lacking foundation. Harris had supposedly written a letter to Mrs. Harris threatening the lives of both Mrs. Harris and Mr. Burdick. On the basis of privilege this letter was not allowed into evidence in the first trial. It would clearly be admissible in the second action, and would be relevant to whether or not Harris mailed the bomb. On these facts the Washington Supreme Court held that the issue had not been "fully litigated" and that therefore the doctrine of criminal collateral estoppel should not apply. Without a single judge dissenting, the supreme court reversed the court of appeals and denied the writ of prohibition.[42]

In a five to two decision the United States Supreme Court reversed the Washington Supreme Court and reaffirmed the position stated in *Ashe v. Swenson*:

> "Collateral estoppel" . . . . means simply that when an issue of ultimate fact has once been determined by a *valid* and *final* judgment,

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39 Ashe v. Swenson, 397 U.S. 436 (1970).

40 *Survey of Washington Law*, 6 GONZ. L. REV. 119, 159 (1970).

41 State v. Harris, 2 Wn. App. 272, 469 P.2d 937 (1970).

42 For a more complete discussion of *Harris*, criminal collateral estoppel, and double jeopardy see Comment, *Double Jeopardy and Criminal Collateral Estoppel in Washington*, 6 GONZ. L. REV. 293, 304 (1971).

> that issue cannot again be litigated between the same parties in any future lawsuit.[43]

It was made clear by the Supreme Court that where there existed a *valid* and *final* judgment, the Constitution would not permit the further requirement that the issue be *fully* litigated.[44] In *Harris* the Court noted:

> The State concedes that the ultimate issue of identity was decided by the jury in the first trial. That being so, the constitutional guarantee applies, irrespective of whether the jury considered all relevant evidence, and irrespective of the good faith of the State in bringing successive prosecutions.[45]

State Vagrancy Statute

Subsection (13) of the Washington vagrancy statute, Wash. Rev. Code § 9.87.010 (1965) recently withstood two attacks directed at its constitutionality. That subsection of the statute provides in part:

> Every—
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> (13) Person, except a person enrolled as a student in or parents or guardians of such students or person employed by such school or institution, who without a lawful purpose therefor wilfully loiters about the building or buildings of any public or private school or institution of higher learning or the public premises adjacent thereto—
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> Is a vagrant, and shall be punished by imprisonment in the county jail for not more than six months, or by a fine of not more than five hundred dollars.

In *State v. Oyen*, 78 Wash. Dec. 2d 934, 480 P.2d 766 (1970), the defendants were charged with a violation of Wash. Rev. Code § 9.87.010(13) when they attempted to distribute draft-resistance literature near a school. They made no attempt to have the material approved, as was required by a school district regulation, and refused to leave the campus voluntarily when asked. When told by a police officer that their conduct was in violation of the state vagrancy statute they informed the officer that they considered the statute unconstitutional.

At trial the defendants mounted a three-pronged attack on the statute contending it to be unconstitutionally vague, over-broad, and

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[43] Ashe v. Swenson, 397 U.S. 436, 443 (1970) (emphasis added).

[44] From a practical standpoint, the requirement that an issue be "fully litigated" in order to apply the doctrine of collateral estoppel would nearly destroy the doctrine. How much is full litigation? In the mind of a judge concerned with the possible release of a defendant whom the judge believes to be a murderer (despite previous acquittal by a jury), full litigation of an ultimate issue may never be quite full enough. The constitutional protection would become weak if not nonexistent.

[45] Harris v. Washington, 92 S. Ct. 183 (1971).

inapplicable as applied to them. Before addressing the issues presented by defendants, the court observed that there is a presumption in favor of a statute's constitutionality, that the education of youth has historically been of supreme concern to our citizenry, and that the questioned statute was enacted under the reserved police power of the state with the design of providing a means by which to exercise control over activities on or near school premises.

The court proceeded to systematically reject each of the defendants' contentions. As for the argument that the statute is unconstitutionally vague, the court noted that all that is required is that "a questioned statute convey a sufficiently definite warning as to proscribed conduct when measured by common practice and understanding."[46] The court admitted that the word "loiter" can be so vague as to raise constitutional problems,[47] but held that, when considered within the full context of the statute, the sort of loitering prohibited by Wash. Rev. Code § 9.87.010(13) is amply set forth in language understandable to the common man.

The defendants further argued that the statute was so broad as to include among its prohibitions certain constitutionally protected freedoms such as freedom of speech. Observing that a statute is not necessarily unconstitutional just because the rights of free speech may be intermingled with the condemned conduct, the court decided that the social interest protected by the statute far outweighed any incidental effect on freedom of expression.

As a final argument the defendants urged that the statute was unconstitutional as applied to them because the school district regulation requiring prior approval operated as an impermissible prior restraint upon free speech. Relying on *Adderly v. Florida*,[48] which held that there is nothing in the Constitution that prohibits a state from controlling its own property for its own nondiscriminatory purpose, the court dismissed the defendants' third contention, ruling that the statute was applied in a non-discriminatory manner.

The constitutionality of Wash. Rev. Code § 9.87.010 was again a point of contention in the factually similar case of *State v. Maloney*.[49] In that case the defendant, a seller of a "so-called under-

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[46] State v. Oyen, 78 Wash. Dec. 2d 934, 940, 480 P.2d 766, 770 (1971).

[47] In Seattle v. Drew, 70 Wn. 2d 405, 406, 423 P.2d 522, 523 (1967), the court voided the following ordinance as being too vague:

> It shall be unlawful for any person wandering or loitering abroad, or abroad under other suspicious circumstances, from one-half hour after sunset to one-half hour before sunrise, to fail to give a satisfactory account of himself upon the demand of any police officer.

[48] 385 U.S. 39 (1966).

[49] 78 Wash. Dec. 2d 949, 481 P.2d 1 (1971).

ground" newspaper, *Spokane Natural*, was convicted of violating subsections (7)[50] and (13) of the vagrancy statute.

The defendant, a non-student, had attempted to sell the *Spokane Natural* on the campus of Spokane Community College. Against the wishes of school officials he continued with his sales efforts, even after being informed that he could comply with school policy by giving his publication away on certain designated areas of the campus or by selling it on the street. His refusal to leave was followed by arrest and conviction after which he appealed contending that the two provisions of the statute were unconstitutionally vague, overbroad, and inapplicable as applied to him.

The supreme court affirmed defendant's conviction under subsection (13) of the statute relying simply on the decision in *State v. Oyen.*

As for the conviction under subsection (7) of the statute, the "lewd, disorderly or dissolute" provision, the court noted that in the 1933 case of *State v. Harlowe*[51] it had been held that the provision in question was not vague and uncertain. The court, however, did agree with Maloney that his actions did not constitute a violation of subsection (7), especially since testimony revealed that the peace and order of the educational process was not generally disturbed. As defendant's conduct was neither blatant, vociferous, nor belligerent, the court reversed his conviction under Wash. Rev. Code § 9.87.010 (7).

Then, though the point was not raised on appeal, the court questioned

> the propriety of the state erecting two counts of vagrancy and seeking to exact two penalties predicated upon identical and indivisible circumstances and events occurring at the same time and place.[52]

While the court said no more on the point, it did cite a California case[53] which held that the defendant, who had been charged with conspiracy to violate a statute relating to narcotics, and with unlawfully transporting, selling, furnishing and giving away and possessing heroin, could only be punished for conspiracy and unlawful sale.

Thus, though the argument has yet to be made before the Washington court, it would appear unlikely that any multiple convictions,

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[50] WASH. REV. CODE § 9.87.010(7) refers to a "lewd, disorderly or dissolute person."

[51] 174 Wash. 227, 24 P.2d 601 (1933).

[52] State v. Maloney, 78 Wash. Dec. 2d 949, 952, 481 P.2d 1, 3-4 (1971).

[53] People v. Roberts, 40 Cal. 2d 483, 254 P.2d 501 (1953).

based upon a single, indivisible act, will be permitted under Wash. Rev. Code § 9.87.010.

Due Process—Breach of Peace Statute

The constitutionality of the Washington statute[54] aimed at preventing breaches of the peace and correlated unlawful acts by punishing those assembled with the intent to do such acts was challenged in *State v. Dixon*, 78 Wash. Dec. 2d 813, 479 P.2d 931 (1971), on three separate grounds: (1) that the statute as formulated violates the constitutional protection of due process in its general vagueness and uncertainty; (2) that the statute abridges the constitutional right to freedom of speech; and (3) that at least part of the statute—in particular the clause "participating therein by his presence"—is uncertain to the point of being void for vagueness by the constitutional due process standard.

As the decisions of both the trial court and the supreme court were based upon more general considerations of the constitutionality of the statute rather than upon its validity in view of the specific case, it suffices in outlining the facts of *Dixon* merely to say that the situation was one in which 75-100 people, led by the defendants, entered, occupied for approximately three hours, and substantially damaged the office of a Seattle school principal during the morning of a regular school day. In writing for the majority Justice Hale noted that the constitutionality of a statute is not to be determined in the abstract but rather in light of the circumstances in which it is applied; that is, unless it is so glaringly contrary to limitations set forth in the Constitution that in declaring it unconstitutional, reasonable men could not differ. However, he went on to evaluate and refute the reasoning behind each of the three defenses.

Quoting *Beauharnais v. Illinois*,[55] Justice Hale concluded that "[w]here a statute is specifically directed at a manifest evil and couched in language drawn from history and practice, courts should not 'parse the statute as grammarians or treat it as an abstract exercise in lexicography.' "[56] It was the opinion of the court that the terms "breach of the peace" and "disturbance of the peace" were sufficiently defined in common law and in a number of statutes to

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[54] WASH. REV. CODE § 9.27.060 (1909), provides in part:
Whenever three or more persons shall assemble with intent—
(2) To carry out any purpose in such manner as to disturb the public peace; or,
(3) Being assembled, shall attempt or threaten any act tending toward a breach of the peace, or an injury to persons or property, or any unlawful act—such an asembly is unlawful, and every person participating therein by his presence, aid or instigation, shall be guilty of a gross misdemeanor.

[55] 343 U.S. 250 (1952).

[56] State v. Dixon, 78 Wash. Dec. 2d 813, 822, 479 P.2d 931, 936 (1971).

justify their being considered sufficiently defined in the Wash. Rev. Code § 9.27.060. Yet it seems reasonable that due process requires that a statutory offense be so defined as to be understandable to the common man without necessitating a resort to the common law history and an extensive case study to clarify its meaning.

The court felt that because the offense was known to the common law, making it one of *malum in se* as well as *malum prohibitum*, strict statutory definition was not necessary. It must be acknowledged, however, that the codification of common law offenses was undertaken at least partially to alleviate the problem of defining the offense solely in reference to prior decisions.

Freedom of speech, the court emphasized, must be *preserved* by such a statute: it is "designed to prohibit the very conduct which will abridge the rights of others to freedom of speech and peaceable assembly and their further rights to peace, safety and repose."[57] "[F]reedom of speech does not carry with it a correlative right to exercise it in every circumstance, everywhere, every moment of every day."[58]

It is questionable whether this "balance of rights" attitude expressed by the court and supported by its reference to *Cantwell v. Connecticut*[59] and *Adderly v. Florida*[60] is within the spirit of the first amendment as it was originally enacted. When the founding fathers provided that Congress would make no law abridging "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,"[61] history suggests that rather than preserving the rights of one individual to exist in relation to the rights of other individuals, they were attempting to preserve the rights of the people as a whole not to be intimidated by their government. It is in this light, then, that the court should have considered the constitutionality of the statute.

Does the vagueness and uncertainty of the clause, "participating therein by his presence"[62] render the clause violative of the due process rights of those arrested under that provision? Might mere innocent bystanders be inappropriately arrested under even a narrow construction of the clause? In repudiating such a contention, the court returned to the argument with which it refuted the possibility of the entire section's uncertainty, adding that, "participating by one's presence in an unlawful assembly is the very antithesis of an

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57 *Id.* at 823, 479 P.2d at 937.
58 *Id.* at 825, 479 P.2d at 938.
59 310 U.S. 296 (1940).
60 385 U.S. 39 (1966).
61 U.S. CONST. amend. I.
62 WASH. REV. CODE § 9.27.060(3) (1909).

innocent and unwitting presence, and requires for conviction evidence or inference from evidence to show an intent or design to engage in or further the unlawful acts while being present at the assembly . . . ."[63]

The court ostensibly implied that it will not punish for intent alone in its use of the statute.[64] Yet the question remains: by the words of the statute *could* such a punishment be wielded? Two other crimes whose crux is intent rather than act—conspiracy and attempt —require that something be done in furtherance of that intent, for such overt acts are the only means of accurately ascertaining that criminal intent. Should assembling, which on its face is ambiguous, be considered an act sufficient to prove criminal intent?

The activity of the defendants in *Dixon* was undoubtedly activity which an organized society desires to prevent; yet this fact should not preclude the suggestion, never entertained by the court, that other criminal statutes might be more applicable to the situation,[65] or the suggestion, discredited by the court, that the statute under which the individuals were arraigned could be rewritten with more precision and clarity to avoid the problems raised herein.

As Justice Hale intimated in the beginning of the *Dixon* opinion, it is impossible to judge the constitutionality of a statute in the abstract. An applicable set of facts are a prerequisite to an applicable law. The instant case upholds his contention.

City Vagrancy Ordinance

In *Seattle v. Jones*, 3 Wn. App. 431, 475 P.2d 790 (1970), the Washington Court of Appeals upheld the constitutionality of a Seattle ordinance[66] which defines and makes unlawful the practice of prostitution. When the defendant was convicted under subsection (g)[67] of the ordinance she attacked her conviction on constitutional grounds.

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[63] State v. Dixon, 78 Wash. Dec. 2d 813, 827, 479 P.2d 931, 939 (1971).

[64] *Id.* at 826, 479 P.2d at 938-39.

[65] *E.g.*, the crimes of assault, battery, & malicious destruction of property.

[66] SEATTLE, WASH. ORDINANCE 73095 as *amended* 97316, § 12.49.010 (1968).

[67] *Id.* at (g) provides:

It is unlawful for anyone:

(g) To loiter in or near any thoroughfare or place open to the public in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting or procuring another to commit an act of prostitution. Among the circumstances which may be considered in determining whether such purpose is manifested: that such person is a known prostitute or panderer, repeatedly beckons to, stops or attempts to stop, or engages male passers-by in conversation, or repeatedly stops or attempts to stop motor vehicle operators by hailing, waiving of arms or any other bodily gesture. No arrest shall be made for a violation of this subsection unless the arresting officer first affords such person an opportunity to explain such conduct, and no one

The court first rejected the defendant's argument that the ordinance was unconstitutionally vague, differentiating it from the ordinance that was struck down in *Seattle v. Drew*.[68] Noting that the ordinance involved in *Drew* imposed sanctions against *innocent* loitering, the court ruled that the ordinance under which Jones was convicted contained no such constitutional deficiency.

Next the court refuted the defendant's contention that the ordinance created an unconstitutional presumption of guilt because it made no mention of *intent*. The court pointed out that prostitution is a crime involving moral turpitude, and therefore the element of intent is *implied*.[69]

Waiver of Right to Remain Silent

In *State v. Cashaw*, 4 Wn. App. 243, 480 P.2d 528 (1971), the Washington Court of Appeals ruled that a defendant's waiver of his *Miranda* rights[70] need not be in writing.

The defendant in *Cashaw* was convicted of living with and accepting the earnings of a common prostitute in violation of Wash. Rev. Code § 9.79.060(5). At the time of his arrest, the defendant, after being given his *Miranda* rights and prior to being taken to the station, admitted that he had lived with the girl in question and knew she was a prostitute. At the station the next day the defendant was again advised of his rights. Though he refused to sign a form waiving the rights, he again admitted living with the girl.

After the defendant was convicted, he appealed on the grounds that his answers in the two interviews were illegally admitted at trial. The court of appeals affirmed the conviction, observing that *Miranda* does not require a written waiver, but merely that any confession be made "voluntarily, knowingly and intelligently."[71]

Right to Retained Counsel

In *Tully v. State*, 4 Wn. App. 720, 483 P.2d 1268 (1971), the court of appeals held that unlike an accused indigent's right to repre-

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shall be convicted of violating this subsection if it appears at trial that the explanation given was true and disclosed a lawful purpose.

For the purpose of this section, a "known prostitute or panderer" is a person who, within one year previous to the date of arrest for violation of this section, has within the knowledge of the arresting officer been convicted of violating any ordinance of the city of Seattle defining and punishing acts of soliciting, committing, or offering or agreeing to commit prostitution.

For the purpose of this chapter "prostitution" means engaging for hire in sexual activity, including homosexual or other deviate sexual relations.

[68] 70 Wn. 2d 405, 423 P.2d 522 (1967).

[69] Morissette v. United States, 342 U.S. 246 (1952).

[70] Miranda v. Arizona, 384 U.S. 436 (1966).

[71] *Id.* at 444.

sentation by appointed counsel at any "critical" stage of criminal proceedings against him, an accused person who has retained counsel is, as a matter of right, entitled to representation at every stage of the proceedings including the preliminary hearing. Refusal to allow an accused representation by his retained counsel at every stage of the proceedings constitute grounds for reversal provided the error is harmful.

In *Tully*, the defendant was charged with grand larceny. He was arraigned on December 5, 1967 at which time a preliminary hearing was scheduled for December 14. Prior thereto the defendant, through his father, retained counsel. Counsel was never notified of the date on which the preliminary hearing was to be held and subsequently, on that date, was out of town on other business. Although the court file listed the defendant's attorney as representative, the judge denied the defendant's request for a continuance. The defendant was not supplied with paper and pencil with which to take notes. No record of the testimony at the hearing was kept and the defendant stated he did not remember what was said. Being unskilled in techniques of cross-examination, the defendant did not examine the testifying witnesses. The defendant was bound over to superior court on the basis of evidence received at the preliminary hearing and subsequently convicted. He later filed a petition for a writ of habeas corpus, contending that his lack of retained counsel at the preliminary hearing had operated to deny him due process of law. The defendant appealed the trial court's denial of that petition to the court of appeals.

The court of appeals held that to deny a defendant the right to representation of retained counsel at *any* stage of criminal proceedings against him constituted constitutional error presumed to be harmful. The case was remanded with directions to the trial court to hold a hearing to determine whether the denial of retained counsel was harmless under the rule of *Chapman v. California*,[72] the state to have the burden of proving the error harmless.

In reaching its decision the court noted the distinction between the rights of the indigent to representation by appointed counsel and the rights of the accused who has retained counsel.[73] It was pointed

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[72] Chapman v. California, 386 U.S. 18 (1967). There the Court held that before an error involving the denial of a federal constitutional right can be held harmless in a state criminal case, the reviewing court must find beyond a reasonable doubt that the error did not contribute to the defendant's conviction.

[73] The court cited Crooker v. California, 357 U.S. 433 (1958) and Betts v. Brady, 316 U.S. 455 (1942) in support of the argument that an accused defendant is entitled to retained counsel at any stage of the proceedings against him and pointed out that art. 1, § 22 (amendment 10) to the Washington State Constitution provides: "In criminal prosecutions the accused shall have the right to appear and defend in person, and by counsel. . . ."

out that this distinction has long been recognized by the United States Supreme Court and that denying a defendant the assistance of his own lawyer in any case, at any stage, on any issue violated the Court's concept of fundamental fairness.[74] It was further indicated that the right to retained counsel at every stage of the criminal proceeding is needed to better protect the dignity of the accused.

When a defendant has been denied representation by his retained counsel at any stage of the criminal proceeding, error has been committed. The question then becomes whether this error was in fact harmless under the rule of *Chapman*. The court in the instant case held that the burden is upon the state to prove that the error was in fact without harm. The stage of the criminal proceedings at which the defendant was denied representation by his retained counsel is a significant factor in determining the extent of the harm caused.

While the court of appeals in *Tully* decided a point of considerable interest, many more questions, which were necessarily left unanswered, were also raised. Perhaps most bothersome is the problem of distinguishing between the right to representation in situations where counsel is retained and where counsel has been appointed by the court. If one of the reasons for allowing retained counsel at every stage of the criminal proceeding is to better protect the dignity of the client, does providing something less for the indigent deny him the dignity which is his and which the court of appeals says "a system of civilized justice must respect?"[75]

Unreasonable Search and Seizures

In *State v. Hatcher*, 3 Wn. App. 441, 475 P.2d 802 (1970), the Washington Court of Appeals curtailed the Seattle Police Department's practice of entering premises without warning when executing a search warrant for narcotic drugs.

In *Hatcher*, the Seattle police executed such a warrant at a residence where defendant Hatcher was visiting. When the police arrived they observed, through a window in the front door, that the defendant and two other persons were in the living room. Though there was no evidence of narcotics being used at that time, the police broke

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[74] When an indigent defendant is involved, the court of appeals pointed out that he is entitled to representation by appointed counsel at any "critical stage" of the criminal proceeding. United States v. Wade 388 U.S. 218 (1967). In Coleman v. Alabama, 399 U.S. 1 (1970) the Court held that a preliminary hearing is a critical stage at which the defendant has a right to appointed counsel. Since the issue in the instant case involved the right to retained counsel the question of the retroactivity of Coleman was not decided.

[75] Tully v. State at 726.

in the door without warning. Heroin was found on the defendant and he was placed under arrest. Defendant attacked the search as being unreasonable and therefore void under the fourth amendment.[76]

The court of appeals agreed with both defendant and the state that *State v. Young*[77] should be controlling, but accepted the defendant's analysis. In *Young*, the police knocked on the door of a house where they were executing a search warrant for narcotics. As soon as they announced their identity they heard screams and sounds of people running from within the house. At that point the officers broke through the door without further announcing their purpose. *State v. Young*,[78] relying on *Ker v. California*,[79] ruled that there may be exigent circumstances which justify a forcible entry without an announcement of purpose and identity. The circumstances in *Young* were the shouting and screaming from within the house, which gave the officers reasonable cause to believe that evidence might be destroyed if they did not enter immediately.

In *Hatcher*, the state argued that necessitous circumstances exist in any instance where police search for drugs, because of the ease with which the evidence can be destroyed. The court disagreed, ruling that such necessitous circumstances could not be inferred in every instance involving possible narcotic violations. Nor did the court find the requisite circumstances present in *Hatcher* since the police were able to see the defendant through a window and, thus, could easily have observed any attempt to destroy evidence after an announcement of identity and purpose.

By ruling the search in *Hatcher* to be invalid, the Washington courts have joined those of California in refusing to approve a blanket "no-knock" search and seizure policy for drugs.[80] Though admitting that the public concern over narcotics makes such a policy very tempting, the court decided the constitutional limitations against unreasonable searches were too strong to be avoided in any but the most extreme circumstances.

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[76] U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

WASH. REV. CODE § 10.31.040 (1881) provides:

To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, *if, after notice of his office and purpose*, he be refused admittance. (Emphasis added).

[77] 76 Wn. 2d 212, 455 P.2d 595 (1969).

[78] *Id.*

[79] 374 U.S. 23 (1963).

[80] People v. Gastelo, 67 Cal. 2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967).

Bail and Traffic Violations

In *State ex rel. Wallen v. Noe*, 78 Wash. Dec. 2d 485, 475 P.2d 787 (1970), the Washington Supreme Court ruled unconstitutional certain sections of the Seattle Traffic Code which required anyone cited for a traffic offense to post bail before obtaining a trial date.

Wallen was arrested and charged with blocking traffic. At the time of his arrest he signed the uniform complaint and citation form thereby agreeing to appear before the traffic violations bureau within seven days. When he did so appear, and stated that he wished to contest the charge, he was informed that under Seattle, Wash. Traffic Code § 21.06.320(2)[81] and Washington Traffic Rules for Justice Court T2.03 and T2.06(b)(2)[82] he could not be given a trial date until he posted bail. Wallen declined to pay and petitioned the superior court for relief. That court held the traffic code provisions to be unconstitutional and the city appealed.

The supreme court affirmed the lower court's judgment holding that the questioned provisions were clearly in conflict with the constitutional assurance of a speedy trial.[83] The court rejected an attempt to justify the pretrial deposit as a "bail" whereby an accused makes a deposit so that he can secure his pretrial liberty in lieu of confinement. The flaw in the city's argument was that the accused had already been granted a seven-day personal recognizance when he signed the uniform citation. If he had not appeared within the seven-day period he would no longer have been at liberty under that recognizance, and only then could the usual procedure relating to arrest and bail have been put into effect. The supreme court then reversed the lower court's ruling that Wallen would still have to stand trial on the original charge, and held that, since his right to a speedy public trial had been denied, the charge against him should be dropped.

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[81] SEATTLE, WASH. TRAFFIC CODE § 21.06.320 provides in part that: "[t]he duties of the Traffic Violations Bureau shall be as follows: . . . . 2) It shall accept designated bail from and issue receipts to all persons who must or wish to be heard in court. . . ."

[82] WASH. TRAF. R.J. CT. T2.06 Traffic Violations Bureau—Procedure:

(2) *Authority to accept bail.* The court may by its order authorize the traffic violations bureau to receive the deposit of bail for appearance in court for specified offenses under a bail schedule issued under Rule T2.03. The traffic violations bureau, upon accepting the prescribed bail, shall issue (a) a receipt to the alleged violator, and (b) a notice of the trial date . . . .

[83] WASH. CONST. art. 1, § 22 provides in part:

In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial . . . in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.