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Notes

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NOTES

Administrative Law—Evidence—Hearsay and the Right of Confrontation in Administrative Hearings

The United States Court of Claims in *Peters v. United States*[1] recently rendered an opinion that significantly affects the character of administrative evidence and the right of cross-examination in a federal hearing. If the decision is widely accepted, the result will be that hearsay evidence can form the sole basis of an administrative adjudication, and the right of cross-examination will be reduced, at most, to a limited privilege.

Sergeant Peters was a placement assistant in the United States Air Force with the responsibility for placing applicants in the Air Force Reserve program. Upon notification that he was being removed for accepting bribes for preferential placements, Peters appealed to the Civil Service Commission, an administrative right available to him as a career airman.[2] Prior to the hearing, the Commission made available to Peters the affidavits of the four persons charging him with bribery and certain other correspondence between the Air Force and the accusers. Several weeks before the hearing Peters' counsel requested that the Air Force produce the four affiants at the hearing, but the Air Force refused because it had no jurisdiction over these men except on training weekends.

At the hearing the Government introduced the four apparent affidavits[3] of the four declarants over Peters' objection and also produced two officers as witnesses. One had taken the four statements, and the other had talked to three of the men. Both corroborated the taking of the statements

[1] 408 F.2d 719 (Ct. Cl. 1969).

[2] Veterans' Preference Act § 14, 5 U.S.C. § 863 (1964). This act provides such special procedural protections for veterans as thirty days advance notice of proposed discharge, information about the reasons for proposed discharge, a reasonable time for answering charges, and the right to appeal to the full Civil Service Commission.

[3] There is some question whether these four typed statements were actually affidavits in the formal sense. The officer before whom the statements were taken testified that because his stenographer was having difficulty, he supplemented her work with his own notes. The two products were later typed together as the formal statements made by the four declarants. 408 F.2d at 722. This procedure raises some doubt as to the accuracy of the statements. The affidavits were written in the third person rather than in the usual first person form, bore no jurat or seal, and were not signed by anyone authorized to administer an oath.

contained in the affidavits. These corroborated statements were the full extent of the Government's evidence presented to the Commission. Peters himself testified as to his innocence and directly contradicted the Government's evidence. On the basis of the four corroborated affidavits, the Commission upheld the Government's action in removing Peters. Alleging that his procedural rights had been violated and that the Commission's decision was contrary to law,[4] Peters brought an action for back pay.

The Court of Claims in a four-to-one decision affirmed the Commission's actions in dismissing Peters. The court held that because the affidavits were corroborated and were declarations against interest, they were reliable, probative, and substantial evidence upon which the decision could rest.[5] The court also held that Peters' procedural rights in regard to cross-examination of the four declarants had not been violated because the burden was upon him to produce them for cross-examination.[6] Each of these determinations appears to be contrary to precedent and raises serious questions regarding the sufficiency of evidence and the right to confront accusers before a federal administrative agency.

Under the Administrative Procedure Act (APA), decisions of federal agencies must be based upon reliable, probative, and substantial evidence;[7] however, rules of evidence need not be strictly followed.[8] It has been consistently recognized that the hearsay rule is not applicable to bar the introduction of statements or testimony before a federal agency.[9] Even with this liberal policy of admission of evidence, a safeguard against arbitrary and capricious decisions was established by the substantial-evidence test.

This test was formulated by the United States Supreme Court over thirty years ago, before the passage of the APA, in *Consolidated Edison Co. v. NLRB*.[10] The Court held that a federal administrative agency must base its decisions on substantial evidence and said: "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reason-

[4] *Id.* at 721.
[5] *Id.* at 724-25.
[6] *Id.* at 725.
[7] 5 U.S.C. § 556(d) (1968).
[8] *See, e.g.*, 5 C.F.R. § 772.305(c)(4) (1969) (Civil Service Commission); 20 C.F.R. § 404.928 (1969) (Health, Education and Welfare).
[9] Cohen v. Perales, 412 F.2d 44, 51 (5th Cir. 1969); Rocker v. Celebrezze, 358 F.2d 119, 122 (2d Cir. 1966); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 690-91 (9th Cir. 1949).
[10] 305 U.S. 197 (1938).

able mind might accept as adequate to support a conclusion."[11] The Court then proceeded to state that "mere uncorroborated hearsay or rumor does not constitute substantial evidence."[12] The pre-APA substantial-evidence test of *Consolidated Edison* was cited by the Court with approval and without modification in *Universal Camera Corp. v. NLRB*,[13] a post-APA case, and clearly remains the law under the APA. In addition, numerous lower courts, including the Court of Claims, have cited the statement from *Consolidated Edison* as controlling on the question of hearsay as substantial evidence.[14] Clearly, then, mere uncorroborated hearsay does not constitute substantial evidence under the APA.

There is authority, however, for the proposition that hearsay may be relevant and have probative value in an administrative finding.[15] A close examination of the major cases in which hearsay evidence was deemed to be relevant reveals that the decisions were based on something more than hearsay alone; in each case there was, in addition to the hearsay evidence, direct and substantial evidence upon which the decisions were ultimately rested.[16] Aside from *Peters*, the correct and accepted rule has been that while uncorroborated hearsay may be admitted into evidence, the ultimate decision must be supported by other legal and substantial evidence.

The Court of Claims in *Peters*, though citing the substantial-evidence test of *Consolidated Edison* with approval, attached little significance to the Supreme Court's statement that "uncorroborated hearsay or rumor does not constitute substantial evidence."[17] The Court of Claims thought that this statement was "obviously dictum,"[18] but overlooked the extent

[11] *Id.* at 229.
[12] *Id.* at 230.
[13] 340 U.S. 474, 477 (1951).
[14] NLRB v. Amalgamated Meat Cutters, 202 F.2d 671, 673 (9th Cir. 1953); Montana Power Co. v. Federal Power Comm'n, 185 F.2d 491, 498 (D.C. Cir. 1950); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 690 (9th Cir. 1949); United States v. Krumsiek, 111 F.2d 74, 78 (1st Cir. 1940); Hill v. Fleming, 169 F. Supp. 240, 245 (W.D. Pa. 1958); Conn v. United States, 376 F.2d 878, 883 (Ct. Cl. 1967); Camero v. United States, 345 F.2d 798, 800 (Ct. Cl. 1965).
[15] Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th Cir. 1949); Morelli v. United States, 177 Ct. Cl. 848 (1966).
[16] Montana Power Co. v. Federal Power Comm'n, 185 F.2d 491 (D.C. Cir. 1950); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th Cir. 1949); Hill v. Fleming, 169 F. Supp. 240 (W.D. Pa. 1958); Morelli v. United States, 177 Ct. Cl. 848 (1966); Camero v. United States, 345 F.2d 798 (Ct. Cl. 1965). *But see* United States v. Costello, 221 F.2d 668 (2d Cir. 1955) (indictment based solely upon hearsay sustained).
[17] 305 U.S. at 230.
[18] 408 F.2d at 723.

to which the principle has been adopted in the cases[19] after *Consolidated Edison.*

Corroboration by the Government's witnesses of the accuracy of the statements contained in the four affidavits did not add any probative value to the evidence in *Peters*, for the corroboration was itself hearsay.[20] Thus the court in effect allowed hearsay upon hearsay—pyramided hearsay —which is no more reliable than single hearsay to sustain a decision.[21] Judge Skelton in an able and revealing dissent in *Peters* aptly described what results from such corroboration: "Adding hearsay to hearsay is like adding zero to zero which still equals zero."[22]

In a further attempt to justify the Commission's decision based solely upon the four affidavits, the Court of Claims held that they contained declarations against interest because the declarants could be subjected to criminal liability for the crimes alleged.[23] By applying this label to the statements, the court was able to satisfy itself that an exception to the hearsay rule formed the basis of the Commission's decision; declarations against interest are recognized as possessing trustworthiness and probative value because the declarant would not intentionally make a statement against his interest unless it was true.[24] The court reasoned that since the hearsay had probative and reliable value, a decision resting upon it could be said to be based upon substantial evidence.

This reasoning significantly diluted the substantial-evidence test. Even if the declarations could be labeled as exceptions to the hearsay rule, the statements contained in the affidavits were still hearsay. They could be introduced and accorded some weight in an administrative hearing, but they were in fact the only evidence used to sustain the decision.

Moreover, it is doubtful that these statements against penal interest were traditional hearsay exceptions under federal law.[25] And there is doubt

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[19] See note 14 *supra.*

[20] *See* Neal v. United States, 22 F.2d 52, 55 (4th Cir. 1927); Royal Ins. Co. v. Taylor, 254 F. 805, 809 (4th Cir. 1918).

[21] See United States v. Grayson, 166 F.2d 863, 869 (2d Cir. 1948). *But see* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 14.10-.12 (1958).

[22] 408 F.2d at 738 (dissenting opinion).

[23] *Id.* at 724.

[24] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 253 (1954).

[25] In Donnelly v. United States, 228 U.S. 243 (1913), the Supreme Court declared that a statement against *penal* interest was not within the exception to the hearsay rule. The holding in *Donnelly* is the overwhelming majority rule today. 5 J. WIGMORE, EVIDENCE § 1476 (3d ed. 1940). A minority of jurisdictions reject the rule in *Donnelly* and hold that a statement against penal interest is within the exception. *See, e.g.*, People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964); Brady v. State, 226 Md. 422, 174 A.2d 167 (1961); Sutter v.

that these statements were actually against penal interest, for as the dissent in *Peters* pointed out,[26] none of these affiants was ever punished in any way. One can infer that the Government promised immunity in return for the affiants' signing the statements. Thus the reliability and probative value of these statements are diminished even further, and they should be entitled to no more consideration than any other hearsay.

The final aspect of *Peters* that is significant is the Court of Claims' holding with regard to the right to confrontation at an administrative hearing. In denying Peters' contention that his procedural right of cross-examination had been violated, the court held that the initial burden of producing the opposing witnesses was upon Peters. The court said that because he failed to attempt to procure their attendance at the hearing, it was his own inaction that prevented his opportunity to confront.[27]

Administrative discharge of civilian employees and career servicemen without the safeguard of the right to confrontation has become an increasing concern.[28] Attack under the due process clause of the fifth amendment has been futile because of the established doctrine that an individual has no constitutional right to governmental employment[29] or military status.[30] A constitutional right of confrontation in deportation hearings has been found,[31] but confrontation has not been accorded the status of a right in ordinary administrative hearings. It is particularly un-

Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945); Blocker v. State, 55 Tex. Crim. 30, 114 S.W. 814 (1908); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923). It should also be noted that those jurisdictions recognizing statements against penal interest as a proper exception to the hearsay rule do so only to exculpate the accused. In *Peters* the declarations were used to incriminate the accused. *But see* State v. Alcorn, 7 Idaho 599, 64 P. 1014 (1901); State v. Voges, 197 Minn. 85, 90, 266 N.W. 265, 267 (1936) (dissenting opinion).

[26] 408 F.2d at 733 (dissenting opinion).

[27] *Id.* at 725.

[28] See Dougherty & Lynch, *The Administrative Discharge: Military Justice?*, 33 GEO. WASH. L. REV. 498 (1964); Susskind, *Military Administrative Discharge Boards: The Right to Confrontation and Cross-Examination*, 44 MICH. ST. B.J. 25 (1965); Note, *Confrontation and Cross-Examination in Hearings for the Administrative Separation of Military Officers*, 20 STAN. L. REV. 360 (1968); 12 AM. U.L. REV. 205 (1963).

[29] *See, e.g.*, Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950).

[30] *See, e.g.*, Reaves v. Ainsworth, 219 U.S. 296, 304 (1911); Beard v. Stahr, 200 F. Supp. 766 (D.D.C. 1961). However, there is authority for the proposition that lack of a substantive due-process right should not defeat the right to procedural due process. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1452 (1968).

[31] Maltez v. Nagle, 27 F.2d 835 (9th Cir. 1928); *Ex parte* Radivoeff, 278 F. 227 (D.C. Mont. 1922).

fortunate that safeguards have not been extended to hearings on discharge of governmental employees and servicemen, for many times these proceedings are almost criminal in nature and result in unemployment and loss of reputation. While the courts have departed from the traditional reluctance to inquire into an agency's action in cases in which the outcome "stigmatizes" the governmental employee[32] or serviceman,[33] these inquiries have been restricted almost entirely to interpretation of the statutory procedural rights provided.[34] An exception is some dictum in the case of *Greene v. McElroy*.[35]

In *Greene* an employee of a private manufacturer was discharged solely as a result of revocation by the Department of Defense of his clearance to handle classified information.[36] Greene was provided a hearing, but was denied the opportunity to confront witnesses whose statements were adverse to his interests.[37] The Supreme Court reversed the revocation of Greene's clearance on the basis that neither Congress nor the President had authorized such a procedure. In significant dictum, Chief Justice Warren, writing for the majority, stated that the Court has adamantly protected the right of confrontation with one's accusers "not only in criminal cases . . . but also in cases where administrative and regulatory action was under scrutiny."[38] Such language indicates that the Court is cognizant that due process is a necessity if the administrative action threatens serious injury to the individual.[39]

But in *Williams v. Zuckert*[40] the Court again avoided squarely facing the constitutional issue of the right to confrontation. Williams was discharged on the basis of three affidavits admitted at an administrative hearing. At the hearing Williams requested for the first time the appearance of the affiants for cross-examination. Williams had made no prior attempt

[32] See Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956); Wieman v. Updegraff, 344 U.S. 183, 192 (1952); *cf.* Peters v. Hobby, 349 U.S. 331, 333 (1955).

[33] Bland v. Connelly, 293 F.2d 852, 858-59 (D.C. Cir. 1961); Covington v. Schwartz, 230 F. Supp. 249 (N.D. Cal. 1961).

[34] *See, e.g.*, Williams v. Zuckert, 371 U.S. 531 (1963), *noted in* 12 AM. U.L. REV. 205 (1963); Vitarelli v. Seaton, 359 U.S. 535 (1959).

[35] 360 U.S. 474 (1959).

[36] *Id.* at 475.

[37] *Id.* at 479.

[38] *Id.* at 497.

[39] *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.05, at 162 (Supp. 1965).

[40] 371 U.S. 531 (1963). The question whether hearsay constitutes substantial evidence was not raised.

to arrange privately for their appearances, and the Supreme Court dismissed certiorari on the basis that the then applicable Commission's regulation[41] required that he *must* make his own arrangements for the presence of witnesses by at least assuming the initial burden of attempting to produce them. By not assuming this burden, Williams lost his right to confrontation. Justices Black and Douglas, dissenting, reached the constitutional issue:

> [P]etitioner has been branded with a stigma and discharged on the strength of three affidavits. Though he asked that these affiants be produced at his hearing, none was called to confront him. The Court says that petitioner's request came too late to conform with the applicable regulation. Due process dictates a different result. We have heretofore analogized these administrative proceedings that cast the citizen into the outer darkness to proceedings that "involve the imposition of criminal sanctions"; and we have looked to "deeply rooted" principles of criminal law for guidance in construing regulations of this character . . . . The requirements of due process provided by the Fifth Amendment should protect him . . . by giving him the same right to confront his accusers as he would have in a criminal trial.[42]

In *Hanifan v. United States*[43] the Court of Claims modified somewhat this initial burden of production of witnesses by the accused in administrative hearings. The petitioner in *Hanifan* had made numerous requests over a period of several months prior to the hearing for the production as witnesses of employees of the Internal Revenue Service. Hanifan, however, did not attempt to arrange privately for their attendance. The court held that Hanifan was excused for his failure to attempt to arrange privately for their appearance because the conclusion was inescapable that the witnesses would not have accepted his invitation if tendered.[44]

It can be argued that *Peters* involved a situation in which the application of the *Hanifan* principle would have been appropriate to overcome the lack of greater initiative on Peters' behalf. Because the affiants may have been granted immunity, their presence would have been undesirable to the

[41] 20 Fed. Reg. 2699 (1955), provided: "The Commission is not authorized to subpoena witnesses. The employee and his designated representative, and the employing agency must make their own arrangements for the appearance of witnesses."

[42] 371 U.S. at 533-34 (dissenting opinion) (footnotes omitted).

[43] 354 F.2d 358 (Ct. Cl. 1965).

[44] *Id.* at 363.

Government; it appears unlikely that an invitation from Peters to appear at the hearing would have been accepted.

In *Peters*, the Court of Claims relied entirely upon *Williams* and analogized the regulations[45] involved in each case. The court concluded that since Peters had not taken the initiative in securing the witnesses' attendance, he was estopped from claiming a denial of the right to confrontation. The analogy between the regulation involved in *Peters* and the one involved in *Williams* is clear, but the Court of Claims failed to realize that the cases are easily distinguishable. In the latter, the Supreme Court placed great reliance upon the fact that Williams' first request for the appearance of the witnesses came *at* the hearing;[46] however, in *Peters* the plaintiff had made a request *prior to* the hearing date—in conformity with the regulation. It can also be argued that in *Peters* the right to confrontation was particularly important, for dismissal for a crime such as accepting bribes results in a stigma attaching to the discharged individual.

Peters is the result of a reviewing court's strained attempt to conform the evidence to meet the standards of the substantial-evidence test. This decision has produced, in effect, a new and less stringent test that treats hearsay as any other substantive evidence and reduces confrontation to an even lesser privilege than it has been accorded in the past. Probably worried about shackling administrative agencies with the bonds of a jury-trial system of evidence, the Court of Claims retreated into a position based upon unsound reasoning.

One possible solution is to require direct evidence when the discharge of government employees or servicemen is in issue before an administrative agency. This solution would also eliminate most confrontation problems inherent whenever hearsay evidence forms the basis of a decision. Perhaps application of a direct-evidence rule to administrative agencies should depend upon the nature of the hearing and the consequences of an adverse decision against the individual so that hearsay evidence alone would not be held sufficient to support a decision in a proceeding that is virtually criminal in nature. Action by Congress is necessary to enact such procedural safeguards for the accused in administrative hearings; neverthe-

[45] 28 Fed. Reg. 10089 (1963), in effect when the hearing in *Peters* took place, provided: "Both parties are entitled to produce witnesses but as the commission is not authorized to subpoena witnesses the parties are required to make their own arrangements for the appearance of witnesses." The current regulation is not significantly different. *See* 5 C.F.R. § 772.305(c)(2) (1969). See note 41 *supra* for the regulation involved in *Williams*.

[46] 371 U.S. at 532.

less, if Congress fails to act, it is not improbable that the Supreme Court may intervene to provide the much-needed protection.

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Civil Procedure—Constitutionality of Constructive Service of Process on Missing Defendants

With the advent of far-reaching long-arm statutes[1] allowing a basis for in personam jurisdiction with only minimal contacts[2] in a state, courts in the future will be faced increasingly with the problem of what manner of service of process is to be allowed as a sufficient giving of notice to the defendant. It is only logical that as the geographical-power concept of jurisdiction diminishes and in personam jurisdiciton can be had over a greater number of nonresidents,[3] courts must give more attention and primary concern to notice requirements.

The purpose of service of process is to give the defendant notice of a suit pending against him so that he may come in and defend.[4] But what happens when the plaintiff has a basis for in personam jurisdiction and the defendant cannot be found so that he can be served with process?

[1] *See* N.C. GEN. STAT. § 1-75.4 (1969); WIS. STAT. ANN. § 262.05 (Supp. 1969). For a thorough discussion of these statutes, see Revision Notes to WIS. STAT. ANN. § 262.05 (Supp. 1969); Hinson, *Jurisdiction Over Persons and Property*, in NORTH CAROLINA BAR ASSOCIATION FOUNDATION, INSTITUTE ON JURISDICTION, JOINDER AND PLEADING UNDER NORTH CAROLINA'S NEW RULES OF CIVIL PROCEDURE II-1 (1968).

[2] There is extensive judicial development in the area of the minimal-contact theory. *E.g.*, Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See generally* Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

[3] In all the problematic situations dealt with in this note, it is assumed that the applicable state long-arm statute has provided the plaintiff with a basis for in personam jurisdiction. The only question for discussion is whether the plaintiff has achieved satisfactory service upon the defendant.

[4] In early American law, jurisdiction and service of process were approached as two aspects of the same thing. *E.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877). However, with the modern view of service as notice-giving, the two have become separate questions. No longer is the manner of notice that is to be given clearly defined by the type of jurisdiction acquired. No matter what type of jurisdiction is acquired, plaintiff is required to give defendant the best notice possible. *See* Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956).

The most common situation in which the problem of the missing defendant will arise is an automobile injury case. Plaintiff, a resident of state *A*, is injured in an automobile accident occurring in state *A*. At the scene of the accident, defendant, resident of state *A* or any other state, gives plaintiff his address. However, when plaintiff later files suit and attempts to serve defendant personally,[5] he cannot be found. An attempt is made to serve defendant by registered mail, but the letter is returned. May plaintiff, consistent with the constitutional standards of procedural due process, then serve defendant by publication and/or mailing to his last known address?[6] If there is no reason to believe that publication in a local newspaper or mailing a letter to defendant's last known address will *in fact* come to defendant's attention, is such service consonant with the present test for procedural due process—"notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"?[7]

Although the United States Supreme Court has yet to directly pass on the question, dictum in *Mullane v. Central Hanover Bank & Trust Co.*[8] indicates that such service in some instances would be constitutional. For "persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constituional bar to a final decree foreclosing their rights."[9]

Recently, the New York Court of Appeals in *Dobkin v. Chapman*[10]

[5] Most statutes dealing with service of process provide for a preferred order of methods. Personal service is always the most desirable. Generally, the method favored next is leaving the summons at defendant's residence with a person of suitable age. Statutes then provide such alternatives as registered mail with return receipt requested and ordinary mailing along with nailing a copy of the summons to the door of defendant's residence. Certainly one, if not all, of these methods should be attempted before resorting to constructive service. *See, e.g.*, FED. R. CIV. P. 4(d); N.Y. CIV. PRAC. LAW § 308 (McKinney 1963); N.C.R. CIV. P. 4(j).

[6] The new North Carolina service statute provides for such constructive service:

> A party subject to service of process under this subsection (9) may be served by publication whenever the party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party under either paragraph a [personal service] or under paragraph b [registered mail] . . . .

N.C.R. CIV. P. 4(j).

[7] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[8] 339 U.S. 306 (1950).

[9] *Id.* at 317.

[10] 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

squarely faced the issue of the validity of an in personam judgment on a missing defendant when notice was given by constructive service. Consolidating three different lower court cases[11] then on appeal, the court held that constructive service on a defendant who could not be found is not violative of due process.

In the first[12] of these three cases, the plaintiff, a resident of New York, was injured in an accident in New York. At the scene of the accident, the defendant produced a license with a Pennsylvania address. The plaintiff's attorney attempted to contact the defendant by ordinary mail, but his letters were neither answered nor returned. An unsuccessful attempt was made at personal service, and a registered letter containing the summons and complaint was returned marked "Moved, Left No Address." The court granted an ex parte order[13] permitting service by ordinary mail to the address given at the scene of the accident. A motion in the cause was thereafter filed by the Motor Vehicle Accident Indemnification Corporation[14] to vacate the ex parte order as being violative of the due process clause. This attack was rejected by the lower court's holding that service by ordinary mail in this instance was reasonably calculated to give notice to the defendant.

In the second case, *Sellars v. Raye*,[15] both the plaintiff and defendant were residents of New York. Again, the plaintiff could not effect service of process in a preferred manner at the address given by the defendant. The court ordered service upon the Secretary of State in addition to the sending of a copy of the summons and complaint by registered mail, with-

[11] Dobkin v. Chapman, 46 Misc. 2d 260, 259 N.Y.S.2d 733 (Sup. Ct. 1965), *aff'd*, 25 App. Div. 2d 745, 269 N.Y.S.2d 49 (Sup. Ct. 1966), *aff'd*, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968); Sellars v. Raye, 45 Misc. 2d 859, 258 N.Y.S.2d 62 (Sup. Ct. 1965), *aff'd*, 25 App. Div. 2d 757, 269 N.Y.S.2d 7 (Sup. Ct. 1966), *aff'd sub nom.* Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968); Keller v. Rappoport, 28 App. Div. 2d 560, 282 N.Y.S.2d 664 (Sup. Ct. 1967), *aff'd sub nom.* Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

[12] Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

[13] The New York service-of-process statute allows plaintiff to come into court and have the court direct the manner of service when it is impractical under the preferred methods. N.Y. CIV. PRAC. LAW § 308 (McKinney 1963).

[14] The Motor Vehicle Accident Indemnification Corporation is a public liability insurer. The corporation was set up by the New York Legislature to provide a source of recovery for the plaintiff who is injured by an uninsured or unknown motorist. The corporation's attorneys may enter an appearance in any suit in which it might be held financially liable. N.Y. INS. LAW §§ 600-26 (McKinney 1963).

[15] 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

out the filing of a return receipt, and the publication in the local newspaper circulated in the vicinity of the defendant's last known residence.

In *Keller v. Rappoport*,[16] the third case, the defendant was a resident of New York at the time of the accident. Upon inquiry of the defendant's insurer, the plaintiff was informed that the defendant had moved to California. Attempted service by registered mail to California was returned marked "Moved-left no address." The court issued an order for service by mailing to defendant's last known New York address and delivery of copies of the complaint to the insurance carrier.

The New York Court of Appeals, relying on the dictum in *Mullane*, upheld service in all three cases and noted that "due process is not . . . a mechanical formula or a rigid set of rules. Increasingly in modern jurisprudence, the term has come to represent a realistic and reasonable evaluation of the . . . circumstances of the particular case."[17] Courts in the future faced with the problem of constructive service on defendants whose actual whereabouts are unknown and unknowable by any ordinary means must carefully evaluate and balance a series of factors before determining whether constructive service meets the due process standard. None of these factors are conclusive in themselves, but a reading of the cases already decided by various state courts discloses the ones that are usually of determinative importance in automobile-accident cases. The remainder of this note will examine those factors.

I. Plaintiff's Interest

The plaintiff's need for an opportunity to recover was recognized by the United States Supreme Court when it observed that "the potentialities of damage by a motorist, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against [the defendant] provided only that he is afforded an opportunity to defend himself."[18] If the courts deny a chance for recovery in instances in which the defendant cannot be personally served, many an injured plaintiff will go without recompense, and the courts would, as a practical matter, be rewarding the defendant who absented himself.

Recognizing that it is all too easy for a defendant to escape liability by secreting himself, many states have enacted statutes providing for service by publication when a resident defendant fraudulently conceals

[16] *Id.*
[17] *Id.* at 502, 236 N.E.2d at 457-58, 289 N.Y.S.2d at 170.
[18] Olberding v. Illinois Cent. R.R., 346 U.S. 338, 341 (1953).

himself to avoid service of process.[19] However, under most of these statutes, the plaintiff must prove fraudulent concealment. In *Harrison v. Hanvey*,[20] the North Carolina Supreme Court succinctly stated the problem:

> If a defendant . . . successfully keeps himself concealed . . . , a plaintiff with a good cause of action may be greatly disadvantaged and the defendant will profit from his fraud unless the plaintiff can serve him with process by publication. Of necessity, often no better notice can be given. No . . . resident of a state should be allowed, by . . . concealment, to escape his legal obligations and thwart the efforts of the courts of his state to enforce the rights of others against him.[21]

A California district court of appeals[22] recently upheld service by publication on an absent defendant without requiring proof by the plaintiff that the defendant was fraudulently concealing himself to avoid process. Noting that, as far as the plaintiff was concerned, it did not matter why the defendant disappeared, the court held that the availability of relief should not depend upon the motive of the defendant.[23] "The careless as well as the scoundrel owe equal responsibility to answer for their obligations."[24]

It might be argued that the plaintiff's interest would be protected adequately by the tolling of the statute of limitations so that the plaintiff would be allowed to file his complaint when he discovers the whereabouts of the defendant. This remedy is certainly not an attractive one for the plaintiff. It is quite likely that by the time he finds the defendant, if he ever does, his claim will be difficult to prove because the necessary witnesses may be unavailable, and even the available witnesses will have the inevitable lapse of memory from the passage of time. If the defendant

[19] *E.g.*, CAL. CIV. PRO. CODE §§ 412, 413, 417 (West 1954); ch. 553, [1957] N.C. Sess. L. 501 (repealed 1967). *See* Skala v. Brockman, 109 Neb. 259, 190 N.W. 860 (1922).

[20] 265 N.C. 243, 143 S.E.2d 593 (1965).

[21] *Id.* at 251, 143 S.E.2d at 599.

[22] Craddock v. Financial Indem. Co., 242 Cal. App. 2d 850, 52 Cal. Rptr. 90 (Dist. Ct. App. 1966).

[23] It is true that a defendant who is secreting himself is in a morally inferior position to one who cannot be found after due diligence. It does not follow that only the former is vulnerable to a personal judgment after published summons. Due process requires no more than "fair notice." Whatever his reason, Cervantes has disappeared. . . . It it [sic] obvious that no notice other than that which was given could have been given.

Id. at —, 52 Cal. Rptr. at 96-97.

[24] Note, *Service by Publication on a Defendant Who Cannot Be Located in California*, 3 U. SAN FRANCISCO L. REV. 320, 326 (1969).

cannot be found, even with a judgment the plaintiff may not be able to collect immediately. But, at least, by having the opportunity to secure an immediate judgment, plaintiff may be able to get at defendant's assets, including insurance; and he can avoid the problems of delay in having his claims heard. Clearly, granting the plaintiff an immediate right to a judgment is a compelling reason for upholding constructive service.

II. The State's Interest in Providing Plaintiff Relief

The second factor is closely related to the plaintiff's interest in recovery. Obviously the state wants to protect its citizens who are victims of automobile accidents by providing them with an adequate remedy. Not only does the state want to protect its citizens, but it also wants to protect itself from having its citizens become a financial burden upon the state. This dual interest was made apparent early in this century by the passage of nonresident motor vehicle statutes.[25] Such statutes allow the resident plaintiff to secure in personam jurisdiction over the nonresident defendant by the legal fiction of statutorily asserting that any nonresident motorist using the state's highways is thereby consenting to in personam jurisdiction over himself in an action arising out of any accident on those highways. Most such statutes provide for service on an instate agent with notice then being sent to the defendant by registered mail, return receipt requested.[26]

The states' interest in providing automobile-accident victims with an immediate and adequate remedy is also shown by laws requiring evidence of an automobile owner's financial responsibility. Some states have even set up agencies that provide a source of recovery for those injured by uninsured or missing drivers.[27]

III. Reasonableness and Diligence of Efforts Taken by the Plaintiff To Inform Defendant of the Suit

It is clear that, at the very least, the plaintiff must make a diligent attempt to notify the defendant by the preferred methods of service before he

[25] For a comprehensive discussion of nonresident motor vehicle statutes, see Jox, *Non-Resident Motorists Service of Process Acts: Notice Requirements—A Plea for Realism*, 33 F.R.D. 151 (1963).

[26] Some states have held that good service is effected even if the signed receipt is not returned. *See, e.g.*, Powell v. Knight, 74 F. Supp. 191 (E.D. Va. 1947); Williams v. Egan, 308 P.2d 273 (Okla. 1957); *cf.* Kelso v. Bush, 191 Ark. 1044, 89 S.W.2d 594 (1935); Sorenson v. Stowers, 251 Wis. 398, 29 N.W.2d 512 (1947). *See also* 34 Mich. L. Rev. 1227 (1936).

[27] See note 14 *supra*.

undertakes publication and/or mailing to the last known address in order for such constructive service to withstand constitutional attack. Service of process statutes that permit constructive service generally require the plaintiff to file an affidavit with the court showing that despite due diligence the defendant cannot be found.[28] It is, however, unclear just how extensive an investigation to find the defendant will be required before constructive service may be undertaken. In *Mullane* the Supreme Court stated that "impracticable and extended searches are not required in the name of due process."[29] The Supreme Court probably will require greater diligence to discover the whereabouts of the defendant in a tort suit than was held essential on the facts of *Mullane*.[30]

In *Gribsby v. Wopschall*,[31] the South Dakota Supreme Court, interpreting the phrase "due diligence," stated that it is incumbent upon the plaintiff to ascertain if the defendant left any relatives, business associates, or friends in the vicinity. If so, inquiry would have to be made of them as to the defendant's whereabouts.[32] Moreover, exercise of due diligence ought to require that the plaintiff inquire as to defendant's present address at the post office[33] and from the Department of Motor Vehicles.[34] If the defendant's insurer is known, inquiry should be made of it.[35]

The ultimate limit of due diligence that can be required of the plaintiff is that he hire a private investigator to make an extensive search for the defendant. In two California cases[36] such searches were undertaken

[28] *E.g.*, N.Y. CIV. PRAC. LAW § 308 (McKinney 1963); N.C.R. CIV. P. 4(j).

[29] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317-18 (1950).

[30] The facts in *Mullane* are easily distinguished from the automobile-accident case and would therefore seem to require a different approach. In *Mullane* the court was considering contingent and unknown beneficiaries of a common trust fund. The court required notice by ordinary mail to those beneficiaries whose addresses were known. Significantly, in an action for the settlement of accounting of a trust fund, the group of present beneficiaries will adequately represent the interests of those beneficiaries who are absent.

[31] 25 S.D. 564, 127 N.W. 605 (1910). For a general discussion of due diligence see Annot., 21 A.L.R.2d 929 (1952).

[32] Grigsby v. Wopschall, 25 S.D. 564, 570, 127 N.W. 605, 607 (1910).

[33] *Id.*

[34] *Cf.* Hayes v. Risk, 255 Cal. App. 2d 613, —, 64 Cal. Rptr. 36, 39 (Ct. App. 1967); Dobkin v. Chapman, 21 N.Y.2d 490, 495, 497, 236 N.E.2d 451, 453, 454, 289 N.Y.S.2d 161, 164, 166 (1968).

[35] *Cf.* Dobkin v. Chapman, 21 N.Y.2d 490, 497, 236 N.E.2d 451, 454, 289 N.Y.S.2d 161, 166 (1968).

[36] Hayes v. Risk, 255 Cal. App. 2d 613, 64 Cal. Rptr. 36 (Ct. App. 1967); Cradduck v. Financial Indem. Co., 242 Cal. App. 2d 850, 52 Cal. Rptr. 90 (Dist. Ct. App. 1966).

before defendants were served by publication. However, since the hiring of a private detective would be such an expensive outlay for the plaintiff, it does not seem desirable to make private investigations essential to the validity of constructive service. To uphold such a requirement would be to greatly burden the impecunious plaintiff, perhaps to the point of foreclosing his remedy of suit altogether.[37]

IV. The Availability of Other Safeguards for the Defendant's Interests

Although some courts have held that a judgment based on constructive service can stand without provision for allowing the absent defendant to come in and have the judgment set aside at a later time,[38] it seems that procedural due process would require such a safeguard. It must be remembered that in tort actions judgments against defendants may run into the tens of thousands and even hundreds of thousands of dollars. No interests of the plaintiff or the state compel the result that a judgment may stand without provision for a previously unaware defendant with a meritorious defense to have the judgment set aside and the case re-opened for a contested trial on the merits within a certain time limit. Some states have statutes that specifically provide this safeguard for the absent defendant.[39]

Such relief for defendants is also available under the Federal Rules of Civil Procedure. A motion for relief from a judgment may be brought by the defendant under rule 60(b)(1)[40] on the ground that he never received actual notice.[41] Generally rule 60(b) is construed liberally and the courts are prone to resolve the controversy in favor of a trial on the merits. Therefore, if the defendant can meet the requirements of rule

[37] Since the test is reasonableness of the plaintiff's search, perhaps the dollar-value of the case and the plaintiff's resources should be factors in measuring how much effort is required. As the value of the case rises, the courts might lean toward requiring the plaintiff to hire a private detective.

[38] Cradduck v. Financial Indem. Co., 242 Cal. App. 2d 850, 52 Cal. Rptr. 90 (Dist. Ct. App. 1966). *But see* Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

[39] N.Y. Civ. Prac. Law § 317 (McKinney 1963) allows defendant to come in within one year after learning of the judgment but in no event more than five years after entry of the judgment.

[40] Fed. R. Civ. P. 60(b)(1) states: "[T]he court may relieve a party . . . from a final judgment . . . for . . . (1) mistake, inadvertance, surprise, or excusable neglect . . . ." *Accord,* N.C.R. Civ. P. 60(b)(1).

[41] *See* Ellington v. Milne, 14 F.R.D. 241 (E.D.N.C. 1953); Huntington Cab Co. v. American Fidelity & Cas. Co., 4 F.R.D. 496 (S.D. W. Va. 1945).

60(b)(1) and also can show a meritorious defense, the likelihood that the requested relief will be granted is great. There is, however, one serious drawback to using rule 60(b)(1)—a motion under it must be brought within one year after the judgment was entered.

In order to avoid the one-year limitation, there has been at least one attempt[42] to use rule 60(b)(6),[43] under which a motion may be filed within a reasonable time. This approach probably would not be very satisfactory since federal courts have regarded rules 60(b)(1) and 60(b)(6) as mutually exclusive.[44] Rule 60(b) provides for a more reliable approach to avoid the one-year limitation; when equitable principles warrant relief, the rule allows the defendant to bring an *independent action*, as distinct from a motion for relief from a judgment, even if the time for relief under 60(b)(1) has run.[45]

V. Other Factors Weighing in Plaintiff's Favor

There are several other aspects of an automobile-injury case that would make it easier for courts to uphold constructive service on the defendant who cannot be located. Unlike many other actions, "in an automobile case, no defendant need be without notice unless he chooses and wants to be."[46] It is perfectly clear that one involved in such an accident should be aware of the likelihood of a suit arising from it. Since a suit should come as no surprise, it is reasonable for the courts to place the responsibility on him to make and keep his presence known.

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[42] *See* Tozer v. Charles A. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951).

[43] Fed. R. Civ. P. 60(b)(6) states: "[T]he court may relieve a party . . . from a final judgment . . . for . . . (6) any other reason justifying relief from the operation of the judgment." *Accord*, N.C.R. Civ. P. 60(b)(6). For a general discussion of the rule, see Note, *Federal Rule 60(b): Relief from Civil Judgments*, 61 Yale L.J. 76 (1952).

[44] *E.g.*, Davis v. Wadsworth, 27 F.R.D. 1 (E.D. Pa. 1961). *But see* Klapprott v. United States, 335 U.S. 601, 613-14 (1949) (Black, J.) (although rules 60(b)(1) and 60(b)(6) are normally exclusive, a motion permissible under 60(b)(6) if more than excusable neglect is shown).

[45] Fed. R. Civ. P. 60(b) states: "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment . . . ." *Accord*, N.C.R. Civ. P. 60(b). *See, e.g.*, West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702 (5th Cir. 1954). There is another advantage to the use of the independent action. Granting a rule 60(b) motion is in the discretion of the trial judge, and, therefore, no appeal may be taken unless there is an abuse of discretion. However, the independent action is a separate equity action from which an appeal may be taken as of right.

[46] Dobkin v. Chapman, 21 N.Y.2d 490, 504, 236 N.E.2d 451, 459, 289 N.Y.S.2d 161, 173 (1968).

In almost all automobile-accident cases, the courts are dealing with an insured interest. In those cases in which the defendant's insurer is known to the plaintiff, notice should be given to the insurance company so that it can come in and defend on behalf of the missing insured.[47] If the insurer is present,[48] the absent defendant's interest should be adequately protected. It is, of course, advantageous to the plaintiff to have the insurer present because it will be liable up to the monetary limits of the defendant's policy, and the plaintiff will have immediately available a source of recovery for his injuries.[49]

VI. CONCLUSION

Certainly the problem of the constitutionality of constructive service on the missing defendant must be decided by the Supreme Court in the near future. It is probable that, in balancing all of the factors involved, the Court will hold that any time the defendant cannot be found after a diligent effort on the part of the plaintiff, constructive service will be sufficient to meet a due process challenge so long as there is a reasonable time limit in which the defendant can set aside the judgment. In fact, it is possible that if a private detective is hired and defendant's insurer came in to defend, the Supreme Court might properly go so far as to not require an opportunity for the judgment to be set aside. Under such circumstances the Court might find that the defendant's interests were

[47] *Id.* at 497, 236 N.E.2d at 454, 289 N.Y.S.2d at 166. A few states have direct-action statutes that provide for direct suit against the insurer. *E.g.*, LA. REV. STAT. ANN. § 22:655 (1959). For an extremely interesting holding that the insurer's obligation to defend is an attachable debt allowing the complaint to be filed wherever insurer is located, see Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

[48] If the disappearance of the insured were found to be a violation of the cooperation clause of the insurance policy, the insurer would have no duty to defend. However, since the main purpose of the cooperation clause is to prevent collusion between the injured and the insured, it seems apparent that in the situation of the insured who has disappeared, the courts will not find non-cooperation. Public policy would seem to indicate a decision in favor of the innocent plaintiff rather than the innocent insurer; at least the insurer has received some payment for his duty to defend. *Cf.* Lane v. Mutual Ins. Co., 258 N.C. 318, 128 S.E.2d 398 (1962); Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

[49] In North Carolina the law is unclear as to the liability of the insurer when the insured has disappeared. There is some authority to indicate that when the insured is not present, the insurer will only be liable up to the statutory minimum insurance requirements rather than the policy limits. *See* Swain v. Nationwide Ins. Co., 253 N.C. 120, 127, 116 S.E.2d 482, 487-88 (1960). *Cf.* Muncie v. Travelers Ins. Co., 253 N.C. 74, 116 S.E.2d 474 (1960). These two cases are based on an interpretation of N.C. GEN. STAT. § 20-309 (1965) and N.C. GEN. STAT. § 20-279.21(f) (1965).

adequately protected in the initial proceeding.[50] If every possible means of reaching the defendant have been exhausted, it would be unreasonable for the court not to sustain the validity of constructive service. If it were impossible to get a valid personal judgment under these circumstances, "it would seem that the plaintiff would be unduly burdened and the defendant pemitted the advantage of a windfall gained through his own undesirable conduct."[51]

JOAN G. BRANNON

Civil Procedure—Finality of Determinations under Federal Rule 23(c)(1)

On January 11, 1966, two indictments alleging a criminal conspiracy to monopolize the low pressure pipe industry were returned in the federal District Court for New Jersey.[1] The defendants pled *nolo contendere* and were sentenced on April 29, 1966.[2] On April 28, 1967, the City of New York, alleging the identical conspiracy, brought an antitrust action against some of the defendants in the New Jersey criminal action.[3] New York City filed the complaint as representative for a Federal Rule 23(b)(3)[4] class alleged to include "all state and municipal governments, government agencies, authorities and subdivisions in the United States."[5] This action was begun within one year following the end of a federal criminal antitrust prosecution during which the running of the statute of limitations is suspended.[6] The defendants moved to strike allegations of

[50] For a similar conclusion reached by a state court, see Cradduck v. Financial Indem. Co., 242 Cal. App. 2d 850, 52 Cal. Rptr. 90 (Dist. Ct. App. 1966). But, of course, the insured is his own best witness, and therefore it can be forcefully argued that his interests can never be adequately protected without his presence.

[51] Comment, *Personal Jurisdiction Over Absent Natural Persons*, 44 CAL. L. REV. 737, 742 (1956).

[1] United States v. International Pipe & Ceramics Corp., Criminal No. 9-66 (D.N.J., Apr. 29, 1966); United States v. International Pipe & Ceramics Corp., Criminal No. 10-66 (D.N.J., Apr. 29, 1966).

[2] *See* City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 296-97 (2d Cir. 1969).

[3] City of New York v. International Pipe & Ceramics Corp., 67 Civil No. 1698 (S.D.N.Y., filed Apr. 28, 1967).

[4] FED. R. CIV. P. 23(b)(3).

[5] City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 296 (2d Cir. 1969).

[6] Clayton Act, 15 U.S.C. §§ 15b, 16(b) (1964).

class action by requesting the court to make a rule 23(c)(1)[7] determination that the action could not be maintained in a representative capacity. After a delay of several months to permit further discovery, the court concluded that "treatment of this suit as a class action would not be 'superior to other available methods for the fair and efficient adjudication of the controversy.' "[8] From this order, interlocutory on its face, appeal was taken to the Court of Appeals for the Second Circuit.[9]

The appellate court dismissed the appeal in *City of New York v. International Pipe & Ceramics Corp.*[10] It held that a determination under rule 23(c)(1) is not ordinarily a final judgment from which appeal may be taken under section 1291 of title 28 of the United States Code.[11] The court found that the parties would be able to urge their respective positions on a later appeal and would be unhindered by the denial of class action. Nor did this denial effectively determine any collateral rights of parties to the action.[12]

The decision reiterated the fundamental principle that only an order that is final as to parties, subject matter, and claims for relief is appealable.[13] This principle—the final-judgment rule—is meant to increase the efficiency and over-all fairness of both the trial and appellate courts.[14] The rule eliminates not only disruptive appeals from interlocutory orders that may be intended by one party to harass the opponent and to delay the proceedings, but also unnecessary appeals on both procedural and substantive rulings that may be adverse to the eventual winner. The review only of complete judgments provides appellate courts with an overview

[7] "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." FED. R. CIV. P. 23(c)(1).

[8] City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 297 (2d Cir. 1969).

[9] The district judge did not make the certification of a controlling question of law, permitted by 28 U.S.C. § 1292(b) (1964), that would have allowed immediate appeal of the rule 23(c)(1) order. City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969).

[10] 410 F.2d 295 (2d Cir. 1969).

[11] "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ..." 28 U.S.C. § 1291 (1964).

[12] 410 F.2d at 295. The interlocutory nature of affirmative rule 23(c)(1) orders has not been questioned.

[13] Arnold v. United States *ex rel.* W. B. Guimarin & Co., 263 U.S. 427 (1923).

[14] *See* American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967); Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292 (1966); Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

of the entire proceedings rather than a limited look at a portion of them.[15] However, because the requirement of finality is to be construed in a reasonable and liberal manner rather than a technical one, orders, otherwise interlocutory, have been treated as final when they have effectively decided the outcome of a case.[16]

In *Cohen v. Beneficial Industrial Loan Corp.*,[17] the Supreme Court created an exception to the final-judgment rule. A New Jersey statute provided defendants in certain types of stockholders' derivative suits the right to a security bond for defense expenses. A federal court, exercising diversity jurisdiction, denied a request for such a bond. The defendants' appeal from this order was allowed. The Court held that this order was one of a

> . . . small class which finally determines claims of right, separable from and collateral to, rights asserted in the action, too important to be denied review, and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.[18]

This small class of appealable collateral orders was significantly enlarged by *Gillespie v. United States Steel Corp.*,[19] in which the Court held that the compelling considerations in deciding whether to accept an appeal from an interlocutory order were "the inconvenience and costs of review on the one hand and the danger of denying justice on the other."[20] The Court based its decision upon the the merits of the case, rather than a detached consideration of the finality of the order or the completeness of the proceedings. A desire to do justice as the Court saw fit prevailed over any question of jurisdictional niceties.

Eisen v. Carlisle & Jacqueline[21] first took up the finality and consequent appealability of determinations under rule 23(c)(1). Eisen brought a private antitrust action alleging a conspiracy to monopolize odd-lot trading on the New York Stock Exchange. Eisen's personal damages amounted to seventy dollars, but he filed his action as representative for a rule

[15] Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292 (1966).
[16] *E.g.*, Kelly v. Greer, 354 F.2d 209 (5th Cir. 1965); United States v. Cefaratti, 202 F.2d 13 (D.C. Cir. 1952).
[17] 337 U.S. 541 (1949).
[18] *Id.* at 546.
[19] 379 U.S. 148 (1964).
[20] *Id.* at 152.
[21] 370 F.2d 119 (2d Cir.), *denying motion to dismiss appeal from* 41 F.R.D. 147 (S.D.N.Y. 1966), *cert. denied*, 386 U.S. 1035 (1967).

23(b)(3) class numbering several million people. Upon defendants' motion, the allegation of class action was dismissed although the individual claim (for seventy dollars) was allowed to stand.[22] From this order Eisen appealed. The court held that the dismissal of the allegation of class action ended the lawsuit "for all practical purposes"[23] and thus was a final order, appealable as such. It found that "no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen."[24] Disallowance of the suit as a class action would prevent not only the adjudication of Eisen's substantive claims, but also any review of the 23(c)(1) determination that decided the outcome of the suit.[25] The ruling of the trial court in *Eisen* was not a final determination of a collateral issue, but was, in effect, a termination of the whole case. It appears that the appeal was allowed because of the traditional construction of the final-judgment rule in a "practical," "liberal," and "reasonable" manner, not because the trial court's decision fell into the category of orders excepted from the general rule by *Cohen* and *Gillespie*.

In *City of New York v. International Pipe and Ceramics Corp.*,[26] the court distinguished the fact situation from that in *Eisen* because the denial of class-action status would not end the litigation. New York City had alleged enough damages to warrant complete prosecution of the case individually.[27] It also had sufficient financial resources so that the loss of class-action status would not influence the decision whether to continue the suit.[28] Review of the rule 23(c)(1) determination would not be prevented by failure to consider it immediately, but could be raised, if the City should so desire, upon a later appeal. The only resulting harm to New York City would be a loss of the bargaining power belonging to a representative in a class action; however, a class action is not to be a device by which bargaining power is increased.[29] The facts of *Eisen* are not comparable; the city as plaintiff would continue the fight.

The holding in *Eisen* apparently will apply only if some purported

[22] Eisen v. Carlisle & Jacqueline, 41 F.R.D. 147 (S.D.N.Y. 1966).
[23] Eisen v. Carlisle & Jacqueline, 370 F.2d 119, 120 (2d Cir. 1966).
[24] *Id.*
[25] *Id.*
[26] 410 F.2d 295 (2d Cir. 1969).
[27] New York City alleged damages in excess of 520,000 dollars. Memorandum in Support of Motion to Dismiss Appeals for Martin Marietta Corporation, at 2, City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969).
[28] 410 F.2d at 301.
[29] Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 328 (E.D. Pa. 1967).

party is found who cannot assert his rights because of the denial of class action. One day before the end of the one-year suspension of the statute of limitations, New York City filed its suit as a class action. The bringing of a sustainable class action tolls the statute for all members of the alleged class.[30] Thirty-seven members of that class intervened in the suit after the year was up.[31] While such passage of time certainly puts a burden upon the intervenors to rebut the effect of the statute of limitations, it can hardly be said that the court's denial of class-action status to the suit amounted to a final judgment as to their rights.

Conceivably some of the intervenors may have relied to their detriment upon the class action by the city to toll the statute of limitations. There was only one day between the filing of the class action and the end of the year of grace in which other parties might have filed actions of their own. Nevertheless, any equitable considerations—such as detrimental reliance[32]—on behalf of an intervening or non-intervening member of the alleged class should be used as a defense against the statute of limitations rather than as grounds to lower the requirements for a class action.

Other than by way of detrimental reliance, it would seem that no intervenor could claim that his rights in the action were in any way decided by the dismissal of the class allegations. This class was not the type for which an aggregation of claims was necessary because each member was as financially capable as New York City to continue the suit and each of them had alleged substantial damages.[33] If the statute of limitations is held to bar their actions, they may take up the negative rule 23(c)(1) determination on an appeal of the limitations holding. Review will not be prevented, as it was in *Eisen*, by a dismissal of the immediate appeal. The rule 23(c)(1) determination cannot be considered

[30] Escott v. Bachris Constr. Corp., 340 F.2d 731 (2d Cir. 1965), *cert. denied sub nom.*, Drexel & Co. v. Hall, 382 U.S. 816 (1966).

[31] 410 F.2d at 297.

[32] "[I]t may well be that . . . an opportunity should be presented for proof of reliance upon the pendency of the purported class action sufficient to toll the statute of limitations. Any other approach would make it virtually mandatory for every class member to file a cautionary separate action within the limitations period." Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 460 (E.D. Pa. 1968).

[33] The intervenor-plaintiffs included the states of Alaska, Ohio, and Wisconsin; the cities of Detroit, Philadelphia, and Cleveland; and the Port of New York Authority. Memorandum in Opposition to Motion of Defendant Kerr Concrete Pipe Company for an Order Determining that this Action is Not to be Maintained as a Class Action by the City of New York, at 6-7, City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969).

to be a final judgment, in either a practical or a technical sense, for any of the named parties in the case.

In order to find the rule 23(c)(1) order a final judgment, there must be discovered among the non-intervening, unnamed class members at least one that had some right cut off. The Second Circuit had held earlier that unnamed class members do not have a practical or legally cognizable existence. In dismissing an appeal from a denial of a "spurious" class-action status, the court pointed out:

> The defendants quite certainly aided the process of hypostasis of these nameless and as yet disembodied spirits by christening them "related defendants" . . . and treating them thereafter as persons, who, as urged on this appeal, may forever forfeit their rights to review unless now [the right is] claimed.[34]

Judge Hays, in his dissent in *International Pipe*, suggested that the rule 23(c)(1) determination was a final judgment for some of the unnamed class members, whose existence he seemed to accept.[35] He pointed out that if New York City is individually successful on the merits, it will have no reason to appeal the dismissal of class-action status. If the intervenors prevail over a statute-of-limitations defense, they also will have no cause to appeal the adverse decision under rule 23(c)(1). If these two contingencies are realized, the unnamed class members will lose any review of the denial of class-action status. Furthermore, if they commence separate actions, they will have to prevail over the statute of limitations. According to Judge Hays, the possibility will still remain that some of the unnamed plaintiffs will have neither the financial resources nor the damages at stake to justify individual litigation; class-action status alone will permit them to litigate their rights.[36] Such unnamed plaintiffs are the only parties whose rights may have been decided by the rule 23(c)(1) order. Whether the representative plaintiffs ought to be able to appeal this determination upon their behalf is the crucial issue.

New York City filed its complaint as representative for a Federal Rule 23(b)(3) class.[37] An action under this provision is the successor of the

[34] All American Airways v. Eldred, 209 F.2d 247, 249 (2d Cir. 1954) (Clark, C. J.).

[35] 410 F.2d at 300, 301 (Hays, J., dissenting).

[36] *Id.* at 301.

[37] *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . .

(3) the court finds that the *questions of law or fact common to the*

so-called "spurious" class action, authorized under the old rule 23.[38] The essence of both the new and the old rules is that although the claims are separate and distinct, there are issues of fact or law common to all members of the alleged class.

Under the Federal Rules, there are procedures other than rule 23 (b)(3) class actions by which claims having common issues of fact or law may be consolidated. An example is permissive intervention under Federal Rule 24(b),[39] which permits a party having such claims to prosecute them in the same proceedings with an action filed earlier by a different litigant. Denial of permissive intervention often has been held unappealable.[40] Another procedure, permissive joinder under Federal Rule 20, is most similar to those actions in which the class is the defendant.[41] However, the finality and consequent appealability of the denial of consolidation under its aegis has apparently not been considered by any court.

The class action under rule 23(b)(3) was established for the convenience of the court and the benefit of the public.[42] The courts have permitted the use of the rule 23(b)(3) action and its predecessor in order to dispose of any issue of fact or law for which an adequate representative has come forward. The courts have pointed out that consolidation of such claims relieves overcrowded calendars and helps to achieve

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members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3) (emphasis added).

[38] [a class action may be maintained] . . . when the character of the right sought to be enforced for or against the class is

. . . .

(3) several, and there is a *common question of law or fact* affecting the several rights and a common relief is sought.

FED. R. CIV. P. 23(a)(3), 39 F.R.D. 69, 95 (1966) (emphasis added).

[39] FED. R. CIV. P. 24(b)(2).

[40] Brotherhood of R.R. Trainmen v. Baltimore & O.R.R., 331 U.S. 519 (1947); Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 KY. L.J. 329, 368 nn.129 & 130 (1968).

[41] FED. R. CIV. P. 20(a).

[42] Z. CHAFEE, SOME PROBLEMS OF EQUITY 202 (1950).

a fair adjudication of all claims.[43] There is no right to maintain an action as a representative of a rule 23(b)(3) type of class.[44] Each claim to be consolidated under authority of rule 23(b)(3) is separate and distinct and otherwise could be prosecuted to a complete and effective judgment.[45] No party's rights are necessarily affected by exclusion from a 23(b)(3) class or by a refusal to recognize such a class. No party should be able to claim a right to a procedure established for the convenience and efficiency of the courts, especially when the procedure is found both inconvenient and inefficient by the trial court itself, for whose particular benefit it was created.

Another and more compelling purpose for the rule 23(b)(3) action and its predecessor, the "spurious" class action, is that by permitting the aggregation of many claims otherwise too small to justify individual litigation, claimants are enabled collectively to enforce their rights.[46] This procedure is especially useful in private enforcement of antitrust legislation, a field in which the parties often have damages far too small for litigation individually. Private enforcement of these semi-public rights, induced by the provisions for treble damages and for adequate attorney's fees, was contemplated as the chief means of carrying out the policies of such legislation.[47] Such considerations suggest that in antitrust cases, the public interest may best be served by permitting plaintiffs to bring rule 23(b)(3) class actions as a matter of right.

This approach would, indeed, serve to facilitate private prosecutions. However, there is a significant difference between consolidating cases such as *International Pipe* and those such as *Eisen*. As noted previously, in a case such as *Eisen* denial of class-action status will serve to terminate the entire litigation because of the insignificance of the individual plaintiffs' damages. The same factors that cause the class action to be necessary to induce private antitrust suits also require that denial of this status be immediately appealable. The opposite is true with cases

[43] *Cf.* Kainz v. Anheuser-Busch, Inc., 194 F.2d 737, 740-41 (7th Cir. 1952).

[44] There may be a right to maintain a representative suit with regard to a rule 23(b)(1) type of class, and possibly with regard to a rule 23(b)(2) type of class. In these types of classes no effective judgment can be given unless parties too numerous to join are bound. This is not the case with the rule 23(b)(3) category.

[45] *Cf.* Snyder v. Harris, 394 U.S. 332 (1969).

[46] Welsh, *Class Actions Under New Rule 23 and Federal Statutes of Limitation: A Study of Conflicting Rationale*, 13 VILL. L. REV. 370, 385 (1968).

[47] Kalven & Rosenfeld, *The Contemporary Function of a Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941).

like *International Pipe*. Any governmental agency or subdivision is likely to be financially able to sustain protracted litigation. Since low pressure and sewage pipes are used for large projects, any agency using them will sustain substantial damages for excessive prices, easily enough damages to warrant an individual suit.

The class action was not meant to be a device by which the statute of limitations may be extended and the defendant confronted with a horde of stale claims. "The theory [of the statute of limitations] is that even if one has a just cause, *it is unjust not to put the adversary on notice to defend within the period of limitations* and the right to be free from stale claims comes in time to prevail over the right to prosecute them."[48] Any class action, however, fails to give the defendant notice that a particular claim will be prosecuted. Rather, a general warning of the type of claim to be advanced by both named and unnamed parties is given. The complex and protracted nature of antitrust litigation intensifies this objection.[49] Nevertheless, the statute is tolled for all members of the class at the time of the filing of the class suit.[50] The tolling of the statute in this manner thwarts in large part its purpose by allowing the resurrection of claims impossible in many circumstances to refute. To lower the requirements for class actions in order to facilitate their use in tolling the statute of limitations would further undermine the rationale of the statute. The inability to toll the statute's running certainly hinders unnamed plaintiffs, and perhaps bars their claims, but these results should not create a right to toll the statute by use of Federal Rule 23.

The trial court's determination under rule 23(c)(1), with regard to an alleged rule 23(b)(3) class, is both discretionary and tentative.[51] Significant discretion is given to the trial judge in making the decision. The criteria for deciding whether a class action is superior to individual actions are based in part upon subjective determinations by the judge of questions of the difficulty of management of a class action and the desirability of the concentration of litigation on the claims. The issues of

[48] Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944) (emphasis added).

[49] Welsh, *Class Actions Under New Rule 23 and Federal Statutes of Limitations: A Study of Conflicting Rationale*, 13 VILL. L. REV. 370, 387 (1968).

[50] Escott v. Bachris Constr. Corp., 340 F.2d 731, 733 (2d Cir. 1965). Judge Friendly dissented vigorously from this part of the decision. *Id.* at 735.

[51] Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42, 45 (S.D.N.Y. 1966).

fact and law will often be ready for trial on the merits before any conclusion as to the superiority of the class action can be made.[52] Yet, because of notice requirements and the inherent difference between litigating as an individual plaintiff and as a class representative, some tentative decision must be reached early in the proceedings.[53] Rule 23(c)(1) provides that the determination may be altered or amended and may be subject to such conditions as the intervention of additional representative plaintiffs.

The judge's decision is by both its tentativeness and discretionary nature excluded from immediate appeal. Except for abuse, discretionary orders may not be appealed at any time.[54] In *International Pipe*, the issue of abuse of discretion was not raised. Orders subject to reconsideration and correction at the trial level also cannot be appealed.[55] The tentative nature of such orders is lost by appellate review unless the higher court order is amendable by the trial court. A rule 23(c)(1) order is correctable at the trial level up until trial on the merits. Only at that point, even if there has been an abuse of discretion, does the trial court lose its power to correct the order. By that time, however, allowing an appeal no longer serves the purpose outlined in *Gillespie v. United States Steel Corp.*[56] No cost is saved, and no denial of justice threatened.[57] The same decision that will make binding the rule 23(c)(1) determination will make the whole case immediately appealable as a final judgment on the merits.

The order at issue in *International Pipe* was made upon the trial judge's discretion with regard to the convenience and efficiency of his own court. To subject a procedural order, especially one of so discretionary a nature as the rule 23(c)(1) determination, to appellate supervision, as suggested by Judge Hays, is not in the public interest.[58] Permitting the appeal of such orders would subvert the authority and impair the public respect for the trial courts, centralize legal power in the ap-

[52] Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 41-42 (1967).
[53] *Id.* at 40-41.
[54] *Cf., e.g.*, Stadin v. Union Elec. Co., 309 F.2d 912 (8th Cir. 1962).
[55] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547 (1949); Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292, 296 (1966).
[56] 379 U.S. 148 (1964).
[57] *See* p. 628 *supra*.
[58] Wright, *The Doubtful Omniscience of the Appellate Courts*, 41 MINN. L. REV. 751, 781-82 (1957).

pellate bench, and multiply requests for ordinary and extraordinary review beyond the capacity of appellate judges to consider them properly.[59]

HUGH J. BEARD, JR.

Civil Procedure—Specificity in Pleading under North Carolina Rule 8(a)(1)

A problem now[1] facing the North Carolina practitioner desiring to bring an action is drafting a complaint[2] that will satisfy the requirements of rule 8(a)(1) of the North Carolina Rules of Civil Procedure[3] (NCRCP). The drafter is no longer required to set out "[a] plain and concise statement of the facts constituting a cause of action . . . ."[4] but rather is supposed to draft "[a] short and plain statement of the claim sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief . . . ."[5]

Since the new North Carolina rules are based almost entirely on the Federal Rules of Civil Procedure[6] (FRCP), from which have developed a sizable body of case law, the North Carolina pleader could rapidly determine the standard that he is required to meet in his complaint were it not for the phrase "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions

[59] *Id.* at 779. The Second Circuit reiterated its limitation of the applicability of *Eisen* in Carceres v. International Air Transport Ass'n, Civil Nos. 33433-39 (2d Cir., Jan. 13, 1970), in which a similar appeal from a negative rule 23(c)(1) determination was dismissed. Upon the authority of *International Pipe*, Judge Hays reluctantly concurred.

[1] The North Carolina Rules of Civil Procedure were adopted by the General Assembly during the 1967 session and were to become effective July 1, 1969. Ch. 954, § 10, [1967] N.C. Sess. L. 1354. The 1969 session of the General Assembly postponed the effective date until January 1, 1970. Ch. 895, § 21, [1969] N.C. Sess. L. —.

[2] Throughout this note, in the interest of simplicity, the pleading alleging a claim will be called a complaint; the pleading party, plaintiff; and the party attacking the complaint, defendant.

[3] N.C.R. CIV. P. 1-84, N.C. GEN. STAT. § 1A-1 (1969). The North Carolina rules are basically the same as the Federal Rules of Civil Procedure; most of the differences between the two sets of rules are discussed herein.

[4] N.C. GEN. STAT. 1-122 (1953) (repealed Jan. 1, 1970). This statute was originally enacted August 18, 1868, as § 93 of the 1868 Code of Civil Procedure.

[5] N.C.R. CIV. P. 8(a)(1).

[6] FED. R. CIV. P. 1-86, 28 U.S.C., app., Rules of Civil Procedure for the United States District Courts (1964).

or occurrences intended to be proved . . . ."[7] This language makes federal precedent construing the specificity requirement of FRCP 8(a)(2)[8] inconclusive at best.

In attempting to determine the degree of specificity required by NCRCP 8(a)(1), the first step must be an analysis of the words used. It could be argued that the added language is merely surplusage since the federal rule also purports to give the court and parties notice of the transaction or occurrence that the plaintiff intends to prove.[9] This argument ignores the simple fact that the drafters did in fact add the language to the North Carolina rule and must have had some reason in so doing: their only possible purpose would seem to be requiring a more specific complaint than is acceptable under the federal rule.[10] However, use of the word "notice" leads to the conclusion that the plaintiff need not be as specific as was required when "facts" had to be included in the complaint.[11] The "notice" concept, at least under the federal rule, simply requires describing the event claimed as a wrong with enough particularity "to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought, so that it may be assigned to the proper form of trial."[12] While the aim of the drafters of the North Carolina rules no doubt included these same ends, they presumably must be accomplished in a more specific manner than simply providing "a generalized summary of the case."[13] In sum, the complaint required by the new North Carolina rule need not be as specific as that under the former practice, but must be to some degree more specific than the federal complaint. The added degree of specificity is not readily determinable from the language of the rule itself.

Since the language of NCRCP 8(a)(1) is essentially the same as that of the New York statute controlling specificity in pleading, Civil Practice

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[7] N.C.R. Civ. P. 8(a)(1).

[8] The federal rule requires only "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."

[9] Conley v. Gibson, 355 U.S. 41, 47-48 (1957); 2A J. Moore, Federal Practice ¶ 8.02 (2d ed. 1968) [hereinafter cited as Moore].

[10] This conclusion is buttressed by noting that the negligence forms provided by the NCR are more specific than the corresponding federal forms. See pp. 642-43 & notes 42 & 44 *infra*.

[11] Phillips, *Pleading—Part I* in North Carolina Bar Association, Institute on Jurisdiction, Joinder, and Pleading under North Carolina's New Rules of Civil Procedure V-1, V-15 (1968).

[12] 2A Moore ¶ 8.13.

[13] *Id.* ¶ 8.03.

Law and Rules § 3013[14] (CPLR), inquiry into the judicial gloss placed on the latter, at least before 1967, will be fruitful.[15] However, there are three differences between the North Carolina and New York rules that must be noted.

First, CPLR 3013 requires the plaintiff to include "the material elements of each cause of action . . . ."[16] in his complaint. Because neither the terms[17] nor the judicial interpretation[18] of FRCP 8(a)(2) requires that the "material elements" of the plaintiff's claim be pleaded, it can be argued that the North Carolina drafters, by leaving this phrase out of NCRCP 8(a)(1), intended to lean toward the federal result rather than

[14] N.Y. CIV. PRAC. LAW § 3013 (McKinney 1963) states:
Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action or defense.

[15] Although there is no legislative history so indicating, the language of NCRCP 8(a)(1) is probably taken from CPLR 3013. The words "notice of the transactions, occurrences, or series of transactions or occurrences . . . ." appear in NCRCP 8(a)(1) and NCRCP 15(c) and in both cases this language represents a change from the corresponding federal rule. The comment following NCRCP 15 states that the new language in that rule is taken from CPLR 3025, the New York analogue to NCRCP 15(c). It seems very unlikely that the North Carolina drafters intended to use the language of a New York rule in NCRCP 15(c) while adopting language in NCRCP 8(a)(1) identical to that in CPLR 3013 without having meant to follow it as well. Thus it can be presumed that NCRCP 8(a)(1) is taken directly from CPLR 3013. Construction of CPLR 3013 by New York courts then becomes all important since the North Carolina Supreme Court has held that it would be bound by such interpretation. In Ledford v. Western Union Tel. Co., 179 N.C. 63, 101 S.E. 533 (1919), in which construction of a North Carolina procedural statute adopted from New York was in question, the court said that "'[w]here the legislature enacts a provision taken from a statute of another State . . . in which the language of the act has received a settled construction, it is presumed to have intended such provision should be understood and applied in accordance with that construction.'" *Id.* at 66, 101 S.E. at 534. *See also* M'Kinnon v. M'Lean, 19 N.C. 79, 84 (1836). This rule of statutory interpretation doubtless would include construction by courts in New York as of the time the North Carolina rules were adopted (1967) and probably should apply to decisions from New York prior to January 1, 1970.

[16] N.Y. CIV. PRAC. LAW § 3013 (McKinney 1963).

[17] *See* note 8 *supra.*

[18] A claim under the federal rule will surely be dismissed (with leave to amend) if a major material element is totally omitted. F. JAMES, CIVIL PROCEDURE § 2.11 (1965). However, for purposes of a motion to dismiss, the federal courts will infer or assume some elements of a claim. Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944); Garcia v. Hilton Hotels Int'l, Inc., 97 F. Supp. 5 (D.P.R. 1951). *See also* Siegel, *Introducing: A Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 190, 207 (1963) [hereinafter cited as Siegel], in which the writer argues that the federal courts do find the "material elements" in such cases as those cited above.

risk a possible strict interpretation that could be obtained from the language of CPLR 3013. Even if this was not the intent of the drafters, there is no reasonable argument that the lack of a "material elements" requirement demands more specificity under NCRCP 8(a)(1) than under CPLR 3013.

CPLR 3013 retains the older "cause of action" language rather than adopting the federal term "claim for relief" as was done in the North Carolina rules. This variation in terms probably makes no difference in comparing the two rules since both the comments to the North Carolina rules[19] and commentators on those of New York recognize that "the difference between 'cause of action' and 'claim for relief' is more semantic than real."[20] If any difference in result could accrue from the difference in terminology, it would again seem that CPLR 3013, by retaining the "cause of action" language, would require more specificity than the more modern terminology "claim for relief" in NCRCP 8(a)(1).

Finally, CPLR 3026 provides that "[p]leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced."[21] Since this rule has been literally applied in New York to demand that defendant must show prejudice[22] to a substantial right before he can successfully attack a complaint,[23] the New York judge has a more clearly-defined mandate upon which he can rely in denying a motion to dismiss than does his North Carolina counterpart. The closest thing to CPLR 3026 in the North Carolina rules is rule 8(f), which states that "[a]ll pleadings shall be so construed as to do substantial justice."[24] Essentially the same result as that reached by the New York courts under CPLR 3026 should be reached by the North Carolina courts under NCRCP 8(f). The language of FRCP 8(f),[25] which is identical to NCRCP 8(f), was considered in *DeLoach v. Crowley's, Inc.*,[26] and the

[19] N.C.R. Civ. P. 8, comment (a)(2).

[20] Weinstein, *Trends in Civil Practice*, 62 Colum. L. Rev. 1431, 1439 (1960); Siegel 206.

[21] N.Y. Civ. Prac. Law § 3026 (McKinney 1963).

[22] The New York courts find the defendant to be prejudiced when the complaint fails to give him sufficient notice of the historical facts or the theory relied upon to enable him to intelligently answer and proceed with discovery. *E.g.*, Meltzer v. Klien, 29 App. Div. 2d 548, —, 285 N.Y.S.2d 920, 922 (1967); Household Coal & Oil Distrib., Inc. v. Sage, 57 Misc. 2d 428, —, 292 N.Y.S.2d 800, 802 (Civ. Ct. N.Y. City 1968).

[23] Foley v. D'Agostino, 12 App. Div. 2d 60, —, 248 N.Y.S.2d 121, 127 (1964).

[24] N.C.R. Civ. P. 8(f).

[25] Fed. R. Civ. P. 8(f).

[26] 128 F.2d 378 (5th Cir. 1942). This case is cited in the comment to N.C.R. Civ. P. 12 as an example of the application of that rule in the federal courts.

court said, "[j]ust what this means is not clear, but it excludes requiring technical exactness, or the making of refined inferences against the pleader, and requires an effort to fairly understand what he attempts to set forth."[27]

Although some commentators feared that New York courts could not reach even an approximation of the federal result under CPLR 3013 because of the inclusion of the phrase "sufficiently particular,"[28] these misgivings soon proved groundless. The trend toward liberal interpretation of pleadings under CPLR 3013 began with *Hewitt v. Maass*,[29] in which the court said:

> The requirement now is "Statements . . . sufficiently particular to give the court and the parties notice . . . ." (CPLR § 3013). This change is reflective of the decisional trend previously and points to not only less formalized pleadings but also to the elimination of obscure distinctions inherent in words such as "conclusions," "ultimate (and other kinds of) facts," and similar others. These classifications and their status and effect as or in pleadings have been eliminated. Now, if *notice*, or literally *comprehension*, can be had from a pleading the method of attaining the communicable pattern becomes secondary.[30]

The Appellate Division rapidly followed with the decision in *Foley v. D'Agostino*,[31] which has become the standard for measuring sufficiency of pleadings in New York.[32] The complaint in *Foley*, which had been dismissed by the trial court, consisted of three causes of action alleging breach of fiduciary obligations and unfair competition by half of the stockholders and the officers of a family corporation. Reversing the dismissal below, the Appellate Division stated its position in the following manner:

> Upon a Rule 3211(a)(7)[33] motion to dismiss a cause of action . . . we look to the substance rather than to the form. Such a motion is

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[27] 128 F.2d at 380.

[28] Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 450 (1958); Siegel 198-202.

[29] 41 Misc. 2d 894, 246 N.Y.S.2d 670 (Sup. Ct. 1964).

[30] *Id.* at —, 246 N.Y.S.2d at 672.

[31] 12 App. Div. 2d 60, 248 N.Y.S.2d 121 (1964).

[32] The New York courts apparently view *Foley* and CPLR 3013 as synonomous in considering a motion to dismiss for failure to state a cause of action. *See, e.g.*, Buljanovic v. Grace Lines, Inc., 31 App. Div. 2d 614, 295 N.Y.S.2d 552 (1968); Richardson v. Coy, 28 App. Div. 2d 640, 280 N.Y.S.2d 623 (1967); Pope v. Zeckendorf Hotels Corp., 22 App. Div. 2d 647, 252 N.Y.S.2d 975 (1964); Infusino v. Pelnik, 45 Misc. 2d 333, 256 N.Y.S.2d 815 (Sup. Ct. 1965).

[33] N.Y. CIV. PRAC. LAW § 3211(a)(7) (McKinney 1963) is the New York analogue of N.C.R. CIV. P. 12(b)(6) (footnote added).

> solely directed to the inquiry of whether or not the pleading, considered as a whole, "fails to state a cause of action." Looseness, verbosity and excursiveness, must be overlooked on such a motion, if any cause of action can be spelled out from the four corners of the pleading.[34]
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> . . . .
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> The proper promotion of the general CPLR objective requires more than mere token observance of or lip service to its mandate for liberal construction of the pleadings. To achieve such objective, we must literally apply the mandate as directed and thus make the test of prejudice one of primary importance. Thereby, we would invariably disregard pleading irregularities, defects, or omissions which are not such as to reasonably mislead one as to the identity of the transactions or occurrences sought to be litigated or as to the nature and elements of the alleged cause of action or defense.[35]

The court then considered the complaint in question and found that even though the first cause of action did not show with specificity the manner and extent of the competition, or to what extent the family corporation had been or would be damaged, the complaint nonetheless gave "notice of the plaintiffs' claims . . . and of the elements of plaintiffs' alleged cause of action; and furthermore, the defendants [were not] prejudiced in any manner by the alleged deficiencies therein."[36]

Having established a liberal pleading rule, the New York courts then continued the trend by completely abandoning the "theory of the pleadings" standard in *Lane v. Mercury Record Corp.*,[37] an action for an accounting of royalties. On a motion to dismiss, the trial court found that the equitable cause of action was sufficiently stated, and the defendant appealed. The Appellate Division held that no equitable cause of action was stated, but affirmed the trial court's refusal to dismiss on the ground that a legal cause of action for breach of contract appeared in the com-

[34] 12 App. Div. 2d at —, 248 N.Y.S.2d at 126.

[35] *Id.* at —, 248 N.Y.S.2d at 127.

[36] *Id.* at —, 248 N.Y.S.2d at 129. Complaints will, however, be dismissed if they fail to meet the standard of *Foley*. *E.g.*, Cushman & Wakefield, Inc. v. John David, Inc., 23 App. Div. 2d 827, 259 N.Y.S.2d 158 (1965) (allegations that defendant "wrongfully" and "maliciously" induced another to breach a contract are insufficient); Shapolsky v. Shapolsky, 22 App. Div. 2d 91, 253 N.Y.S.2d 816 (1964) (complaint jumbled actions in individual and representative capacities, demanded accounting without pleading the basis therefor, demanded delivery of stock certificates without pleading entitlement). *See also* Loudin v. Mohawk Airlines, Inc., 24 App. Div. 2d 447, 260 N.Y.S.2d 899 (1965) (complaint alleging malicious interference with right to employment and conspiracy dismissed for failure to state "evidentiary facts" sufficient to support the claim).

[37] 21 App. Div. 2d 602, 252 N.Y.S.2d 1011 (1964).

plaint. *Lane* was affirmed unanimously by the Court of Appeals in a one line memorandum opinion,[38] and the "theory of the pleadings" rule disappeared from New York practice.[39] Thus, although the plaintiff always should and usually will clearly outline the theory he has selected and be correct in his selection, the court may not grant a motion to dismiss if any theory of recovery can be found in the pleading, regardless of the relief requested.[40]

The dire predictions precipitated by the additional language in CPLR 3013 not found in the federal rules were averted by early and strong judicial action. Before an intent to reach the same or a more liberal result can be ascribed to the drafters of the North Carolina rules, however, additional features of those rules must be considered. In addition to the language of rule 8(a)(1), the North Carolina drafters retained pre-complaint discovery[41] from the former practice and included specifications of negligent acts in the official forms[42] accompanying the new rules.

The comments to the rules give no clue why the drafters thought that the retention of pre-complaint discovery in NCRCP 27(b) was necessary or desirable. Whatever the drafters intended, one possible effect of this provision is that a defendant attacking a complaint for insufficiency can argue that plaintiff had an opportunity through use of rule 27(b) to obtain enough information to plead in detail and that, having failed to take advantage of this provision, he should be dismissed without leave to amend, particularly when plaintiff asserts that he cannot amend without discovery.

[38] Lane v. Mercury Record Corp., 18 N.Y.2d 889, 233 N.E.2d 35, 276 N.Y.S.2d 626 (1966).

[39] In a case such as *Lane*, if the parties have not previously sought a jury trial, CPLR 4103 allows the adverse party to request a jury when the issues appear. NCRCP 38 allows demand for jury trial of right until ten days after the service of the last pleading directed to the issue. Thus, if the court finds a legal issue when construing the complaint pursuant to a motion to dismiss, the defendant will not have answered; and, assuming the complaint is not dismissed, the plaintiff still has until ten days after the defendant's answer to demand jury trial. See 5 MOORE ¶ 38.39[2].

[40] *E.g.*, Buljanovic v. Grace Lines, Inc., 31 App. Div. 2d 614, 295 N.Y.S.2d 552 (1968) (complaint alleging unseaworthiness should not have been dismissed by trial court in any case because it stated a cause of action for failure to provide a safe place to work); Richardson v. Coy, 28 App. Div. 2d 640, —, 280 N.Y.S.2d 623, 624 (1967); Sheehan v. Amity Estates, Inc., 27 App. Div. 2d 594, 275 N.Y.S.2d 644 (1966) (allegation of fraud insufficient, but cause of action stated in unilateral mistake); Barrick v. Barrick, 24 App. Div. 2d 895, 264 N.Y.S.2d 888 (1965) (complaint requesting reformation insufficient, but cause of action stated in breach of contract).

[41] Ch. 760, § 1, [1951] N.C. Sess. L. 734-41. (N.C. GEN. STAT. §§ 1-568.1 to -568.27, repealed Jan. 1, 1970).

[42] N.C.R. CIV. P. 84, forms (3) & (4).

If this argument is attempted, the courts should immediately reject it because (1) if the complaint is interpreted liberally, there is no need for pre-complaint discovery; (2) pre-complaint discovery is more awkward than pre-trial discovery;[43] and (3) pre-trial discovery will satisfy any demand of defendant for facts without creating problems concerning statutes of limitations or the relation-back theory, which often result from dismissal and amendment.

The North Carolina drafters also altered the complaints for negligence from the conclusory style of the federal[44] and New York[45] forms to forms complete with specifications of negligent acts. Since NCRCP 84[46] states not only that the forms provided are sufficient, but are also guides to the simplicity and brevity intended in the rules, it may be, as one commentator suggests, that specific, factual complaints are limited to situations involving negligence in operation of autmobiles.[47] It seems more plausible to assume that North Carolina forms (3) and (4) will become the standard and that the other forms will be limited to the particular claim for relief that they illustrate.[48] In any event, the drafters have indicated that at least in some cases the North Carolina rules require a more specific complaint than the rules of either federal or New York procedure.[49]

Even granting, however, that more specific complaints are required in certain cases under the new rules, the North Carolina courts should still be very reluctant to grant a motion to dismiss for failure to state a claim upon which relief can be granted under rule 12(b)(6).[50] The 12(b)(6) motion—unlike a demurrer—when sustained is considered an adjudication on the merits and the plaintiff's claim, if leave to amend is requested and denied, is res judicata.[51] This harsh result can be defended only if

[43] *Compare* N.C.R. Civ. P. 26(a) *with* N.C.R. Civ. P. 27(b).

[44] Fed. R. Civ. P. forms 9 & 10.

[45] 2 McKinney's Forms, Civil Practice Law & Rules §§ 4:48, 4:49 (Supp. 1969).

[46] N.C.R. Civ. P. 84.

[47] Sizemore, *Introduction* in North Carolina Bar Association Foundation, Institute on Jurisdiction, Joinder and Pleading under North Carolina's New Rules of Civil Procedure I-1, I-13 (1968).

[48] Since all the forms provided are copies of common law common counts except forms (3) and (4), it would appear that when the drafters had the opportunity to create their own forms, they opted for specificity.

[49] *See* N.C.R. Civ. P. 8, comment (a)(3).

[50] This motion is analogous to a demurrer for failure to state facts sufficient to constitute a cause of action. In application it is similar to the demurrer to a statement of a defective cause of action. *See* N.C.R. Civ. P. 12, comment.

[51] The demurrer to a statement of a defective cause of action, when sustained, made plaintiff's claim res judicata. Davis v. Anderson Indus., 266 N.C. 610, 146

the procedural system insures the plaintiff that he will not be dismissed when there is any possibility whatsoever that he can recover.[52] The motion should only be granted when, as in the federal system, an affirmative defense appears on the face of the complaint,[53] the complaint itself negatives any right to recover,[54] or it is clear beyond doubt that "the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."[55] Dismissal at the pleading stage, at least dismissal without leave to amend, for any other reason does not give the plaintiff adequate assurance that he will be afforded an opportunity to avoid the effect of res judicata.

That this analysis is correct can be seen by exploring the alternatives and their effects on the parties. If the motion to dismiss is denied, the defendant still has three options open to him: he may answer and take discovery;[56] he may answer, take discovery and move for summary judgment;[57] or, assuming that he includes the motion with his motion to dismiss, he may move for a more definite statement.[58] If defendant chooses the first course, he has presumably gathered all the information needed for trial preparation from discovery and has in no way been injured.

If it appears from the information obtained in discovery that plaintiff does not have a valid claim under any state of the facts, defendant can move for summary judgment and should prevail.[59] In this situation

S.E.2d 817 (1966); 1 McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1189 & n.5.7 (Supp. 1969). The demurrer to a defective statement of a good cause of action generally had no such effect. *Id.* § 1200 (2d ed. 1956) & § 1200 (Supp. 1969). Under the federal rules, the granting of a 12(b)(6) motion always results in the application of res judicata. Arrowsmith v. U.P.I., 320 F.2d 219, 221 (2d Cir. 1963).

[52] *See* Louis, *The Sufficiency of a Complaint, Res Judicata, and the Statute of Limitations—A Study Occasioned by Recent Changes in the North Carolina Code,* 45 N.C.L. REV. 659, 673 (1967).

[53] L. Singer & Sons v. Union Pac. R.R., 109 F.2d 493 (8th Cir.), *aff'd,* 311 U.S. 295 (1940) (plaintiff's lack of capacity to sue evident on the face of the complaint).

[54] Leggett v. Montgomery Ward, 178 F.2d 436 (10th Cir. 1949) (in an action for malicious prosecution, plaintiff pleaded that probable cause was found).

[55] Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

[56] N.C.R. CIV. P. 12(a)(1) & Article 5, Depositions and Discovery.

[57] N.C.R. CIV. P. 56. This motion may be made at any time.

[58] N.C.R. CIV. P. 12(e).

[59] Summary judgment is the device for determining whether there is any genuine issue as to a material fact. 6 MOORE ¶ 56.04. If plaintiff stated conclusory allegations in his complaint, discovery should inform defendant whether plaintiff has facts to support the conclusions. Obviously, a better determination as to the merits can be made following discovery than can be made at the pleading stage. Judgment on the pleadings is also available under N.C.R. CIV. P. 12(c); for the relationship of this rule to summary judgement *see* 6 MOORE ¶ 56.09.

defendant has not been prejudiced except to the extent of writing and mailing interrogatories or taking depositions; plaintiff has had an opportunity to establish the factual validity of his claim; and if the claim fails here, it can properly be dismissed on the merits.[60] It should be noted that summary judgment is the fact-interception device provided by the new rules, and there is no longer a necessity for fact-interception at the pleading stage as there was under prior practice.

Finally, defendant may press a motion for a more definite statement.[61] This motion, because of the waiver provision of rule 12(g),[62] must be included with the 12(b)(6) motion. If the court determines that the complaint is lacking in specificity, it can then grant the motion for a more definite statement[63] rather than the motion to dismiss and thus avoid problems of dismissal and relation back and possible res judicata consequences of dismissal while assuring that the defendant is provided with the specificity to which he is entitled. This course is preferable to dismissal, but still not always desirable because it will often violate the function of the motion for a more definite statement. Assuming that the defendant does not obtain all the facts that he would like from a complaint, he can still use the provision in rule 8(b) allowing denial without sufficient knowledge[64] and thus avoid being faced with a complaint "so vague and ambiguous" that he cannot respond.

The danger of the motion for a more definite statement under rule 12(e) is that it will become, in effect, a bill of particulars and a dilatory pleading.[65] If it is allowed to become a bill of particulars and plaintiff cannot satisfy the order, then his pleading may be struck or other action taken.[66] The argument could then be made that plaintiff is not prejudiced

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[60] 6 MOORE ¶ 56.03.

[61] N.C.R. CIV. P. 12(e).

[62] N.C.R. CIV. P. 12(g) requires all motions, with a few exceptions, to be made together; otherwise they are waived.

[63] N.C.R. CIV. P. 12(e) refers to a compliant "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading . . . ."

[64] N.C.R. CIV. P. 8(b) allows defendant to answer that "he is without knowledge or information sufficient to form a belief as to the truth of the averment . . . ." and states that this form of answer will be treated as a denial. See 2A MOORE ¶ 8.22.

[65] *See* Comment, *The Revival of the Bill of Particulars under the Federal Civil Rules*, 71 HARV. L. REV. 1473 (1958); Comment, *Federal Rules of Civil Procedure —Federal Rule 12(e): Motion for More Definite Statement—History, Operation and Efficacy*, 61 MICH. L. REV. 1126 (1963).

[66] N.C.R. CIV. P. 12(e). *Cf.* Lodge 743, International Ass'n of Machinists v. United Aircraft Corp., 30 F.R.D. 142 (D. Conn. 1962). The court in this case granted the 12(e) motion, but deferred plaintiff's addition to the pleading until after plaintiff's discovery. The case seems wrongly decided.

because he could have taken pre-complaint discovery and avoided the entire problem. But pleading under the new rules would thus become a mere extension of code practice. The only apparent method of avoiding this result is for the court to grant the 12(e) motion only when it would be granted in federal practice. An exception should be made for complaints following North Carolina forms (3) and (4). When these forms are used, the 12(e) motion should be granted in preference to a motion under 12(b)(6).

If a motion to dismiss is granted, there still exists the possibility of amendment (and relation back) under rule 15.[67] NCRCP 15(a) allows one amendment of right before service of the responsive pleading or, if there is no responsive pleading, within thirty days of service of the pleading to be amended.[68] Even though a motion to dismiss is not a responsive pleading,[69] amendment of right is generally cut off when the motion is granted.[70] The dismissed party must then request leave to amend from the court.[71] The standard for granting leave to amend under NCRCP 15(a) is that it shall be "freely given when justice so requires."

In any case in which a complaint is dismissed because it lacks specificity under NCRCP 8(a)(1), justice does require that leave be granted; indeed, the federal courts interpret FRCP 15(a) to require the granting of leave to amend unless the plaintiff clearly can never amend to plead any state of facts upon which, if proven, relief might be granted.[72] Even with free amendment, however, the best solution is to give the requirement of "notice" greater weight than the words "sufficiently particular" in new rule 8(a)(1). If this suggestion is followed, the complaint would not be dismissed in the first instance, and plaintiff would not be put to the uncertainty of requesting leave to amend and the expense of writing and filing the amendment. Yet dismissal with leave to amend is still preferable to the res judicata consequences of judgment of dismissal.

[67] N.C.R. Civ. P. 15.

[68] N.C.R. Civ. P. 15(a).

[69] 3 Moore ¶ 15.07(2).

[70] Swan v. Board of Higher Educ., 319 F.2d 56 (2d Cir. 1963); Cassell v. Michaux, 240 F.2d 406 (D.C. Cir. 1956). But some cases hold that plaintiff may amend as a matter of right after a motion to dismiss has been granted. *E.g.*, Brieir v. Northern Calif. Bowling Proprietors Ass'n, 316 F.2d 787 (9th Cir. 1963); Fuhrer v. Fuhrer, 292 F.2d 140 (7th Cir. 1961).

[71] Swan v. Board of Higher Educ., 319 F.2d 56, 61 (2d Cir. 1963).

[72] Foman v. Davis, 371 U.S. 178, 182 (1962). The test is stated in Alexander v. Pacific Maritime Ass'n, 314 F.2d 690, 694 (9th Cir. 1963) to be whether "The complaint [can] under any conceivable state of facts be amended to state a claim."

If, however, a complaint is dismissed and leave to amend denied, the appellate courts should closely examine the trial judge's reasons for the denial[73] to determine if he has abused his discretion.[74] Only in this way can the appellate courts truly chart the course of the new North Carolina rules and insure that justice is done.

When plaintiff is granted leave to amend, the amendment will relate back to the time of the filing of the original pleading if the amended complaint gives "notice of the transactions, occurrences, or series of transactions or occurrences . . . ." that are to be proved pursuant to the amended pleading.[75] This phraseology is intentionally designed to avoid distinctions between pleading a new cause of action and amplifying an old one.[76] Thus, even if the complaint is dismissed, but leave to amend is granted, plaintiff can amend with a new theory based on the same set of historical facts, and the amended complaint will relate back. Since defendant was already on notice from the first pleading as to what facts that the plaintiff was claiming as a wrong, he should not be surprised by the presentation of that same transaction or occurrence in a new form.[77]

Since no reasons exist for not following the liberal precedent of the federal and New York courts, except in situations involving negligent operation of automobiles that are governed by specific forms in the new rules and since there is no compelling purpose in requiring specificity in pleading when other fact-interception and issue-formulation devices are provided, NCRCP 8(a)(1) should be interpreted to require no more specificity than FRCP 8(a)(2). Similarly, motions under 12(b)(6) should be granted in the same circumstances as they are in the federal

[73] North Carolina trial judges will be required to articulate reasons for refusing leave to amend under the amendment to N.C.R. Civ. P. 52(a). Ch. 895, § 12, [1969] N.C. Sess. L. —.

[74] Under North Carolina Code practice a trial judge has never been found to have abused his discretion in denying leave to amend. Louis, *The Sufficiency of a Complaint, Res Judicata and the Statute of Limitations—A Study Occasioned by Recent Changes in the North Carolina Code*, 45 N.C.L. Rev. 659, 674 & nn.83-84 (1967). The federal trial courts are closely regulated by the appellate courts on this point. The Supreme Court has stated:

> Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of that discretion . . . .

Foman v. Davis, 371 U.S. 178, 182 (1962).

[75] N.C.R. Civ. P. 15(c).

[76] *Id.*, comment (c).

[77] *Id.*; *see also* F. James, Civil Procedure § 5.9 (1965).

courts. If, however, the courts of North Carolina determine that greater specificity is required by NCRCP 8(a)(1) than by FRCP 8(a)(2), the use of the 12(e) motion in place of the one under 12(b)(6) and the liberal allowance of amendments are recommended as methods of insuring a balanced and equitable system.

ROGER GROOT

Constitutional Law—Illegality of Police Program To Gather Information on Civil Disorders

In *Anderson v. Sills*[1] a New Jersey Superior Court held that a state-sponsored program of information-gathering about civil disorders and the participating groups and individuals was an unconstitutional infringement of the plaintiffs' rights of free speech and assembly. The state attorney general had ordered preparation of two forms for use by local police departments.

One, the "Security Incident Report Form," was designed to gather information on any "civil disturbance, riot, rally, protest, demonstration, march or confrontation," including "the names of organizations or groups involved, leaders, and the type of organization."[2] The "Security Sum-

[1] 106 N.J. Super. 545, 256 A.2d 298 (Super. Ct. 1969).

[2] *Id.* at 548, 256 A.2d at 300. An excerpt from the report's "instructions for preparation" illustrates its breadth:

9. TYPE OF INCIDENT—Enter the type of incident. EXAMPLES: Civil disturbance, riot, rally, protest, demonstration, march, confrontation, etc.
10. LOCATION—Type the location of the incident. If business or residence, the number and name of street, road, lane or avenue. If open area, give approximate distance to a known geographic location.
11. REASON OR PURPOSE OF INCIDENT—Enter reason for incident or alleged purpose.
12. NUMBER OF PARTICIPANTS—List estimated or announced number of participants or anticipated participants.
13. ORGANIZATIONS AND/OR GROUPS INVOLVED—Give full names and addresses of organizations and/or groups involved. If more space is needed, use Narrative.
14. LEADERS—Enter names, addresses and titles, if any, of leaders of organizations and/or groups involved. Include nicknames, aliases, and other identifying data.

. . . .

17. NARRATIVE
    a. Information previously included elsewhere on this report need not be repeated in the Narrative.

mary Report" recorded the "date and place of birth, marital status, name of spouse, age, race, physical description, occupation and employer, motor vehicle record"[3] and other characteristics of participants in the activity who might therefore be suspected of involvement in future civil disorders. A result of the apprehension induced by recent racial upheavals, the avowed purpose for the reports was prediction and control of potential disorders.[4]

The court, taking judicial notice that some of the individual plaintiffs[5] had been involved in sit-ins and civil rights activities, did not require them to allege that they had actually been subjected to any surveillance or reporting, but followed the federal "concepts of standing in First Amendment cases [that] have had the effect of constituting individual litigants *quasi*-attorneys general for large classes of citizens whose rights might otherwise be oppressed."[6] The plaintiffs sought and obtained a judgment declaring the reporting system unconstitutional per se and ordering that the reports be discontinued and that all forms and files be destroyed.[7] The court found

> "that the directive in question, and Forms 420 [Security Incident Report] and 421 [Security Summary Report] as used therewith, are violative of the First Amendment of the United States Constitution in that they overreach in their attempt to achieve what is probably a legitimate governmental goal . . . . The exercise of power which deters individuals from exercising First Amendment rights is denied to government."[8]

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b. If an organization and/or group is involved in the incident reported, include type and how involved.
EXAMPLES OF TYPES: Left wing, Right wing, Civil Rights, Militant, Nationalistic, Pacifist, Religious, Black Power, Klu [*sic*] Klux Klan, Extremist, etc.
EXAMPLES OF HOW INVOLVED: Sponsor, co-sponsor, supporter, assembled group, etc.

Id. at 559-60, 256 A.2d at 306-07.

[3] *Id.* at 552-53, 256 A.2d at 302.

[4] *Id.* at 551-52, 256 A.2d at 301-02. The Attorney General introduced excerpts from the report of the National Advisory Commission on Civil Disorders urging improvements in police intelligence procedures as valuable aids in preventing and controlling disorders to justify the reporting procedure. *See* Momboisse, *Riot Prevention and Survival*, 45 CHI.-KENT L. REV. 143 (1969), in which the need for adequate police intelligence activity is stressed.

[5] Plaintiffs in this case were the local NAACP chapter and individual members of the chapter who had been involved in civil rights activities. 106 N.J. Super. at 545, 550-51, 256 A.2d at 298, 301.

[6] *Id.* at 551, 256 A.2d at 301.

[7] *Id.* at 557-58, 256 A.2d at 305. This case was an action under the New Jersey declaratory judgment statute.

[8] *Id.* at 556-57, 256 A.2d at 304.

It is useful to review briefly the more important precedent cited by the court in support of its decision. Such analysis will reveal an implicit extension of first-amendment freedoms in the New Jersey court's holding.

Dombrowski v. Pfister,[9] cited by the court to support its decision on standing as well as its determination on the merits, involved an attempt by Louisiana to apply state anti-sedition statutes to individuals and associations working for equal rights for Negroes.[10] The Supreme Court, deciding that the federal district court should not abstain from hearing the complaint, held that the Louisiana statutes under which the plaintiffs had been arrested and indicted were unconstitutionally vague and overly broad since they created a zone "within which protected expression may be inhibited."[11]

In *Lamont v. Postmaster General*,[12] the Supreme Court held that a statute requiring potential recipients of "communist political propaganda" to request its delivery in writing unduly limited first-amendment freedom to receive mail.[13] Mr. Justice Douglas, writing for the Court, concluded that the statute was "unconstitutional because it requires an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights."[14]

The state court's contempt conviction of the National Association for the Advancement of Colored People for failing to produce a list of its members was reversed in *NAACP v. Alabama*.[15] The Supreme Court, noting the possibility of private reprisal and threats, held that the forced disclosure would impair the ability of members to pursue their legitimate aims and dissuade other individuals from joining the organization in contravention of the first-amendment right to freedom of association.[16]

NAACP v. Button[17] involved an attempt by Virginia to expand its definition of solicitation of legal business to preclude the plaintiffs from encouraging and supporting litigation aimed at eliminating racial dis-

[9] 380 U.S. 479 (1965).
[10] *Id.* at 482.
[11] *Id.* at 494.
[12] 381 U.S. 301 (1965).
[13] The right to receive mail was considered an integral part of freedom of speech. *Id.* at 308 (Brennan, J., concurring).
[14] *Id.* at 305.
[15] 357 U.S. 449 (1958).
[16] *Id.* at 462-63, 466. The Court derived a freedom of association from the related freedoms of speech and assembly specifically granted by the first amendment. *Id.* at 460. *See* NAACP v. Button, 371 U.S. 415, 430-31 (1963).
[17] 371 U.S. 415 (1963).

crimination. The Supreme Court found that plaintiff's conduct was a form of speech protected by the first amendment and that the state's attempt to make it unlawful could not be sustained.[18]

The Supreme Court was fundamentally concerned in each of the above cases with examining the chilling effect the governmental action had on the exercise of first-amendment rights; once a sufficient inhibition was demonstrated, the state's interest yielded. Considered in this light, the cases cited by the New Jersey court provide a sound basis for its holding in *Anderson*: there can be no doubt that the attorney general's reporting system was a form of state action having the potential effect of discouraging individuals from a constitutionally-protected pursuit of legitimate aims. But by not requiring the plaintiffs to show an actual threat giving rise to a chilling effect on first-amendment rights, the court in *Anderson* reached beyond any of these cases. In both *Dombrowski* and *Button* it was the existence of criminal statutes, likely to be invoked against plaintiffs for their exercise of protected rights, that gave rise to an actual threat. In *Lamont*, the most recent of the cases, the majority of the Supreme Court went to some lengths in its opinion to point out the affirmative obligation that the statute imposed on the addressee before he could receive certain mail.[19] Even in *NAACP v. Alabama*, in which there was no claim that the state statutes involved were unconstitutional on their face, the Court relied in part on the demonstrated probability of "economic reprisal, loss of employment . . . [and] physical coercion"[20] if the state were permitted to force disclosure of membership lists through contempt proceedings.

In contrast to *Dombrowski* and *Button* there was no real threat of prosecution for engaging in protected activities in *Anderson*, for while the investigation of activities such as sit-ins and protest marches was the medium for obtaining information, the purported uses of that information were limited to preventing riots and civil disorders,[21] which are surely not protected speech and assembly. Unlike *Lamont* and *NAACP v. Alabama*, there was no affirmative action required of the plaintiffs before they could carry out protected activities. Moreover, it does not appear in *Anderson* that there was any showing of possible intimidation or har-

[18] *Id.* at 437. Virginia argued without success that the restraint was only incidental to the legitimate pursuit of the state's goal of ensuring high professional standards for the legal profession. *Id.* at 438.

[19] 381 U.S. at 305, 307.

[20] 357 U.S. at 464.

[21] 106 N.J. Super. at 552-53, 256 A.2d at 302.

rassment by state agencies either in obtaining the information or in its later use.

Although the court in *Anderson* recognized "that plaintiffs and others may well be subjected to abuse as a result of this intelligence system,"[22] the main thrust of its conclusion is that such files are inherently dangerous since the mere knowledge of their existence tends to inhibit advocation of social and political change.[23] If any chilling effect similar to that found in the cases that the court cited is to be found in *Anderson,* it must rest on a judicial inference that the police will misuse information contained in their files or will harrass and intimidate individuals while collecting it.[24] Granting that such an inference may be justified if required for the protection of first-amendment freedoms, one must still consider whether it is always necessary or desirable in light of public-policy decisions favoring police functions of crime prevention and detection.

If police limited their activities to investigation of reported crimes after the occurrence, their operations would rarely be disturbed by charges of repression and abuse of power; the first amendment would never be the gravamen of a complaint against police excesses. Perhaps unfortunately, however, the law arms the police with conspiracy statutes and expects them to stop crime in its incipiency without furnishing clear-cut guidelines of acceptable methods of prevention. One of the most effective crime-prevention tools is the information-collection system condemned in *Anderson.*[25]

The harm caused to first-amendment freedoms by such a system is twofold: first, the knowledge that the police are noting people's presence at a particular event may dissuade individuals from participating in legal political activity and discussion; second, police presence at gatherings tends to inhibit participants from speaking out as freely as they otherwise might.[26] A more serious problem arises when the police use clandestine

[22] *Id.* at 557, 256 A.2d at 304-05.

[23] *Id.* at 556-57, 256 A.2d at 304.

[24] The court obviously gave some credence to this possibility: "[T]he probability that it [the directive to gather information] will be interpreted by some as requesting investigations of political trouble makers is too apparent." *Id.* at 557, 256 A.2d at 304. "[P]laintiffs and others may well be subjected to abuse as a result of this intelligence system." *Id.,* 256 A.2d at 305.

[25] *See* Momboisse, *supra* note 4.

[26] This precise deterrent effect came before a federal district court in *Local 309, United Furniture Workers v. Gates,* 75 F. Supp. 620 (N.D. Ind. 1948). Following picket-line violence, state and local police began attending—but did not actively interfere with—union meetings in the county courthouse. The union mem-

surveillance or infiltration of groups to obtain information. Unless the presence of the police is realized at some point, there is no inhibition of the exercise of first-amendment freedoms absent a general, persisting fear that an informer may be present. Moreover, it is seldom possible to attack covert surveillance successfully on fourth- or fifth-amendment grounds unless there has been some trespass, and this affirmative remedy is not available if the infiltrator's presence is at least tacitly condoned,[27] as is the case at public meetings.

Granting that harm flows from the knowledge that the police are engaging in information-collecting, is it really essential to impute to them either bad motives or harrassing tactics to find a judicial basis for stopping or limiting such activities?[28] Since the harm to the plaintiffs in *Anderson* was solely in their individual reaction and not in the possibility of affirmative state action against them, the court was, in effect, protecting a right to exercise *in privacy* first-amendment rights. By recognizing a distinction between protecting the freedom to exercise first-amendment rights and protecting a right of privacy from governmental intrusion, and accepting *Anderson* as a case involving the right to privacy,

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bers sought and obtained an injunction prohibiting the police from attending the meetings on the basis that such attendance "restrained and hampered those who had thus met in lawful and peaceful assembly." *Id.* at 625.

[27] Considering the assiduous efforts of the courts to protect individuals from invasions of privacy by electronic and mechanical surveillance methods, the unrestricted leeway given unaided eavesdroppers and informers is surprising. *Compare* Katz v. United States, 389 U.S. 347 (1967) *and* Berger v. New York, 388 U.S. 41 (1967) *with* Hoffa v. United States, 385 U.S. 293 (1966), in which the Supreme Court upheld a conviction based on testimony from an informer and did not consider it significant that the police probably had introduced him into the group. *See also* Osborne v. United States, 385 U.S. 323 (1966) and Lewis v. United States, 385 U.S. 206 (1966). The latter decisions have been criticized: *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 193-94 (1967); Note, *Judcial Control of Secret Agents*, 76 YALE L.J. 994 (1967). The acceptance of the use of eavesdroppers and informers perhaps stems from the difficulty in formulating a theory placing "overhearing" within any category of state activity presently held to violate enumerated rights or freedoms, but it should not be overlooked that the cases permitting eavesdropping did not involve first-amendment freedoms and might have been decided differently if they had. The Court in *Katz* held that a physical trespass was not necessary for finding an illegal search and seizure by electronic bugging and used language that could be equally applied to unaided eavesdropping.

[28] Besides furthering an obvious policy conflict by resting decisions on imputations of bad faith, courts would seem to be guilty of that old legislative mistake of overbreadth since this inference, once applied, cannot logically be limited to reports of the type involved in *Anderson*, but must be applied to all information-gathering and use of official records.

the court could have avoided trying to find a deterrent effect based on possible police misbehavior.[29]

The existence of a right to privacy in exercise of certain first-amendment freedoms has clearly been accepted by the Supreme Court.[30] When an attack on governmental activity is based on a violation of this right to privacy, plaintiff does not bear the burden of proving an additional affirmative, deterrent state activity; it is sufficient to show only an invasion of privacy and a lack of justification for that invasion. Indeed, once an investigation into protected activities is shown, the burden is then on the state to justify it.[31] The court in *Anderson* came very close to accepting a right to privacy in the exercise of both actual and symbolic speech, and the case has been interpreted by one writer as authority for such a right.[32] If this interpretation is correct, *Anderson* brings the judiciary one step closer to accepting the suggestion by Mr. Justice Douglas[33] that the proper solution is to adopt a "right to be let alone" and to establish that until an organization or individual acts illegally, no governmental unit should be authorized or allowed to investigate. A less drastic suggestion is to place information collected by surveillance and infiltration on the same basis as wiretapping and to require prior judicial approval by use of warrants[34] before evidence obtained as a result of such police action can be used in any court.

The injunctive remedy granted in *Anderson*, depending as it does on

[29] The court came close to adopting this approach: "[I]t is not too difficult to imagine the reluctance of an individual to participate in any kind of protected conduct which seeks publicly to express a particular or unpopular political or social view because of the fact that by doing so he might now have a record . . . ." 106 N.J. Super. at 556, 256 A.2d at 304. "I conclude that plaintiffs' complaint, that they do not want to be investigated and the subject of central surveillance as potential problems, bears merit." *Id.* at 557, 256 A.2d at 304. *But cf.* note 24 *supra*.

[30] *See, e.g.*, DeGregory v. Attorney Gen., 383 U.S. 825, 829 (1966); Gibson v. Florida Legis. Inves. Comm'n, 372 U.S. 539, 544 (1963); Talley v. California, 362 U.S. 60, 65 (1960); NAACP v. Alabama, 357 U.S. 449, 462 (1958); United States v. Rumely, 345 U.S. 41, 57-58 (1953) (concurring opinion). *See also* Griswold v. Connecticut, 381 U.S. 479 (1965).

[31] *See* Gibson v. Florida Legis. Inves. Comm'n, 372 U.S. 539 (1963); *cf.* Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Katz v. United States, 389 U.S. 347 (1967) for application of this principle to a fourth-amendment situation.

[32] Schlam, *Police Intimidation Through "Surveillance" May be Enjoined as an Unconstitutional Violation of Rights of Assembly and Free Expression*, 3 CLEARINGHOUSE REV. 130, 157 (1969).

[33] Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361 (1963).

[34] *The Legitimate Scope of Police Discretion to Restrict Ordinary Public Activity*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 233, 341 (1969).

affirmative action initiated by the plaintiff, will not provide relief from pervasive covert collection of information. The combination of an exclusionary evidentiary rule, based on the requirement of a warrant, and injunctive relief would, however, be a potent weapon for discouraging police activities likely to stifle the free and open exercise of the rights of freedom of speech, assembly, and association. Since surveillance would be permitted only if the need for it could be demonstrated to a judicial officer, the police would not be forced into illegal conduct to carry out the investigative and preventive activities demanded of them by society.

DONALD W. HARPER

Constitutional Law—Power of Congress To Exclude Persons Duly Elected

In the congressional elections of 1966, Adam Clayton Powell was duly elected to the Ninetieth Congress from the eighteenth congressional district of New York. When the House of Representatives convened, Powell was not administered the oath. On the same day, the House provided for the appointment of a select committee to determine Powell's eligibility to take his seat.[1]

The committee found that Powell met the standing qualifications of article I, section 2 of the Constitution.[2] The committee further reported, however, that Powell had misappropriated public funds, had made false reports on expenditures of foreign currency, and had asserted unwarranted privilege and immunity from the processes of the courts of New York.[3] The committee recommended that Powell be sworn and seated, but that he be fined 40,000 dollars, censured, and deprived of his seniority.[4] When the proposed resolution was presented to the House, an amendment was offered calling for Powell's exclusion and a declaration that his seat was vacant.[5] After heated debate, the amendment was adopted,

[1] 113 CONG. REC. 16 (daily ed. Jan. 10, 1967).

[2] H.R. REP. No. 27, 90th Cong., 1st Sess. 31 (1967). The relevant part of article I, § 2 declares:

> "[n]o person shall be a Representative who shall not have attained to the Age of twenty-five years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

[3] H.R. REP. No. 27, 90th Cong., 1st Sess. 31-32 (1967).

[4] *Id.* at 33.

[5] H.R. Res. 278, 90th Cong., 1st Sess., 113 CONG. REC. 4997, 5020 (1967).

and House Resolution No. 278, in its amended form, was approved by over a two-thirds margin.

Powell and thirteen voters of the eighteenth congressional district brought suit requesting injunctive and declaratory relief. They alleged that the House in voting to exclude Powell violated two specific provisions of the Constitution: article I, section 2, clause 1,[6] because the resolution was inconsistent with the mandate that the members of the House shall be elected by the people of each state; and Article I, section 2, clause 2,[7] which, it was asserted, sets forth the exclusive qualifications for membership. The district court dismissed the complaint "for want of jurisdiction of the subject matter."[8] The court of appeals affirmed on somewhat different grounds, with each judge filing a separate opinion.[9]

On certiorari, the Supreme Court reversed.[10] The Court passed over the claim under article I, section 2, clause 1, but held that under article I, section 2, clause 2 the House had no power to exclude from its membership any person, duly elected by his constituents, who met the age, citizenship, and residence requirements specified in the Constitution. In so holding, the Court insisted that it was not dealing with a nonjusticiable political question.[11]

The impact of *Powell* on the political-question doctrine is emphasized through the fact that the Court, had it based its decision on article I, section 2, clause 1, could have resolved the issue within accepted conceptions of justiciability. The theory embodied in this provision is that the right of the people in each district to choose their congressional representatives is fundamental to a democratic system of government. As stated

[6] "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

[7] See note 2 *supra.*

[8] Powell v. McCormack, 266 F. Supp. 354, 360 (D.D.C. 1967).

[9] Powell v. McCormack, 395 F.2d 577 (D.C. Cir. 1968). Writing for the court, Judge Burger, now Chief Justice of the United States, held that the case involved non-justiciable political issues. Judge McGowan felt that the decision by the House that the power to expel included the power to exclude, provided a two-thirds vote was forthcoming, did not present an impelling occasion for judicial scrutiny. Judge Leventhal concluded that "[t]he House had legislative jurisdiction to consider and appraise the activities and fitness of Powell at the time he presented his credentials." 395 F.2d at 611.

[10] Powell v. McCormack, 395 U.S. 486 (1969). For a lengthy analysis of *Powell,* see generally *Symposium—Comments on Powell v. McCormack,* 17 U.C.L.A.L. REV. 1 (1969).

[11] 395 U.S. at 549.

by Robert Livingston in his speech before the New York ratification convention, "The people are the best judges [of] who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights."[12] It is this "natural right" that is the basis for the one man, one vote requirement in congressional districting.[13] Justice Black in *Wesberry v. Sanders*[14] said, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[15]

The same rationale was later a basis for the Court's decision in *Bond v. Floyd*.[16] Julian Bond had been excluded by the Georgia House of Representatives for making certain statements opposing the Vietnam War. Georgia did not argue that Bond's statements violated any laws, but contended that although such statements by a private person might be protected by the first amendment, the state may nevertheless apply a stricter standard to its legislators.[17] The Court rejected this contention:

> The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also *so they may be represented in governmental debates by the person they have elected to represent them.*[18]

When Adam Clayton Powell was elected to the Ninetieth Congress, it was the twelfth consecutive time that his constituents had chosen him.

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[12] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 292-93 (rev. ed. M. Farrand 1966) [hereinafter cited as Farrand], *quoted in* 395 U.S. at 541, n.76. At the same convention Hamilton stated: "[T]he true principle of a republic is, that the people should choose whom they please to govern them." Farrand 257, *quoted in* 395 U.S. at 540-41.

[13] Justice Douglas, concurring in *Powell*, stated in regard to the one man, one vote principle: "When that principle is followed and the electors choose a person who is repulsive to the Establishment in Congress, by what constitutional authority can that group of electors be disenfranchised?" 395 U.S. at 553 (concurring opinion).

[14] 376 U.S. 1 (1964). The complaint alleged that plaintiffs "were deprived of the full benefit of their right to vote," in violation of art. I, § 2, clause 1. *Id.* at 3.

[15] 376 U.S. at 17.

[16] 385 U.S. 116 (1966).

[17] *Id.* at 132-33.

[18] *Id.* at 136-37 (emphasis added).

In 1968 he was re-elected to the Ninety-First Congress.[19] The citizens of Harlem have consistently selected Powell despite the well-publicized allegations against him. In view of the principles stated in such cases as *Wesberry* and *Bond*, surely it follows that the power of the House to disenfranchise an entire congressional district in violation of the express terminology of the Constitution is reviewable by the Supreme Court.

But the Court passed over this ready-at-hand basis for disposition of Powell's claim to resolve the issue under the constitutional clause directly pertaining to qualifications for membership in the House of Representatives. In so doing, it elected to grapple once again with the doctrine of "political questions."[20] It was not until *Baker v. Carr*[21] that some illumination was finally cast upon the enigma of the doctrine of political questions. That case involved the apportionment of the Tennessee legislature. All such previous cases had been held "political" and, therefore, not justiciable.[22] In holding that cases involving reapportionment of legislative bodies were not political questions, Justice Brennan, speaking for the Court, reviewed much case law. His review revealed that "it is the relationship between the judiciary and the coordinate branches of the Federal Government [the separation of powers doctrine] . . . which gives rise to the 'political question.' "[23] He then ventured several factors by which a dispute could be tested for determining whether it was political in nature:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially

[19] This time the House fined him 25,000 dollars, but seated him. H.R. Res. No. 2, 91st Cong., 1st Sess., 115 CONG. REC. H21 (daily ed., January 3, 1969). This event brought forth a suggestion of mootness, but that defense was rejected by the Court in *Powell*. 395 U.S. at 495-500. See Justice Stewart's dissent, 395 U.S. at 559.

[20] *See generally*, A. BICKEL, THE LEAST DANGEROUS BRANCH 183-198 (1962); H. M. HART AND H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 192-209 (1953); Bickel, *The Passive Virtues*, foreword to *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40 (1961); Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925); Scharpf, *Judicial Review and the Political Question: A Fundamental Analysis*, 75 YALE L.J. 517 (1966); Tollett, *Political Questions and the Law*, 42 U. DET. L.J. 439 (1965); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925).

[21] 369 U.S. 186 (1962).

[22] *See, e.g.*, Colegrove v. Green, 328 U.S. 549 (1946).

[23] 369 U.S. 186, 210 (1962).

> discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence.[24]

From this list two ideas emerge as dominant. First, when a constitutional power is specifically conferred upon a branch of government other than the judiciary the exercise of that power is non-reviewable. Second, if there is a possibility of divergent views between coordinate departments on a question, or resolution of a problem by one branch may express an embarrassing lack of respect due to another branch, then the matter is political and non-justiciable.

Although there is no precedent directly in point,[25] the principal federal cases prior to *Powell* touching on the subject of legislative exclusion seemed to reinforce the view that Congress has the sole authority to judge its members. The issue was generally considered political and non-justiciable.[26] In *Sevilla v. Elizalde*,[27] the Court of Appeals for the District of Columbia Circuit declared that the power to pass on the qualifications of legislators is "lodged exclusively in the legislative branch."[28] Similarly, in *Barry v. United States ex rel. Cunningham*,[29] the Supreme Court

[24] *Id.* at 217.

[25] "In our entire history, no case has been found where the judgment of either House has been overruled in a judicial proceeding." Curtis, *The Power of the House of Representatives to Judge the Qualifications of its Members*, 45 TEX. L. REV. 1199, 1204 (1967).

[26] *See* Powell v. McCormack, 266 F. Supp. 354, 356 (D.D.C. 1967).

[27] 112 F.2d 29 (D.C. Cir. 1940). This case involved a suit by a citizen of the Commonwealth of the Philippine Islands seeking a determination that the defendant did not possess the requisite qualifications for holding the office of Resident Commissioner of the Commonwealth to the United States. The court dismissed the complaint upon the grounds that it raised a political question over which the court had no jurisdiction and also that the court had no authority to pass upon the qualifications of a delegate from a territory.

[28] *Id.* at 38.

[29] 279 U.S. 597 (1929). *Barry*, upon which the respondents in *Powell* relied heavily, involved the power of the Senate to issue an arrest warrant to summon a witness to give testimony concerning a senatorial election.

declared that certain powers had been conferred upon the Houses of Congress that were not legislative, but were judicial in nature, and that among these judicial powers is that of judging the qualifications of members.[30] The Court said that a judgment in exercise of those powers is "beyond the authority of any other tribunal to review."[31] But in *Powell* the Court leaped over these apparent hurdles by ignoring *Sevilla* and distinguishing *Barry*.[32]

The respondents relied on *Sevilla* and *Barry* in contending that under article 1, section 5,[33] there was a "textually demonstrable constitutional commitment"[34] to the House to determine Powell's qualifications. They argued that the House, and the House alone, has power to judge who is qualified to be a member. The Court, to determine the merits of the respondents' arguments, was required to interpret the Constitution:

> If examination of § 5 disclosed that the Constitution gives the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications, further review of the House determination might well be barred by the political question doctrine. On the other hand, if the Constitution gives the House power to judge only whether elected members possess the three standing qualifications set forth in the Constitution, further consideration would be necessary to determine whether any of the other formulations of the political question doctrine are inextricable from the case at bar.[35]

Stated differently, if the constitutionally enumerated qualifications are *minimum* standards for the House to judge its members, then judicial

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[30] *Id.* at 613.

[31] *Id.*

[32] *Barry* provides no support for respondents' argument that this case is not justiciable, however. First, in *Barry* the Court reached the merits of the controversy, thus indicating that actions allegedly taken pursuant to Art. I, § 5, are not automatically immune from judicial review. Second, the quoted statement is dictum; and, later in the same opinion, the Court noted that the Senate may exercise its power subject "to the restraints imposed by or found in the implications of the Constitution." Third, of course, the statement in *Barry* leaves open the particular question that must first be resolved in this case: the existence and scope of the textual commitment to the House to judge the qualifications of members.
395 U.S. at 519 n.40 (citation omitted).

[33] "Each House shall be the Judge of the Elections, Returns and Qualifications of its own members . . . ."

[34] 395 U.S. at 519. If any of the six tests formulated in *Baker* are met, the case may involve a political question and therefore be non-justiciable. Powell v. McCormack, 395 F.2d 577, 593 (D.C. Cir. 1968).

[35] 395 U.S. at 520-21.

review of its determination is a political question since the issue is textually committed to a coordinate political department. On the other hand, if those specified requirements are *maximum* standards, the issue has not been committed to a coordinate department and the extra-constitutional action of the House is subject to judicial scrutiny unless any other of *Baker's* formulations can be applied to the facts of the case.

The Court held that the standards were maximum: "[O]ur examination of the relevant historical materials leads us to the conclusion that . . . the Constitution leaves the House without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[36] Since article 1, section 5 is a "textually demonstrable commitment" to the House to judge only the qualifications expressly set forth in the Constitution, the " 'textual commitment' formulation of the political question doctrine does not bar federal courts from adjudicating petitioners' claims."[37] Adam Clayton Powell was duly elected and was not ineligible to serve under any provision of the Constitution; therefore the House was without power to exclude him from its membership.[38]

Since there are no cases interpreting the meaning of the phrase to "judge the qualifications of its members," the Court had to look to the records of the debates during the Constitutional Convention.[39] Early in the Convention, George Mason of Virginia had moved to include a property qualification for members of the legislature. The Convention adopted this proposal and instructed the Committee of Detail to draft such a qualification. The committee's report of August 6 provided that: "The Legislature . . . shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient."[40]

The debate on this proposal is a great source of the Framers' view of the qualifications issue. James Madison stated that the proposal would vest

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[36] *Id.* at 522. The Court expressed no view on the issue of whether federal courts could review a factual determination by the House that a member did not meet one of the prescribed qualifications. *Id.* at 521, n.42.

[37] *Id.* at 548.

[38] *Id.* at 550.

[39] Much of the Court's discussion of the Convention proceedings is taken from C. WARREN, THE MAKING OF THE CONSTITUTION 418-26 (1926) [hereinafter cited as WARREN]. In his arguments before the Supreme Court, Powell's counsel relied heavily on Professor Warren's analysis.

[40] *Id.* at 418. *See generally,* Farrand 179.

> [a]n improper and dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution . . . . It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partisans of a weaker faction.[41]

It is significant that Madison aimed his argument not at the imposition of a property qualification per se, but at the delegation to the legislature of discretionary power to establish *any* qualifications.[42] Referring to the British Parliament's assumption of the power to regulate the qualifications of both electors and elected, Madison went on to note that "the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties."[43]

The Convention obviously concurred with Madison's views, for both the proposal to give to Congress power to establish qualifications in general and the proposal for a property qualification were defeated.[44] It is within this context that on the same day (August 10, 1787) the Convention agreed to article 2, section 5 of the Constitution, which provided that "Each House shall be the judge of the . . . qualifications of its own members."[45]

One additional decision made that day is also important in determining the meaning of article 1, section 5. When the proposal to empower each House to *expel* its members was discussed, Madison observed that "the right of expulsion . . . was too important to be exercised by a bare majority of a quorum: and in emergencies one faction might be dangerously abused."[46] He therefore moved that "with the concurrence of two-thirds" be inserted. The motion was approved. The Court in *Powell* considered this decision highly significant:

> [T]he Convention's decision to increase the vote required to expel, because that power was "too important to be exercised by a bare

[41] Farrand 249-50; WARREN 420.

[42] Chief Justice Warren also made note of this fact. 395 U.S. 534.

[43] J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 at 429 (A. Koch ed. 1966).

[44] WARREN 420-21.

[45] *Id.* at 419.

[46] J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 at 431 (A. Koch ed. 1966).

majority," while at the same time not similarly restricting the power to judge qualifications, is compelling evidence that they considered the latter already limited by the standing qualifications previously adopted.[47]

It seems only logical that if the Convention voted to require a two-thirds vote of a House to *expel* a member, it was not willing to allow either House to *exclude* a member-elect for any reason at all merely by a majority vote.[48]

Another source for examining the intent of the Framers is *The Federalist*,[49] a series of essays written for the express purpose of explaining the Constitution. Madison, for example, states in one of his papers: "The qualifications of the elected being less carefully and properly defined by the State Constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the Convention."[50] Hamilton expressed similar thoughts by saying, "[t]he qualifications of the persons who may choose or be chosen . . . are defined and fixed in the constitution; and are unalterable by the legislature."[51] Such authorities are persuasive.[52]

There are, of course, arguments that article 1, section 2 establishes only *minimum* standards. One such argument, relying on a change by the Committee of Style in the form of article 1, section 2, was proposed by the respondents in *Powell*, but rejected by the Court.[53] Another argument is that in addition to the age, citizenship, and inhabitancy qualifications of article I, section 2, there are other constitutional disqualifications;[54] thus this provision cannot provide maximum congressional

[47] 395 U.S. at 536.

[48] This argument is precisely that of Professor Warren. WARREN 424.

[49] THE FEDERALIST (J. Cooke ed. 1961).

[50] THE FEDERALIST No. 51, at 354 (J. Cooke ed. 1961) (J. Madison).

[51] THE FEDERALIST No. 60, at 409 (J. Cooke ed. 1961) (A. Hamilton).

[52] Professor Warren has concluded:

> As the Constitution, as then drafted, expressly set forth the qualifications of age, citizenship and residence, and as the Convention refused to grant to Congress power to establish qualifications in general, the maxim *expressio unius exclusio alterius* would seem to apply . . . . The elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications.

WARREN 421-22.

[53] 395 U.S. at 525-26. The respondents argued that the change made by the Committee of Style in Article I, § 2 from positive statements of qualifications to the present negative form evidenced a design to give Congress the power to deny a seat if it deeemed one "unfit" for reasons other than the meeting of the enumerated requirements. *Id.*

[54] Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J. PUB. LAW 103 (1968). First, any person convicted after im-

standards. But this argument, far from rebutting the theory of express qualifications, actually strengthens it. For if the Framers saw fit to list qualifications for office in the Constitution, they must have intended to preclude the addition of any others by the Houses of Congress.

Having decided that the issue in *Powell* was not textually committed to another branch of government, the Court still had to resolve other considerations. The respondents contended as an alternative theory that the case presented a political question under the *Baker* formulations because judicial resolution of Powell's claim would produce the "potentiality of embarrassment" from a confrontation between equal branches of the federal government.[55] The Court also had to overcome the suggestion that a determination in his favor would express a "lack of the respect due" a coordinate department.[56] But the Constitution is the "supreme Law of the Land"[57] and it is the responsibility of the Supreme Court to act as the ultimate interpreter of this document.[58] As stated in *Cooper v. Aaron*:[59]

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of

peachment by the Senate is disqualified not only from serving in Congress, but also may not "hold and enjoy any Office, of honor, Trust or Profit under the United States." U.S. CONST. art. I, § 3.

A second disqualification is found in article I, § 6: members of Congress may not hold any other "office under the United States."

The guaranty clause of article IV, § 4 points to another disqualification. This provision guarantees "every State in this Union a Republican Form of Government." In Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849), the Court interpreted this article to mean that Congress has the unreviewable power to decide what government is the established one in a state. If Congress can acknowledge that a state has a republican government and thus accept its representatives, it must also have the authority to disqualify Congressmen elected in a state not having a republican form of government. Dionisopoulous *supra*, at 114.

An additional provision pertaining to qualifications is article VI, clause 3, requiring that all public officials, national and state, "shall be bound by oath or Affirmation, to support this Constitution . . . ." This Provision was recently interpreted to mean that a "legislator . . . can be required to swear to support the Constitution of the United States *as a condition of holding office.* Bond v. Floyd, 385 U.S. 116, 132 (1966) (dictum) (emphasis added).

[55] 395 U.S. at 548.

[56] *Id.*

[57] U.S. CONST. art. VI, § 2.

[58] Baker v. Carr, 369 U.S. 186, 211 (1962).

[59] 358 U.S. 1 (1958).

> *Marbury v. Madison*, . . . that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our Constitutional system.[60]

Determination of Powell's right to be seated by the House thus but required the Court to perform its duty as ultimate interpreter of the Constitution. It is not unusual for the federal courts to interpret the Constitution in a manner at variance with the construction given by another branch. Such a division occurs whenever congressional acts are declared unconstitutional. Any conflict between the branches of government that such an adjudication may cause cannot justify the courts' avoiding their constitutional duties.[61]

The major impact of *Powell* is its effect on the political question doctrine. The doctrine has, at the very least, been seriously undermined by the holding in *Powell*. The formulations in *Baker* relating to the potential embarrassment or lack of respect of coordinate branches of government must be considered as having been read out of the doctrine. If the Supreme Court has the power, indeed the mandate, to hear all questions involving constitutional interpretation, then these bases of the political question doctrine are no longer viable; judicial review of constitutional construction of another branch of the government is, by its very nature, an intrusion upon the traditional concept of separation of powers.

Although the potential embarrassment of a coordinate branch has been eliminated by *Powell* as a test for political questions, the textual commitment concept remains. The Court in *Powell* did not find a textual commitment; however, certain powers do seem textually committed exclusively to a branch of government others than the judiciary,[62] and in such cases determinations by that branch would present non-justiciable political questions.

It is perhaps significant that the Court was unwilling to speculate what the result might have been had Powell been expelled from the House

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[60] *Id.* at 18.

[61] 395 U.S. at 549.

[62] For example, there can be little doubt that the powers given Congress by Article I, § 8 are exclusively reserved to the legislature. In addition, Article I in §§ 3 & 4 gives Congress, and not the courts, the power to impeach and to try impeachments.

rather than excluded.[63] Whether the authority of the House under article 1, section 5 to expel a member "with the Concurrence of two-thirds" constitutes an unreviewable textual commitment remains to be answered. Yet surely a legislative body has the authority to police the conduct of its own members. To hold otherwise is to conclude that it is at the mercy of its unscrupulous or disruptive legislators.

The specific holding of *Powell*—that a duly elected legislator cannot be excluded if he meets the constitutionally specified requirements—is of little significance in the day-to-day practice of law. Its real importance to the practitioner is in the partial collapse of the political-question doctrine as an aid to a policy of judicial self-restraint. It would seem that *Powell* has provided authority for federal courts to hear important constitutional issues previously held to be non-justiciable.

NEILL HOWARD FLEISHMAN

Criminal Procedure—Juries in the Juvenile Justice System?

In re Gault[1] indicated in dictum that a juvenile hearing must meet the basic requirements of due process.[2] *Duncan v. Louisiana*[3] held that trial by jury in non-petty criminal cases is a basic requirement of due process. The logical completion of the syllogism is: A juvenile hearing must involve a jury if the youth's offense is not petty or his term

[63] 395 U.S. at 508. The Court also expressed no view on what, if any, limitation may exist on Congress' expulsion powers. *Id.* at 507 n.27.

[1] 387 U.S. 1 (1967).

[2] The Court in *Gault* said that in Kent v. United States, 383 U.S. 541 (1966), [w]e announced . . . that while "We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; . . . we do hold that the hearing must measure up to the essentials of due process and fair treatment." We reiterate that view, here in connection with a juvenile court adjudication of "delinquency" . . . .

387 U.S. at 30 (footnote omitted). The Court in *Gault* was silent about trial by jury: Duncan v. Louisiana, 391 U.S. 145 (1968), had not yet been decided, and the facts might not have presented the issue in any event since Gerald Gault's offense if committed by an adult could not have brought a sentence of longer than two months. *Id.* at 8-9. The specific holding of *Gault* went only so far as to require notice of the charges, *id.* at 33-34; the right to be represented by counsel or by appointed counsel in cases of poverty, *id.* at 41; the privilege to remain silent, *id.* at 55; and the right to confront and cross-examine witnesses, *id.* at 56-57.

[3] 391 U.S. 145 (1968). *See also* Bloom v. Illinois, 391 U.S. 194 (1968).

of institutionalization potentially extensive. On the basis of a technicality, however, the United States Supreme Court declined the opportunity to apply this logic and dismissed the recent case of *DeBacker v. Brainard*,[4] which squarely presented the issue of the right to a jury in juvenile hearings.

The state courts are split on the question, both internally and from jurisdiction to jurisdiction. Since *Gault* was handed down, fewer courts have followed the logic outlined above than not.[5] The most recent of majority persuasion is the North Carolina Supreme Court, which in deciding *In re Burrus*[6] noted that the juvenile (district) court had met all the narrow *Gault* requirements,[7] that trial by jury was not among them, and that, therefore, the case was closed.[8]

The decisions and opinions against the jury requirement in juvenile proceedings elaborate in detail the theory that gave rise to a separate system of justice for juveniles at the turn of the century; they point to the excellence of the goals of the theory; they emphasize the crucial differences between that theory and the criminal justice system for adults. At times admitting a certain gap between theory and actuality,[9] these

[4] 396 U.S. 28 (1969). In DeStefano v. Woods, 392 U.S. 631 (1968), the Court held that *Duncan* and *Bloom* would have only prospective application. Clarence DeBacker's juvenile court hearing was held on March 28, 1968; *Duncan* and *Bloom* were handed down on May 20, 1968.

[5] Three pre-*Duncan* cases interpreted *Gault* to require trial by jury in the juvenile hearing: Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968); Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968); *In re* Rindell, 2 BNA CRIM. L. REP. 3121 (Providence, R.I., Fam. Ct. 1968). *See also* Hogan v. Rosenberg, 24 N.Y.2d 207, 247 N.E.2d 260, 299 N.Y.S.2d 424, *prob. juris. noted sub nom.* Baldwin v. New York, 395 U.S. 932, *motion to expedite denied sub nom.* Puryear v. Hogan, 395 U.S. 973 (1969). Among the decisions denying trial by jury before *Duncan* are: Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A.2d 9 (1967) and Estes v. Hopp, 73 Wash. 2d 272, 438 P.2d 205 (1968); after *Duncan*: Dryden v. Commonwealth, 435 S.W.2d 457 (Ky. 1968); *In re* Johnson, 255 Md. 1, 255 A.2d 419 (1969); DeBacker v. Brainard, 183 Neb. 461, 161 N.W.2d 508 (1968), *aff'd per curiam*, 396 U.S. 28 (1969); *In re* State *ex rel.* J. W., 106 N.J. Super. 129, 254 A.2d 334 (Union County Juv. & Dom. Rel. Ct. 1969); and *In re* Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969). The rift is most clearly demonstrated with the *DeBacker* case. Four of the seven judges on the Nebraska Supreme Court found the confluence of *Gault* and *Duncan* a mandate to reverse that state's policy of excluding the jury from the juvenile hearing. However, the Nebraska Constitution provides that "[n]o legislative act shall be held unconstitutional except by the concurrence of five judges." NEB. CONST. art. 5, § 2.

[6] 275 N.C. 517, 169 S.E.2d 879 (1969).

[7] These requirements are listed in note 2 *supra*.

[8] 275 N.C. at 533-34, 169 S.E.2d at 889.

[9] *In re* Johnson, 255 Md. 1, —, 255 A.2d 419, 423 (1969); *In re* W., 24

opinions nonetheless indicate a belief that interjecting the jury would mean a retrogression to the "ordinary criminal trial."[10] The theory favored can be expressed in this fashion: The wayward child is not to be examined with regard to the act he might have committed; but rather the judge, as the child's surrogate parent, is benignly to inquire into the totality of circumstances impinging on the child and do the best for him; official stigma is to be washed away. Strict procedures would be antithetical to such a non-retributive process. The process, in fact, would be wholly civil, simply an extension of the equity court's traditional jurisdiction over neglected children. Not so exuberantly stated, the theory was nonetheless thriving handsomely in 1969: "The delinquency status is not made a crime; and the proceedings are not criminal. There is, hence, no deprivation of due process . . ." in disallowing jury trial.[11]

The argument is that aside from weighing down the juvenile proceeding with a criminal-trial aura, the presence of the jury would cramp the judge's flexibility in the essential "whole-child" analysis. Contentiousness would be promoted. The cherished informality that engenders a sense of cooperation and does not overly frighten the child would be destroyed. Implicit in this argument is the notion that the traditional secrecy of the

N.Y.2d 196, 198, 247 N.E.2d 253, 254, 299 N.Y.S.2d 414, 416, *prob. juris. noted sub nom. In re* Winship, 396 U.S. 885 (1969); Commonwealth v. Johnson, 211 Pa. Super. 62, 70-71, 234 A.2d 9, 13-14 (1967). On March 31, 1970, the United States Supreme Court, deciding *In re Winship*, reversed the New York court and held that the Constitution requires as high a standard of proof in juvenile courts as in courts trying adults. N.Y. Times, Apr. 1, 1970, at 24, col. 1.

[10] 387 U.S. at 75 (dissenting opinion). The phrase is Justice Harlan's, used in the specific context of *Gault*, but typical of the "theorist" approach.

[11] *In re* W., 24 N.Y.2d 196, 203, 247 N.E.2d 253, 257, 299 N.Y.S.2d 414, 420 (1969). The theorists are not at all chary of quoting the old cases. The successful dissent to the majority's decision in *DeBacker* at the state level, for example, quoted Laurie v. State, 108 Neb. 239, 242-43, 188 N.W. 110, 111 (1922), *quoting* Wisconsin Indus. School for Girls v. Clark County, 103 Wis. 651, 664-65, 79 N.W. 422, 426-27 (1899):

> "'The proceeding is not one according to the course of the common law in which the right of trial by jury is guaranteed, but a mere statutory proceeding for the accomplishment of the protection of the helpless, which object was accomplished before the Constitution without the enjoyment of a jury trial. There is no restraint upon the natural liberty of children contemplated by such a law—none whatever; but rather the placing of them under the natural restraint, so far as practicable, that should be, but is not, exercised by parental authority. It is the mere conferring upon them that protection to which, under the circumstances, they are entitled as a matter of right.'"

183 Neb. at 472-73, 161 N.W.2d at 514. For an explanation of why the dissent was successful under Nebraska law, see note 5 *supra*.

juvenile proceeding would be compromised by the presence of a jury, thus increasing the stigma felt by the child. Presumably, the argument goes, the jury is an inadequate fact-finder—at least, no better a fact-finder than the judge. And the question is put: Could there be any petty-serious distinction made as called for by the rationale of *Duncan*? Juveniles may normally be committed to a training school for an indefinite period, not to exceed their minority, even though the given offense if committed by an adult might involve a maximum sentence of less than six months. Finally, it is argued that the jury's inefficiency would promote delay at great economic cost and also at great cost in terms of crippling the more immediate implementation of the theory.

> It takes no imagination to prophesy that the increase in percentage of jury trials could easily delay a case for several years, which in the case of growing children whose personalities and learning change daily, is much more critical than in the case of adults.[12]

This note will attempt to show that each of these arguments against the jury fails; it will not attempt affirmatively to argue on behalf of the jury as an institution. Trial by jury is not "the mainstay and bulwark upon which truth and liberty rest"[13] nor "the most cherished right awarded to man."[14] But *Duncan v. Louisiana* stands as a constitutional mandate, however strong or weak its logical underpinnings. If the juvenile proceeding is not meaningfully different from the adult proceeding in its form or consequences, *Gault* and *Duncan* demand that trial by jury be granted when requested.

The fundamental analytical blunder of the contra-jury theorists has been the failure in their reasoning to separate the adjudicatory from the dispositional aspects of the juvenile proceeding; as will be shown later, the need for flexibility exists primarily on the dispositional side where the jury has no place. Another error, or perhaps a knowing technique for avoiding confrontation of the real issues, has been the intoning of catch-phrases such as "parens patriae" or "civil, not criminal." "Form [has] swallowed substance, and semantics [has] disposed of the constitutional rights of juveniles . . . ."[15] The Supreme Court indicated in *Gault* that it is not tricked by these words:

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[12] Brief for Appellee at 12, DeBacker v. Brainard, 396 U.S. 28 (1969).
[13] *In re* Rindell, 2 BNA CRIM. L. REP. 3121 (Providence, R.I., Fam. Ct. 1968).
[14] *Id.* at 3126.
[15] DeBacker v. Brainard, 183 Neb. 461, 466, 161 N.W.2d 508, 511 (1968).

> The Latin phrase [parens patriae] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance.[16]

Before other grounds for excluding the jury from the juvenile hearing are examined, a basic point—which will appear too obvious—must be made. One gets the impression from the cases that there is a fear that the unknowing juvenile will be forced into having a jury and thus will be unduly intimidated. "[T]he short answer is that if an accused juvenile and his counsel do not want a jury trial, they do not have to have one."[17]

The plea for informality fails to take into account the salutary effect that the solemnity of the courtroom has in increasing respect for the law.[18] Furthermore, the idea of informality in the courtroom or even the judge's chambers (where the judge "can on occasion put his arm around [the child's] shoulder and draw the lad to him")[19] is a hoax. The process may be less formal from the judge's point of view, but it is not the judge's "alienation" about which there is concern. The process cannot be informalized from a child's point of view.[20]

A noble aim of the juvenile court theory has been "to save [the child] from the brand of criminality, the brand that sticks to it for life . . . ."[21] Yet how much violation of secrecy is really going to occur

[16] 387 U.S. at 16.

[17] Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 FAM. L.Q. 1, 23-24 (Dec. 1967) [hereinafter cited as Dorsen & Rezneck]. N.C. CONST. art. 1, § 13, guaranteeing trial by jury in criminal cases, has been interpreted to *require* trial by jury for all adults accused of any crimes except petty misdemeanors. State v. Holt, 90 N.C. 749 (1884). If a youthful offender is to be treated in the same way as an adult in regard to the right to trial by jury, as this note indicates *Gault* and *Duncan* require, then it may be argued that a North Carolina juvenile, in the same way as a North Carolina adult, will not be allowed to waive the jury. This argument has the advantage of consistency, but it also ensures that the judge can never play the role attributed to him by the theorists even when all parties are willing for him to attempt it.

[18] Dorsen & Rezneck 23.

[19] Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909) [hereinafter cited as Mack].

[20] [I]nformal handling appears informal only to the officials charged with execution of certain responsibilities; to those caught up in the net of the juvenile justice system, it is impressively authoritative and formal . . . . THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 10 (1967) [hereinafter cited as TASK FORCE REP.]. The Commission recognized this fact as one defect in its argument for extending discretion on the pre-judicial level.

[21] Mack 109.

by including twelve strangers in the juvenile adjudicatory process? Already exclusion of the general public from a juvenile hearing is discretionary with the judge, at least in North Carolina.[22] Moreover, the Court in *Gault* called the claim of secrecy, with regard to the perhaps more telling area of court records, "more rhetoric than reality."[23]

The possibility that some petty offenses might be tried by jury in juvenile court along with offenses serious by adult standards is certainly an unsubstantial reason for denying the right to jury. The maximum possible adult sentence could furnish one test for determining whether the given offense was serious or petty.[24] However, a juvenile offender when committed to a reformatory remains incarcerated at the discretion of the institution's administrators for a period that typically may not extend beyond the youth's eighteenth or twenty-first birthday. Gerald Gault, for example, could have been institutionalized for as many as six years since he was only fifteen years old at the time of his hearing; however, had he been an adult, he could not have received a sentence of more than two months.[25] In this sense, no offense committed by a youth is ever "petty."

To the fact-finding and economic arguments against the jury, the answer is that these may also be directed against the adult trial system; thus they were refuted in *Duncan*. In that decision the Court relied on a "recent and exhaustive study" by Messrs. Kalven and Zeisel,[26] which "concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them . . . ."[27] The efficiency-economy argument seems particularly inappropriate in a state such as North Carolina, which has one of the highest annual (adult) criminal jury trial rates in the nation.[28]

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[22] N.C. GEN. STAT. § 7A-285 (1969).

[23] 387 U.S. at 24. This observation is one further example of the disparity between theory and reality.

> In theory the court's action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers, schools, the armed services—by society generally—as a criminal.

TASK FORCE REP. 9.

[24] The maximum adult sentence was accepted as the test by the losing, though majority, faction of the Nebraska Supreme Court in DeBacker v. Brainard, 183 Neb. 461, 469-70, 161 N.W.2d 508, 513 (1968).

[25] 387 U.S. at 8-9.

[26] H. KALVEN & H. ZEISEL, THE AMERICAN JURY 494 (1966).

[27] 391 U.S. at 157.

[28] In the year 1955 there were 3,950 criminal jury trials in North Carolina; this number was exceeded only in Georgia (5,300), California (4,940), and Alabama (4,270). H. KALVEN & H. ZEISEL, THE AMERICAN JURY 502-03 (1966).

It is perhaps true that delay is a more serious matter with regard to juveniles than to adults, especially in light of the frightening upsurge of juvenile delinquency in the last decade[29] and the general belief that more "can be done with" a child than an adult if only he can be "got to" soon enough; but delay is endemic throughout the judicial system and is a serious blackmark against it no matter what the defendant's age. Against the economy argument must be balanced the constitutional right that is involved.[30] Moreover, gross delay may in the end be a good thing: perhaps the people and the legislatures will be forced to give more attention to these problems.

The theorists' intricate rationale against jury-inclusion in juvenile proceedings rests upon a tenuous foundation consisting of certain incorrect assumptions: that a juvenile court judge always uses his unhampered discretion in the most intelligent and benevolent way; that the dispositional alternatives open to a judge are genuinely rehabilitative; and that instituting the jury must necessarily deprive the judge of any flexibility with which he might sensitively employ rehabilitative plans, if available. These assumptions will be considered in turn.

One state court judge recoiled angrily against the statement in *Gault* that "the condition of being a boy does not justify a kangaroo court"[31]; he called this "an implied criticism of juvenile judges that is wholly unwarranted."[32] Other judges are not so defensive, but they exhibit a no less unqualified faith in the juvenile court judge.[33] However, the image of the amiable, well-meaning, tender-hearted, fatherly juvenile court judge is no more realistic than the conception of the judge as overworked, hardened, insensitive, and prosecution-oriented. The mere possibility of the latter is sufficient ground for requiring determination of guilt by a jury. This ancient reason for having trial by jury is no less compelling because the defendant is under the age of sixteen. To the contrary, it

[29] TASK FORCE REP. 1.

[30] *See In re* Rindell, 2 BNA CRIM. L. REP. 3121, 3125 (Providence, R.I., Fam. Ct. 1968).

[31] 387 U.S. at 28.

[32] DeBacker v. Brainard, 183 Neb. 461, 476, 161 N.W.2d 508, 516 (1968) (dissenting opinion). The judge declared, "I am not so naive as not to recognize that Kent, Gault, and Duncan point to the eventual destruction of the juvenile court acts existing in most of the states of the union." *Id.* at 480-81, 161 N.W.2d at 518. "But I shall neither bend the knee nor bow the head on mere inferences, speculations, or probabilities as to what [the United States Supreme Court] will eventually do." *Id.* at 482, 161 N.W.2d at 519.

[33] *See* Commonwealth v. Johnson, 211 Pa. Super. 62, 76-77, 234 A.2d 9, 16-17 (1967).

has been said that "juvenile judges have the most difficult job in the whole legal system"—a job demanding intelligence and empathy; yet it is a job generally without prestige.[34] Moreover, "[a]s often as not the judge acts as prosecutor—a depressingly unjust practice. Or he assigns the job to a probation worker who later is supposed to win the child's confidence to help him change his ways."[35] If a juvenile court has pre-judicial machinery for screening out numerous youthful offenders, those sent into court cannot but be "tainted" in the judge's eyes; a jury would not be as likely to feel such a prejudice.

If the juvenile justice system worked, the argument for exclusion of the jury from the hearing and, indeed, for deprivation of procedural due process generally, would seem much stronger—even though the argument is not stronger from a purely logical point of view. The inference from the court opinions opposing inclusion of the jury, even when they acknowledge a degree of failure in the system, is that it is successful to a greater or lesser degree. But the truth is startlingly the opposite.[36]

In 1909 Judge Mack described juvenile penal-corrective conditions prior to the inception of the theory of the juvenile justice system as follows:

> [I]nstead of the state's training its bad boys so as to make of them decent citizens, it permitted them to become the outlaws and outcasts

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[34] James, *Do Children Get Their Day in Court?*, The Christian Science Monitor, April 12-14, 1969, at 10, col. 4.

[35] *Id.*, col. 1.

[36] No discussion of juvenile delinquency would be complete without the much-quoted statement from the Supreme Court's first juvenile delinquency case, *Kent v. United States*:

> [T]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections afforded to adults nor the solicitous care and regenerative treatment postulated for children.

383 U.S. at 556 (footnote omitted). The *Task Force Report* of the President's Commission on Law Enforcement and Administration of Justice leaves no doubt about the failure of the system:

> [T]he postulates of specialized treatment and resulting reclamation basic to the juvenile court have significantly failed of proof, both in implementation and in consequences. The dispositions available for most youths adjudicated delinquent are indistinguishable from those for adult criminals: Probation with a minimum of contact . . . or institutionalization in what is often, as a result of overcrowding and understaffing, a maximum security warehouse for youths. The vaunted intermediate and auxiliary measures—community residential centers, diversified institutions and institutional programs, intensive supervision—with which youth was to be reclaimed have come to pass only sporadically, hampered by lack of money, lack of staff, lack of support, lack of evaluation.

TASK FORCE REP. 23.

> of society; it criminalized them by the very methods that it used in dealing with them.[37]

His statement perfectly describes conditions today, long after implementation of the theory. Probational officers or juvenile counselors, where they exist, have "caseloads typically . . . so high that counseling and supervision take the form of occasional phone calls and perfunctory visits instead of the careful, individualized service that was intended"[38]; salaries being meagre, naturally the most intelligent and dynamic persons are not drawn into the field. State institutions for juvenile delinquents are regimented and often brutal[39] festering grounds for hardening youths unalterably into criminals.[40]

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[37] Mack 107. Judge Mack's conception of the ease with which juveniles could be rehabilitated was perhaps grossly overly optimistic. Yet he realized that

> despite the great ultimate financial saving to the state through this method of dealing with children, a saving represented by the value of a decent citizen as against a criminal, the public authorities are nowhere fully alive to the new obligations that the spirit as well as the letter of this legislation imposes upon them.

Id. 115. He was aware that the system could not work without meaningful rehabilitative alternatives, and he warned:

> If a child must be taken away from its home, if for the natural parental care that of the state is to be substituted, a real school, not a prison in disguise, must be provided.

Id. 114.

[38] TASK FORCE REP. 8.

[39] *See* James, *Do Children Get Their Day in Court?*, The Christian Science Monitor, April 12-14, at 9, col. 1.

[40] According to Mr. George F. McGrath, head of the New York City prison system:

> The public should be told that correctional agencies contribute enormously to the crime rate . . . . There is a direct relationship between the growing crime rate and our institutions.
>
> The people do not understand that. Public officials do not understand that. But it is unquestionably true.

James, *Reach a Child Early Enough*, The Christian Science Monitor, April 19-21, at 9, col. 3. Mr. Milton Luger, president of the National Association of State Juvenile Delinquency Program Administrators, has said: "[W]ith the exception of a relatively few youths, it [would be] better for all concerned if young delinquents were not detected, apprehended, or institutionalized. Too many of them get worse in our care." James, *"Too Many of Them Get Worse in Our Care,"* The Christian Science Monitor, April 26-28, at 9, col. 4.

> . . . Oliver J. Keller, who recently took over as head of the Florida Division of Youth Services [has said]:
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> "We are working in a terribly primitive field. Primitive. Punitive. Brutal. I don't like large institutions. I don't like what happens to children in them. One of my men says living in a training school is as cozy as living in a wash bay of a filling station. I agree. The child is returned to the streets with none of his family problems solved. And he's more sophisticated in crime."

Id.

Despite the imperfections of the present system of juvenile justice, without any doubt "the ideal of separate treatment of children is still worth pursuing."[41] Just as obviously, the traditional jury is not equipped to know the best dispositional alternatives for each individual child, no matter how effectively the opposing counsel argue for given dispositions. The fallacy in mourning the demise of the juvenile justice system because of the intrusion of the jury is in the failure to distinguish the adjudicatory, or "fact," and dispositional, or "whole-child," aspects of a proceeding.[42] A jury centers only upon the question of whether a specific act was committed. The Supreme Court was careful to make this distinction in *Gault*:

> [W]e are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. . . . We consider only . . . proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution.[43]

As the Court explained:

> We do not mean by this to denigrate the juvenile court process or to suggest that there are not aspects of the juvenile system relating to offenders which are valuable. But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication.[44]

One more among the catalogue of reasons given for excluding the jury is that the jurisdiction of the juvenile court extends beyond juveniles who have committed adult crimes and includes suzerainty over juveniles who have violated laws peculiar to children (*e.g.*, truancy), who are dependent (because their parents are economically unable to take care of

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[41] TASK FORCE REP. 9.

[42] Technically, both fact and whole-child analyses are adjudicatory, the dispositional being yet another step. However, the President's Commission on Law Enforcement and Administration of Justice has used the adjudication-disposition terminology.

> Perhaps the height of the juvenile court's procedural informality is its failure to differentiate clearly between the adjudication hearing, whose purpose is to determine the truth of the allegations in the petition, and the disposition proceeding, at which the juvenile's background is considered in connection with deciding what to do with him.

Id. 35.

[43] 387 U.S. at 13.

[44] *Id.* at 22.

them), or who are neglected (since their parents wilfully refuse to take care of them).[45] Partly because of this argument, the President's Commission's *Task Force Report*, written before *Gault* and *Duncan* were handed down, opposed the jury:

> Inequality and disparate decisions are invited by giving these formulae [neglect, dependency, incorrigibility, truancy, etc.] to *ad hoc* juries for application rather than to judges, who tend inevitably to develop concrete meanings for such terms.[46]

The simple answer to this objection is that since juries do not decide such matters in adult trials, they need not decide them in juvenile hearings. The marriage of *Gault* and *Duncan* would not require it.

So far as adjudication of guilt is concerned, there are no additional adjudicatory problems presented merely because the defendant is a child.

> The issues in the delinquency trial of a law violation are the same as in a criminal trial of the same offense. The jury function of weighing the evidence, evaluating the credibility of witnesses, and finding the facts are [*sic*] no harder with respect to whether a juvenile committed a criminal act than whether an adult did.[47]

It will still be argued, however, that since juvenile proceedings are wholly rehabilitative in spirit, the adjudication of the fact of guilt vel non is unimportant and irrelevant. The New York Court of Appeals said on March 6, 1969: "[A] child's best interest is not necessarily, or even probably, promoted if he wins in the particular inquiry which may bring him to the juvenile court."[48] Of course, the major goal of the juvenile court movement was to get away from the mere "specific act" determination of the traditional criminal trial. But this last-ditch argument pays no heed to the quotidian realities of judicial technique. A child whom the juvenile court judge finds to be wholly innocent of any type of offense is not likely to be retained and sent through the remaining channels of the juvenile penal-corrective process simply because he has once come to

[45] The new North Carolina statute typifies the generally loose formulations. N.C. GEN. STAT. § 7A-278 (1969).

[46] TASK FORCE REP. 38. The Commission also opposed the jury on the basis of formality. It must be noted that the Commission was gravely skeptical over the possibility of youths being sent to training schools for acts that are not offenses when committed by adults. *Id.* 25-28.

[47] Dorsen & Rezneck 23.

[48] *In re* W., 24 N.Y.2d 196, 199, 247 N.E.2d 253, 255, 299 N.Y.S.2d 414, 417 (1969).

the judge's attention. The jury assailants are put in the position of arguing that a judge presented with four children—one innocent of any act, though peevish or melancholy; one guilty only of having parents who do not want him; one who has stolen a piece of candy; and one who has murdered the town's most distinguished citizen—will look only to each child's emotional and developmental needs in fashioning a plan for his behavior modification.

On the one hand, it cannot be denied that the act a child has committed is inseparable from the child's personality; his act has become a part of his personality in the eyes of all who view the child.

> However advanced our techniques for determining what an individual is, we have not approached the point at which we can safely ignore what he has done. What he has done may often be the most revealing evidence of what he is.[49]

On the other hand, neither can it be denied that the judge is the embodiment of society, and as such he must and will—even if not consciously—protect society from threatening conduct, no matter if that conduct is committed by a fourteen-year-old or by a twenty-four-year-old.

> While statutes, judges, and commentators still talk the language of compassion, help, and treatment, it has become clear that in fact the same purposes that characterize the use of the criminal law for adult offenders—retribution, condemnation, deterrence, incapacitation—are involved in the disposition of juvenile offenders, too.[50]

Simply put, there is a punitive as well as a rehabilitative element in the juvenile process; to this extent the adjudication of the fact of guilt is important, and the jury has a place in the juvenile hearing.

HAYWOOD RANKIN

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[49] TASK FORCE REP. 30, *quoting* ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 19 (1964).

[50] TASK FORCE REP. 8. The Commission accounted for nonrecognition of the punitive aspect of the juvenile process in the following way:

> One explanation of the general failure to admit the court's social protection function is, of course, the traditional view that the juvenile court must and does act always and only in the child's best interest, regardless of any interest society may have. A second and, perhaps, more significant reason lies in the fact that most juvenile courts are legislatively provided with mechanisms [*e.g.*, waiver to adult court] for evading the social protection responsibility in its . . . most public posture.

Id. 24.

Criminal Procedure—Right To Defend *Pro Se*

In *Seale v. Hoffman*,[1] the defendant Seale, one of eight charged in a much-publicized Chicago trial[2] with conspiring to violate the recently-adopted federal antiriot act,[3] sought injunctive relief and a declaratory judgment to test the constitutionality of those proceedings. One of Seale's primary contentions was that he was denied his constitutional right to appear and to defend *pro se* in his trial. The federal district court dismissed the complaint on its own motion on the ground that the action should properly have been brought to a higher court on appeal or in a mandamus proceeding because a district court is without authority to review the rulings and procedures of another federal trial court.[4]

Moreover, the court concluded that Seale's claim of a right to defend himself, under the circumstances, raised no constitutional issue conferring jurisdiction over the subject matter. Seale, it was noted, had been represented by an attorney who had cross-examined sixteen government witnesses on his behalf, Seale had exhibited gross contempt of court, and he had been on trial on a charge of considerable legal complexity. As the right of a criminal defendant to dismiss his counsel during trial in order to appear *pro se* is qualified by the trial court's discretionary assessment of the extent of potential disruption, delay, confusion of the jury, and prejudice to the defendant, the denial of Seale's request was not erroneous.[5]

Seale's asserted right to defend *pro se* is by no means novel. The right of a criminally accused *not* to have a lawyer pre-dates the Bill of Rights.[6] Currently, the right to defend *pro se* in the federal courts is guaranteed by congressional statute. Section 1654 of title twenty-eight of the United States Code provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . ."[7] Thirty-seven states provide constitutionally for the right to appear *pro se*; some allow the accused the right to be heard, or to defend, in person *and* by counsel,[8] others grant the right for a defendant to defend in person *or* by

[1] 306 F. Supp. 330 (N.D. Ill. 1969).
[2] United States v. Dellinger, — F. Supp. — (N.D. Ill. 1970).
[3] 18 U.S.C.A. §§ 2101, 2102 (Supp. 1970).
[4] 306 F. Supp. at 331-32.
[5] *Id.* at 332.
[6] *See* United States v. Plattner, 330 F.2d 271, 274 (2d Cir. 1964).
[7] 28 U.S.C. § 1654 (1964).
[8] ARIZ. CONST. art. 2, § 24; ARK. CONST. art. 2, § 10; CAL. CONST. art. 1, § 13;

counsel,[9] and the remainder provide the right for an accused to defend either by himself, by counsel, *or* both.[10] Statutes guarantee the right in other states.[11]

The Supreme Court has considered the right of a criminally accused to defend *pro se*, but in an indirect and somewhat equivocal fashion. *Adams v. United States ex rel. McCann*[12] seemingly held the right to be of constitutional stature:

> The right to assistance of counsel and the correlative right to dispense wth a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice . . . . Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant . . . .[13]

Speaking in a different case, the Court later held:

> Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt . . . . the Constitution . . . does not require that under all circumstances counsel be forced upon a defendant.[14]

The Court's position in the above case seems to indicate that concepts of due process and assistance of counsel allow, but do not positively confer, the right to defend *pro se*. In yet another case the Court intimated that the right is basically statutory.[15]

COLO. CONST. art. 2, § 16; CONN. CONST. art. 1, § 9; DEL. CONST. art. 1, § 7; IDAHO CONST. art. 1, § 13; ILL. CONST. art. 2, § 9; IND. CONST. art. 1, § 13; KY. CONST. Bill of Rights, § 11; MO. CONST. art. 1, § 18(a); MONT. CONST. art. 3, § 16; NEV. CONST. art. 1, § 8; N.H. CONST. Bill of Rights, art. 15; N.M. CONST. art. 2, § 14; N.Y. CONST. art. 1, § 6; N.D. CONST. art. 1, § 13; OHIO CONST. art. 1, § 10; OKLA. CONST. art. 2, § 20; ORE. CONST. art. 1, § 11; PA. CONST. art. 1, § 9; S.D. CONST. art. 6, § 7; TENN. CONST. art. 1, § 9; UTAH CONST. art. 1, § 12; VT. CONST. ch. 1, art. 10; WIS. CONST. art. 1, § 7. *See* LA. CONST. art. 1, § 9.

[9] KAN. CONST. Bill of Rights, § 10; MASS. CONST. pt. 1, art. 12; NEB. CONST. art. 1, § 11; WASH. CONST. art. 1, § 22.

[10] ALA. CONST. art. 1, § 6; FLA. CONST. Declaration of Rights, § 11; ME. CONST. art. 1, § 6; MISS. CONST. art. 3, § 26; S.C. CONST. art. 1, § 18; TEX. CONST. art. 1, § 10.

[11] *E.g.*, N.C. GEN. STAT. § 1-11 (1969).

[12] 317 U.S. 269 (1942).

[13] *Id.* at 279.

[14] Carter v. Illinois, 329 U.S. 173, 174-75 (1946).

[15] Price v. Johnson, 334 U.S. 266, 285-86 (1948).

Relying upon *Adams* several federal appellate courts have held that the right is constitutionally protected, either by the sixth amendment as correlative to right to counsel,[16] or as implicit in both the fifth and sixth amendments,[17] or by the fifth amendment's due process clause alone.[18] Further support for the constitutional position has been found in section thirty-five of the Judiciary Act of 1789, which states that parties might "plead and manage their own causes personally."[19] Because this Act predated the sixth amendment, it has been asserted that the sixth amendment was intended to include the guarantee to defend *pro se* as well as to enjoy assistance of counsel.[20] However, the more prevalent position, both federal and state, holds that although the Constitution *allows* the criminally accused the right to manage and conduct his defense personally, nevertheless "the right is statutory in character and does not rise to the dignity of one conferred and guaranteed by the Constitution."[21]

One problem that arises because of a finding that the right is a constitutional one concerns the proper disposition by an appellate court of a case in which that right had been denied. Before *Chapman v. California*,[22]

[16] Juelich v. United States, 342 F.2d 29 (5th Cir. 1965).

[17] United States v. Plattner, 330 F.2d 271 (2d Cir. 1964).

[18] MacKenna v. Ellis, 263 F.2d 35 (5th Cir. 1959) (*semble*).

[19] 1 Stat. 73, 92 (1789). The substantial equivalent of that statute is currently 28 U.S.C. § 1654 (1964).

[20] United States v. Plattner, 330 F.2d 271, 274 (2d Cir. 1964).

[21] Brown v. United States, 264 F.2d 363, 365 (D.C. Cir. 1959). This position seems buttressed by analogy to the right to jury trial. Clearly, the right to jury trial and the right to counsel are similar in that in given situations one might reasonably elect to his advantage not to exercise his constitutional privilege. Indeed, in Duncan v. Louisiana, 391 U.S. 145 (1967), holding the right to jury trial for non-petty crimes binding upon the states, the Court acknowledged that a "jury trial has 'its weaknesses and the potential for misuse.'" *Id.* at 156. Nonetheless, it was early held on both federal and state levels that a defendant could not waive his right to jury trial. *E.g.*, Low v. United States, 169 F. 86 (6th Cir. 1909); Cancemi v. People, 18 N.Y. 128 (1858).

In 1930 it was held that a defendant could waive jury trial consistent with the United States Constitution (Patton v. United States, 281 U.S. 276 (1930)), but it was much later before most states decided that a waiver was possible under their constitutions. *E.g.*, People v. Spegal, 5 Ill. 2d 211, 125 N.E.2d 468 (1955); People v. Carroll, 7 Misc. 2d 581, 161 N.Y.S.2d 339 (King County Ct. 1957). In Singer v. United States, 380 U.S. 24 (1965), an undivided Court rejected the claim that the right to waive a jury trial is guaranteed by the Constitution and found it "difficult to understand how the petitioner can submit . . . that to compel a defendant . . . to undergo a jury trial against his will is contrary to . . . due process." *Id.* at 36. Indeed, "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Id.* at 34-35.

[22] 386 U.S. 18 (1967).

which announced a reasonable-doubt test for harmless constitutional error, the breach would have required automatic reversal regardless of the absence of prejudice to the defendant.[23] It could be argued that, despite *Chapman*, automatic reversal is still necessary since the degree of prejudice suffered by the defendant through a denial of this right could be estimated only inferentially and rarely, if ever, proved harmless beyond reasonable doubt.[24] Presumably this result need not follow were the right of non-constitutional origin.[25] It is not unreasonable to expect that courts might more narrowly define the circumstances in which one might appear *pro se* in order to minimize the possibility that defendants, afforded effective assistance of counsel, would receive the windfall of a new trial by proving a denial of the right while not proving any prejudice.[26]

Another problem suggested by the constitutional position is waiver. If the right to defend *pro se* is a constitutional one "correlative" to that of assistance of counsel, it could be contended that it too would require competent and intelligent waiver.[27] To the extent that an intelligent waiver means that the defendant was at least cognizant of his right, the requirement would violate the admonition of one court that "if notice of the right [to defend *pro se*] had to be given, the task of administering the overriding constitutional policy in favor of granting a lawyer to every person accused of a serious crime would become unduly treacherous."[28]

A final problem with the constitutional position concerns one of logic. No doubt a creditable argument could be advanced that the right to defend oneself is inherent in the concept of due process.[29] But the argu-

[23] *See, e.g.*, United States v. Plattner, 330 F.2d 271, 273 (2d Cir. 1964).

[24] *See* United States v. Guerra, 334 F.2d 138, 146 n.4 (2d Cir. 1964). The Court in *Chapman* seemingly recognized that certain classes of constitutional error still require automatic reversal and cited Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel) as an example. 386 U.S. at 23 n.8.

[25] *E.g.*, Juelich v. United States, 342 F.2d 29, 33 (5th Cir. 1965); Butler v. United States, 317 F.2d 249, 258 (8th Cir. 1963); Brown v. United States, 264 F.2d 363, 366 (D.C. Cir. 1959).

[26] *See* Brown v. United States, 264 F.2d 363, 366 (D.C. Cir. 1959).

[27] Johnson v. Zerbst, 304 U.S. 458 (1938). At least one court placing the right to defend *pro se* on a constitutional level did so impliedly by requiring that the trial court "by recorded colloquy" apprise the accused of his alternate rights to defend by counsel or *pro se*. United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964).

[28] United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 16 (2d Cir. 1965).

[29] At common law the right actively to be represented by counsel was extremely limited; the attorney acted primarily as advisor to the defendant on points of law. Betts v. Brady, 316 U.S. 455 (1942). The heightened stature of the right to be defended by counsel does not necessarily dictate for purposes of due process a

ment that this right is based on the sixth amendment as "correlative" to the right to assistance of counsel produces a questionable corollary itself. After all, to defend *pro se* is, for whatever reason, *not* to defend through counsel. These procedures are related only in that they are antagonistic to each other in the usual situation if the rationale of the numerous cases supporting right to counsel is accepted.[30] Thus, if the right to counsel is indeed "one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty"[31] and is binding upon the states[32] as "implicit in the concept of ordered liberty,"[33] it is difficult to conceive how the right to defend *pro se*, necessarily *not* "one of the safeguards," could, by virtue of this opposite relationship alone, be a constitutional right and, moreover, could emanate from the same source, the sixth amendment.[34] As the holdings of the Supreme Court hardly command the finding that the right is constitutional,[35] and as there is little on policy grounds to recommend such a stance, the non-constitutional position is preferable.

Aside from the problem of whether the right to defend *pro se* has a constitutional basis, the case treatment of it has been relatively uniform. The typical statement is that a criminal defendant who is sui juris and mentally competent possesses this right,[36] and it has been termed "in-

corresponding diminution of the privilege to be heard personally, particularly when the element of individual autonomy is weighed in the balance.

[30] *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

[31] Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

[32] See cases cited note 30 *supra*.

[33] Palko v. Connecticut, 302 U.S. 319, 325 (1937). *Quaere* whether the right to defend *pro se* if more extensively held to be a guarantee of the Bill of Rights would be "absorbed" through the fourteenth amendment's due process clause? At least one state court decision already holds that it is. Capetta v. State, 204 So. 2d 913 (Fla. Dist. Ct. App. 1968).

[34] This argument is perhaps unwittingly suggested in Juelich v. United States, 342 F.2d 29 (5th Cir. 1965). Upon denial of a motion to vacate a prior conviction, the defendant alleged as error the denial of his motion to dismiss appointed counsel and to appear *pro se* in the hearing on the motion. Though the court held that the right was constitutionally protected, it was thought inapplicable in this procedural context because a movant under 28 U.S.C. § 2255 (1964) was not within the meaning of the sixth amendment "accused" in a "criminal prosecution." Moreover, recognizing that fifth-amendment due process might make the right to counsel mandatory anyway to insure a "fair and meaningful hearing," the court reasoned that

> In such Fifth Amendment cases, it can hardly be argued that there is any "correlative right to dispense with a lawyer's help" for that would imply the *reductio ad absurdum* that a hearing *not* "fair and meaningful" is a constitutionally protected right. The courts have not yet gone so far.

Id. at 31.

[35] See text at notes 12-15 *supra*.

[36] Annot., 77 A.L.R.2d 1233 (1961).

herent,"[37] "unqualified,"[38] and "as basic and fundamental as [the] right to be represented by counsel."[39] Of course, such statements are misleading since defending *pro se* will inevitably involve a waiver of the right to counsel. Therefore, the right is initially curtailed to the extent that the defendant must be capable of effecting a competent and intelligent waiver.[40] This capability cannot alone be inferred from the defendant's capacity to stand trial since there is a recognized distinction between competency to stand trial and competency to defend personally,[41] and "an adjudication by the trial court that an accused is capable of going to trial and aiding his counsel, is not a determination of his competency to act as his own counsel."[42] Thus if it is found that a particular defendant through lack of knowledge or skill is incapable of comprehending legal issues and conducting his own defense, the court must appoint counsel, even over his protests, to prevent judicial deterioration;[43] to this extent, at least, the Constitution does indeed force a lawyer upon a defendant.

Whatever his competency, it is clear that a defendant appearing *pro se* need not possess any particular legal skills.[44] Conversely, in terms of the consequences of defending himself, an accused does so at his peril and acquires as a matter of right no greater privileges or latitude than would an attorney acting for him. Thus a defendant appearing *pro se* does not become a ward or client of the court,[45] nor must the court give the defendant legal advice, explain potential defenses,[46] or advise the defendant of the right to ask instructions,[47] nor generally allow him to proceed differently than would his attorney.[48] The usual caveat holds that such a defendant "assumes for all purposes connected with his case,

[37] Coleman v. Smyth, 166 F. Supp. 934, 937 (E.D. Va. 1958).
[38] United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965).
[39] People v. Sinko, 21 Ill. 2d 23, 25-26, 171 N.E.2d 9, 10 (1960).
[40] 23 C.J.S. *Crim. Law* § 979(3) (1961).
[41] *E.g.*, Massey v. Moore, 348 U.S. 105, 108 (1954).
[42] State v. Kolocotronis, — Wash. 2d —, —, 436 P.2d 774, 781 (1968).
[43] *Id. Accord*, People v. Burson, 11 Ill. 2d 360, 143 N.E.2d 239 (1957); McCann v. Maxwell, 174 Ohio St. 282, 189 N.E.2d 143 (1963).
[44] *E.g.*, People v. Linden, 52 Cal. 2d 1, 18, 338 P.2d 397, 405 (1959). Undoubtedly, the fact that the defendant is an attorney is a relevant consideration when the right is evoked before trial as well as during trial. However, even in the latter context, defendant's status is not controlling. *See, e.g.*, Duke v. United States, 255 F.2d 721 (9th Cir. 1958).
[45] Burstein v. United States, 178 F.2d 665, 670 (9th Cir. 1949).
[46] Michener v. United States, 181 F.2d 911, 918 (8th Cir. 1950).
[47] State v. Miller, 292 S.W. 440 (Mo. 1927).
[48] O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967).

and must be prepared to be treated as having, the qualifications and responsibilities concomitant with the role he has undertaken."[49]

Once the obstacles of competency and waiver of counsel are met, the right to defend *pro se* is relatively unqualified, at least if expressly asserted before trial.[50] However, a further limitation is found in the rule that a defendant must make an election to appear either *pro se* or through counsel and if represented, has no right personally to conduct all or any part of the case.[51] The rights in this context are thought alternative and distinct—not correlative. A defendant having made the initial election to proceed in either fashion is not entitled to a hybrid of the two rights.[52]

Illustrative of the distinction is a holding that a defendant appearing personally has no residual right under the sixth amendment for appointment of counsel in an advisory capacity and that the aforementioned section 1654,[53] which states the rights alternatively, is not unconstitutional for this reason.[54] A parallel case on the state level reached a similar conclusion despite the fact that the asserted constitutional guarantee was conjunctive, allowing the right to defend in person *and* by counsel.[55]

Though a court might permit a defendant represented by counsel to participate actively in his trial, the practice has been termed undesirable.[56] Even in jurisdictions in which the state constitution guarantees the right to be heard personally, by counsel, or both, there is no absolute right for a defendant represented by counsel to conduct personally part of his defense, such as addressing the jury or examining witnesses, the matter being one of the court's discretion.[57] The factors held pertinent to this discretionary decision include the potential interference with orderly

[49] People v. Mattson, 51 Cal. 2d 777, 794, 336 P.2d 937, 949 (1959); *accord*, People v. Harmon, 54 Cal. 2d 9, 351 P.2d 329, 4 Cal. Rptr. 161 (1960).

[50] United States *ex rel.* Davis v. McMann, 386 F.2d 611 (2d Cir. 1967); United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965); United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963).

[51] *E.g.*, Egan v. Teets, 251 F.2d 571 (9th Cir. 1957); People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959); People v. Northcott, 209 Cal. 639, 289 P. 634 (1930); People v. Glenn, 96 Cal. App. 2d 859, 216 P.2d 457 (Dist. Ct. App. 1950).

[52] Duke v. United States, 255 F.2d 721 (9th Cir. 1958); State v. Phillip, 261 N.C. 263, 268, 134 S.E.2d 386, 391 (1964).

[53] 28 U.S.C. § 1654 (1964).

[54] Shelton v. United States, 205 F.2d 806 (5th Cir. 1953).

[55] People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959).

[56] Brasier v. Jeary, 256 F.2d 474, 478 (8th Cir. 1958).

[57] Thompson v. State, 194 So. 2d 649 (Fla. Dist. Ct. App. 1967); Foster v. State, 148 Tex. Crim. 372, 187 S.W.2d 575 (1945).

trial practice, the capacity of the accused to conduct his defense, and the gravity of the offense.[58]

The position that a defendant represented by counsel should not be entitled to reap the advantages of both rights by alternating between actively participating and passively accepting assistance, with the concomitant disadvantages to the court and prosecution, is probably justified. However, there remains another context in which the exercise of the right to defend *pro se* is similarly cloaked with judicial discretion, but for which the rationale is less evident. The defendant, as in *Seale v. Hoffman*,[59] proceeds to trial with counsel, but at a later date, for reasons sufficient to himself if not the court, seeks to dismiss the attorney and to defend *pro se* for the balance. In this situation the defendant typically finds, as did Seale, that a court formerly willing "that he be allowed to go jail under his own banner if he so desires,"[60] had he clearly asserted the right before trial, is vested with considerable discretionary power to refuse his wishes because "there must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruptions of the proceedings already in progress."[61] In short, if the right to dispense with a lawyer's help is almost absolute when evoked before trial, it is less so thereafter and, regardless of its arguably constitutional dimensions, need not be recognized if doing so would disrupt the court's business.[62]

The potential disruption and the possible prejudice to the defendant's interests if his request is denied are the primary factors to be weighed in this discretionary decision.[63] Applying these principles to *Seale*, the court felt that the defendant's generally contemptuous demeanor and the complexity of the legal issues in his trial militated against a finding of abuse of discretion.[64] But it is interesting to note, regarding the question of

[58] State v. White, 86 N.J. Super. 410, 419, 207 A.2d 178, 183-84 (Super. Ct. 1965).

[59] 306 F. Supp. 330 (N.D. Ill. 1969).

[60] United States *ex rel* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965).

[61] *Id.*

[62] United States v. Private Brands, 250 F.2d 554, 557 (2d Cir. 1957). *Accord*, United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963); United States v. Dennis, 183 F.2d 201 (2d Cir. 1950). *But see* United States v. Burkeen, 355 F.2d 241 (6th Cir. 1966); United States v. Johnson, 333 F.2d 1004 (6th Cir. 1964).

[63] United States v. Davis, 260 F. Supp. 1009 (E.D. Tenn. 1966).

[64] Seale v. Hoffman, 306 F. Supp. 330, 332 (N.D. Ill. 1969). Generally speaking, would it ever be possible to find that a defendant had been prejudiced by denying him the right to defend himself? The classic statements argues that

> [t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If

potential prejudice by not allowing the defendant to proceed *pro se*, that Seale's attorney of record was later sentenced to what may be the longest prison sentence for contemptuous behavior ever imposed in an American court.[65]

While *Seale* appears secure on the precedents, the case raises the larger question of the validity of the process by which a right formerly "absolute"[66] becomes subject to the discretion of the court. One explanation is that by proceeding to trial with counsel, appointed or retained, the defendant legally waives his right to later defend *pro se*. While a few cases explicitly take this position,[67] apparently the more prevalent view is that the right is merely "qualified" or "sharply curtailed," not waived, once trial begins.[68] It is certainly arguable, however, that the right has effectively, if not legally, vanished at this point.[69]

Apart from the matter of waiver, the "absolute-discretionary" dichotomy seems to be based on the assumption that there is an additional quantum of trial delay and confusion that would likely result beyond what would be occasioned had the defendant evoked his right to defend per-

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charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

If the defendant were prejudiced by a denial of the right to defend himself, is not the actual source of error more likely to reside in a lack of *effective* counsel than in a denial of the right to defend *pro se*? *See, e.g.*, Von Moltke v. Gilles, 332 U.S. 708 (1948); Glasser v. United States, 315 U.S. 60 (1942). Of course, there may be certain practical advantages to defending *pro se*—for example, the opportunity to make unsworn statements to the jury under the aegis of examination of witnesses without waiver of the immunity against self-incrimination—but it seems clear that these are not legitimate considerations in the sense that a defendant is entitled to such advantages. See text at notes 44-49 *supra*. The cynic might suspect, not unreasonably, that there is no "balancing" (see text at note 61 *supra*) involved at all regarding the discretionary decision of whether to allow a defendant to discharge his attorney and to appear *pro se* since all the factors support its refusal, and that a defendant, having appeared with counsel, has at least de facto waived his right to dispense with a lawyer's help.

[65] News and Observer, Raleigh, N.C., Feb. 18, 1970, at 8, col. 6.

[66] See text at notes 36-39 *supra*.

[67] *E.g.*, People v. Ephraim, 411 Ill. 118, 122-23, 103 N.E.2d 363, 365-66 (1952).

[68] *E.g.*, United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965).

[69] See note 64 *supra*.

sonally before trial. Clearly this supposition is valid were there an absolute privilege to discharge counsel for purposes of substituting another. Such a privilege might easily be abused and continuances and mistrials made necessary in order not to violate the highly-regarded right to effective counsel.[70] But it is less clear that discharge of one's attorney in order to defend personally would necessarily yield the same result because this right, unencumbered by the constitutional policy attaching to the right to counsel, might be conditioned precisely to that extent rather than disallowed altogether.[71] Should the defendant's attempt to defend personally prove confusing to the jury, the defendant, not the prosecution, likely would be prejudiced. When the court is confronted with an unruly and contemptuous defendant, the contempt power, judiciously exercised, should prove a sufficient tool for preserving order and decorum.

One thing for certain can be said about the "absolute-discretionary" dichotomy. As currently enunciated, it imparts to the right to defend *pro se* an evanescent quality not entirely consistent with the actual and alleged constitutional underpinnings of the right, nor with notions of individual autonomy.

RICHARD A. LEIPPE

Evidence—Admissibility of Computer Business Records As an Exception to the Hearsay Rule

Modern businesses have begun increasingly to rely on the electronic digital computer[1] as in integral part of their regular operations.[2] Computers are used to make numerical calculations, to store and process information on business transactions, to keep personnel records, to perform various accounting tasks, and to summarize many types of information needed for management decisions—in short, they are admirable receptacles for all types of traditional business records.

[70] United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943).

[71] *Id.* at 1011-12 (dissenting opinion). *Cf.* United States v. Abbamonte, 348 F.2d 700 (2d Cir. 1965); Relerford v. United States, 309 F.2d 706 (9th Cir. 1962); United States v. Arlen, 252 F.2d 491 (2d Cir. 1958); United States v. Paccione, 224 F.2d 801 (2d Cir. 1955).

[1] For a general discussion of the admission of computer business records into evidence, see Annot., 11 A.L.R.3d 1377 (1967). The admission of ordinary business records into evidence is dealt with in Annot., 21 A.L.R.2d 773 (1952).

[2] Freed, *Computer Print-Outs as Evidence*, in 16 AM. JUR. PROOF OF FACTS § 1, at 274 (1965) [hereinafter cited as Freed].

Inevitably, printed-out business records are offered as evidence in litigation. A recent example is *King v. State ex rel. Murdock Acceptance Corp.*[3] King, a notary public, was sued for damages because of his false notarial certificate of acknowledgment to a deed of trust.[4] To establish damages, the plaintiff corporation had to prove the balance due on certain conditional sales contracts and a note. This proof was made by introducing both the original contracts and computer print-outs showing the payments made and the balance due on the contracts and the note. The original records of payments were made in the branch offices of the plaintiff and then forwarded to the home office where the information was fed into a computer.[5] The court found that the computer records were "originals" sufficient to satisfy the best evidence rule even though the real "original" records of the transactions were available in the branch offices.[6] The court, without benefit of a statute on the subject, admitted the computer records as business records:

> In sum, we hold that print-out sheets of business records stored on electronic computing equipment are admissible in evidence if relevant and material, without the necessity of identifying, locating, and producing as witnesses the individuals who made the entries in the regular course of business if it is shown (1) that the electronic computing equipment is recognized as standard equipment, (2) the entries are made in the regular course of business at or reasonably near the time of the happening of the event recorded, and (3) the foundation testimony satisfies the court that the sources of information, method and time of preparation were such as to indicate its trustworthiness and justify its admission.[7]

The leading case admitting computer business records into evidence is *Transport Indemnity Co. v. Seib*,[8] in which plaintiff insurer used a computer to calculate premiums due on an insurance contract made with the defendant. The formula used for fixing the premiums was contained in the contract between the parties; one component of the formula considered claims made by the defendant for earlier losses. Plaintiff proved the amount of these prior claims by computer records printed out especially for the litigation. Defendant argued that the original claim

[3] 222 So. 2d 393 (Miss. 1969).
[4] *Id.* at 394.
[5] *Id.* at 396-97.
[6] *Id.* at 397-98.
[7] *Id.* at 398.
[8] 178 Neb. 253, 132 N.W.2d 871 (1965).

files and reports should have been produced. The court held the computer evidence was properly admitted since the reports had been made to plaintiff and fed into the computer in the regular course of business.[9] The decision is sound: there is no reason to compel production of the original claim files unless defendant proposed to prove the inaccuracy of a particular loss figure, in which case he could produce his own records on the claim.

Computer records such as those in *King* and *Transport*, if offered to prove the truth of the statements contained therein, are hearsay[10] because they are extra-judicial assertions whose reliability cannot be checked by cross-examination. The primary reason for the hearsay rule is to exclude evidence of the assertions of an absent declarant, whose perceptive skill, memory, and sincerity are not subject to cross-examination. Of course, a business record cannot be cross-examined, but it is admissible without that imagined safeguard because of a presumed inherent trustworthiness due to internal business reliance on its accuracy.[11]

The common-law exceptions to the hearsay rule for the admission of business records was quite narrow;[12] it is unlikely that most of today's computer records would qualify. But most states, faced with contemporary commercial reality, desired to amplify statutorily the miserly common-law exception; businessmen needed a reasonable means of proving debts owed them.[13] Several "uniform" codfiications evolved. In 1927, the Model Act for Proof of Business Transactions was proposed;[14] it has been

[9] *Id.* at 259, 132 N.W.2d at 875.

[10] *See* Transport Indem. Co. v. Seib, 178 Neb. 253, 259, 132 N.W.2d 871, 875 (1965). See also the definition of hearsay in the PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 8-01(c), at 159 (Prelim. Draft March 1969).

[11] The real guarantee stems from the nature of business operations themselves: Modern business and professional activities have become so complex, involving so many persons, each performing a different function, that an accurate daily record of each transaction is required in order to prevent utter confusion. An inaccurate and false record would be worse than no record at all.

Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 35, 125 S.E.2d 326, 329 (1962).

[12] For a discussion of common-law rules and exceptions, see 5 J. WIGMORE, EVIDENCE §§ 1517-1519, at 347-61 (3d ed. 1940) [hereinafter cited as WIGMORE].

[13] The business-record exception to the hearsay rule is a manifestation of judicial conformity to sound business practice. *Cf.* Transport Indem. Co. v. Seib, 178 Neb. 253, 259, 132 N.W.2d 871, 875 (1965). Thus, the guarantee of trustworthiness may not be the only reason for the exception.

[14] 5 WIGMORE § 1520, at 362 (footnote omitted). The Commonwealth Fund subsidized a committee to draft the Model Act, and its report is contained in Morgan,

adopted by Congress and the legislatures of several states.[15] In 1933, the Uniform Business Records as Evidence Act emerged;[16] it has been adopted in several states.[17] Besides the Model Act and the Uniform Act, the admissibility of business records has been provided for in the Model Code of Evidence,[18] the Uniform Rules of Evidence,[19] and the proposed federal rules of evidence.[20]

The Model Act and the Uniform Act have produced the same standards of admissibility for both computer and conventional business records.[21] Computer records, just as other business records, must

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The Law of Evidence: Some Proposals for Reform (1927). Green, *The Model and Uniform Statutes Relating to Business Entries as Evidence*, 31 TUL. L. REV. 49 n.9 (1956).

[15] 28 U.S.C. § 1732 (1964) is the federal statute. Connecticut, Georgia, Maryland, Massachusetts, Michigan, Nebraska, New Mexico, New York, and Rhode Island have passed statutes based on the Model Act. Green, *The Model and Uniform Statutes Relating to Business Entries as Evidence*, 31 TUL. L. REV. 49 n.9 (1956). The text of the Model Act provides:

> Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence, or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. . . .

Reprinted in 5 WIGMORE § 1520, at 362.

[16] The Uniform Act reads in part as follows:

> A record of an act, condition or event shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if in the opinion of the Court, the sources of information, method and time of preparation were such as to justify its admission.

Reprinted in 5 WIGMORE § 1520, at 363.

[17] California, Delaware, Florida, Hawaii, Idaho, Minnesota, Missouri, Montana, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Vermont, Washington, and Wyoming have passed the Uniform Act. Misc. Acts, 9 UNIFORM ACTS ANNOT. 506 (1951). *See, e.g.*, DEL. CODE ANN. tit. 10, § 4310 (1953); N.J. STAT. ANN. §§ 2A:82-34 to -40 (1952); WASH. REV. CODE ANN. §§ 5.45.010-.920. (1963).

[18] MODEL CODE OF EVIDENCE rule 514 (1942).

[19] UNIFORM RULES OF EVIDENCE rule 63(13).

[20] PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 8-03(b)(6) (Prelim. Draft March 1969).

[21] North Carolina is one of the states that has adopted neither the Model nor the Uniform Act. A law review writer recommended that North Carolina adopt the Model Act in *Proposals for Legislation in North Carolina*, 9 N.C.L. REV. 1, 47 (1930). However, by judicial decision North Carolina appears to have accom-

meet the basic requirements of the act in question. The record must be made in the regular course of business at or near the time of the act or transaction recorded, or within a reasonable time thereafter.[22] The Uniform Act specifies further that the custodian of the record, or some other qualified witness, must testify as to its identity and mode of preparation and that the circumstances must justify to the court its admission.[23] The regular course of business must require the making of such records even though the record sought to be admitted was, in fact, made in the regular course of business.[24] Some jurisdictions may require satisfaction of the best evidence rule, but at least one federal court of appeals has eliminated any such requirement in applying the federal business records statute.[25] In New York the best evidence rule is satisfied by non-original records if the originals were destroyed in the usual course of business.[26]

A record may be denied admissibility because of a lack of assurance that sources of information for it are accurate.[27] The source may have had

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plished virtually the same result as the Model and Uniform Acts. *See* Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); Smith Builders Supply, Inc. v. Dixon, 246 N.C. 136, 97 S.E.2d 767 (1957); Dairy & Ice Cream Supply Co. v. Gastonia Ice Cream Co., 232 N.C. 684, 61 S.E.2d 895 (1950). D. STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE § 155, at 390 (2d ed. 1963) states:

> It is no longer necessary that the person making the entries be dead, or even that he be identifiable, and he need not have had personal knowledge of the transaction entered. If the entries were made in the regular course of business, at or near the time of the transaction involved, and are authenticated by a witness who is familiar with the system under which they were made, they are admissible.

(Footnote omitted.)

North Carolina has adopted the UNIFORM PHOTOGRAPHIC COPIES OF BUSINESS AND PUBLIC RECORDS AS EVIDENCE ACT. N.C. GEN. STAT. §§ 8-45.1 to -45.4 (1953). *See* State v. Shumaker, 251 N.C. 678, 111 S.E.2d 878 (1960).

[22] *See* the text of the Model and Uniform Acts, notes 15 & 16 *supra.*

[23] 5 WIGMORE § 1520, at 363. *See* Transport Indem. Co. v. Seib, 178 Neb. 253, 132 N.W.2d 871 (1965).

[24] Palmer v. Hoffman, 318 U.S. 109 (1943); Comment, *Computer Print-Outs of Business Records and their Admissibility in New York*, 31 ALBANY L. REV. 61, 63-64 (1967). *See also* Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930).

[25] United States v. Kimmel, 274 F.2d 54 (2d Cir. 1960). The proposed federal rules of evidence would confer the status of an original record upon any computer print-out. PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 10-01(c), Comment (Prelim. Draft March 1969).

[26] Comment, *Computer Print-Outs of Business Records and their Admissibility in New York, supra* note 24 at 70 (footnote omitted) (original emphasis deleted).

[27] *Cf.* Owens v. City of Seattle, 49 Wash. 2d 187, 194, 299 P.2d 560, 564 (1956).

to make subjective and now unknown judgments about objective data. In such a situation the business record is inadmissible without his testimony.[28] A business record may also be excluded from evidence because sources of information are insufficient to make a reliable record.[29] The business record may be denied admissibility because the information therein was haphazardly collected from random sources whose reliability is difficult to evaluate.[30] But the lack of a motive by any of the sources to falsify may justify admissibility.[31]

Although a series of business records may not be complete enough to prove the non-occurrence of a certain event,[32] when considered together, they may be complete enough to prove a positive fact.[33] A record such as that in *King* would, for example, be complete enough to prove both the absence of a particular payment and that certain other payments were made.

Business records will not normally be excluded for the reason that they are "self-serving."[34] Indeed, their presumed trustworthiness is based on the self-interest of the businessman in the systematic and accurate compilation of his record.[35] A more worthy inquiry is whether the preparation of the record was "inner-directed" or "outer-directed"; that is, whether the nature of it is such that the business must rely on its accuracy in its daily transactions.[36]

The record must, of course, be relevant to an issue involved in the

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[28] *Cf.* Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954).

[29] Allen v. St. Louis Pub. Serv. Co., 365 Mo. 677, 681 n.1, 285 S.W.2d 663, 666 n.1 (1956); Watson v. Clutts, 262 N.C. 153, 161, 136 S.E.2d 617, 622 (1964).

[30] United States v. Grayson, 166 F.2d 863, 869 (2d Cir. 1948).

[31] Freedman v. Mutual Life Ins. Co., 342 Pa. 404, 21 A.2d 81 (1941); *cf.* Woodward v. United States, 185 F.2d 134 (8th Cir. 1950), *aff'g* 88 F. Supp. 152 (S.D. Mo. 1949). *But cf.* Taylor v. B. Heller & Co., 364 F.2d 608 (6th Cir. 1966).

[32] Bowman v. Kaufman, 387 F.2d 582, 587-88 (2d Cir. 1967).

[33] *See* Doyle v. Chief Oil Co., 64 Cal. App. 2d 284, 292, 148 P.2d 915, 919 (Dist. Ct. App. 1944). In some cases, incompleteness of the record may go to weight rather than to admissibility. United States v. Kimmel, 274 F.2d 54, 57 (2d Cir. 1960).

[34] New York Life Ins. Co. v. Taylor, 147 F.2d 297, 306 (D.C. Cir. 1945); Owens v. City of Seattle, 49 Wash. 2d 187, 190, 299 P.2d 560, 564 (1956). But conceivably there are cases in which such an objection might legitimately be raised. *See, e.g.*, Douglas Creditors Ass'n v. Padelford, 181 Ore. 345, 182 P.2d 390 (1947).

[35] *See* Weis v. Weis, 147 Ohio 416, 425-26, 72 N.E.2d 245, 250 (1947).

[36] As the size of a business increases, the necessity of an accurate record for internal reliance increases. But the possibility of error also increases if the record is the product of several human sources. Of course, it only takes one person who is careless or of bad motive to make an inaccurate entry, and the likelihood of his doing so unnoticed increases as the size of the business increases.

litigation.[37] Even if the business record is admissible, parts of it may not be[38] because they contain information that is not trustworthy, such as unsubstantiated subjective opinions.[39] There may also be reason to suspect the trustworthiness of records when they deal with loans or payments of money[40] or when the first entry on a balance sheet is a statement of money owed with no itemization or other indication of the origin of the stated figure.[41]

Even if the business record otherwise qualifies under the Uniform or Model Act, the trial court must still determine whether the record appears accurate and trustworthy.[42] In making this determination, the court should insist on some underlying guarantee in the record-making process that the data is trustworthy.[43]

Occasionally, the party against whom a business or computer record is offered may be estopped by his conduct to object to its admission, or he may be deemed to have admitted the truth of its contents by his silence in an out-of-court situation. In *State v. Veres*[44] the defendant was charged with passing checks while having insufficient funds to cover them. The trial court over the defendant's objection admitted bank records that were inadequately qualified because the qualifying witness testified that he was not familiar with the mechanical operation of the automatic machine

[37] Hancock v. Crouch, 267 S.W.2d 36, 40-41 (Mo. App. 1954); Freedman v. Mutual Life Ins. Co., 342 Pa. 404, 414, 21 A.2d 81, 86 (1941). *See also* Ostrov v. Metropolitan Life Ins. Co., 260 F. Supp. 152, 168 (E.D. Pa. 1966), *vacated on other grounds*, 379 F.2d 829 (3d Cir. 1967).

[38] Maggi v. Mendillo, 147 Conn. 663, 667, 165 A.2d 603, 605 (1960).

[39] *See* New York Life Ins. Co. v. Taylor, 147 F.2d 297, 299-303 (D.C. Cir. 1944). *But see* Allen v. St. Louis Pub. Serv. Co., 365 Mo. 677, 681-83, 285 S.W.2d 663, 666-67 (1956).

[40] The reason is that the payee has it within his power to take a note or receipt for the money as independent evidence of the transaction. Douglas Creditors Ass'n v. Padelford, 181 Ore. 345, 357, 182 P.2d 390, 396 (1947). However, under modern business statutes it now appears that evidence of loans or payments of money are usually admissible just as any other business entry. Annot., 13 A.L.R.3d 284 (1967). *See* Olson v. McLean, 132 Mont. 111, 313 P.2d 1039 (1957); Mahoney v. Minsky, 39 N.J. 208, 188 A.2d 161 (1963).

[41] This problem was presented in Merrick v. United States Rubber Co., 7 Ariz. App. 433, 440 P.2d 314 (1968), in which the court held that the stated unproven balance and subsequent transactions must constitute separate counts and could not be joined in the same action. At first blush this holding may seem unrealistic, but it has the merit of providing protection for the businessman while encouraging the jury to evaluate separately the proof of each count. *But cf.* Thompson v. Machado, 78 Cal. App. 2d 870, 178 P.2d 838 (Dist. Ct. App. 1947).

[42] Bowman v. Kaufman, 387 F.2d 582, 587 (2d Cir. 1967).

[43] *See* United States v. Grow, 394 F.2d 182, 205 (4th Cir. 1968); Hartzog v. United States, 217 F.2d 706, 710 (4th Cir. 1954).

[44] 7 Ariz. App. 117, 436 P.2d 629 (1968).

making the records.[45] On appeal, admission of the evidence was upheld on the ground that the defendant had testified both that his bank account was not in good condition and that at the time of the writing of the checks he had requested that they not be negotiated.[46] This holding is unsound. The state had the burden of proof and should have had to qualify the record *regardless* of the defendant's testimony.

In *Thompson v. Machado*,[47] a suit on an open-book account, plaintiff-businessman had repeatedly mailed to the defendant monthly statements of an amount due. The plaintiff's original business records had been detroyed in a fire, and the trial court admitted "secondary" records.[48] The appellate court affirmed, saying that the defendant could not deny the truth of the amount due because he could not prove that he had protested the accuracy of the monthly statements after he received them.[49] The application of estoppel or admission by silence is more justifiable in this case: the defendant's objections were more properly directed to the weight to be given the "secondary" records, not to their admissibility.

Computer print-outs as business records lead to unique evidentiary problems. Qualification of computer records is one. The witness qualifying computer records should have a substantial knowledge of the equipment used and the ability to explain its operation in detail.[50] He should testify as to the procedure of the business[51] in using the equipment and explain just how the record in question was made. Any deviation from the usual practice of the business in making the record should be disclosed. In particular, a witness should describe any procedures—computer or human—used to check for error in the record-making process.[52]

The opponent of the evidence's introduction may attack the equipment or "hardware" and show, if possible, that it is unreliable. This attack may be accomplished by testimony regarding the malfunctions of the specific machine that made the record or the general unreliability

[45] *Id.* at —, 436 P.2d at 637.
[46] *Id.* at —, 436 P.2d at 638.
[47] 78 Cal. App. 2d 870, 178 P.2d 838 (Dist. Ct. App. 1947).
[48] *Id.* at —, 178 P.2d at 841.
[49] *Id.*
[50] But business records have been qualified even though the witness admitted a lack of familiarity with the electronic equipment. Merrick v. United States Rubber Co., 7 Ariz. App. 433, —, 440 P.2d 314, 316 (1968).
[51] The procedures of the business at the time the record was made are the ones to which testimony ought to be directed. Mutual Fin. Co. v. Auto Supermarkets, Inc., 383 S.W.2d 296, 299 (Mo. Ct. App. 1964).
[52] Comment, *Computer Print-Outs of Business Records and their Admissibility in New York, supra* note 24 at 71.

of that brand or type of computer. The opponent might also assert that the controls over error were insufficient and seek to destroy any guarantee of trustworthiness.

Qualifying the "software" is equally essential; the witness supporting introduction of the records should explain the programming methods used[53] since the program furnishes the computer with its instructions. The opponent may attempt to show that the program was inadequate to make an accurate record. The opponent should be allowed to examine the program and present his own expert witness to challenge the program's reliability.

When computerized information is used at trial, normally it is a print-out from data fed earlier into the computer. The objection has arisen that the computer record was prepared for the litigation and hence is not to be trusted.[54] This argument is, of course, specious; the focal point of inquiry should be the initial making of the record rather than its appearance in printed form for trial.[55]

Both the Model Act and Uniform Act require the business entry to be made at or near the time of the event or transaction recorded.[56] A business record made years after the transaction or event that it seeks to prove does not qualify for admission.[57] The date of an entry in an account book can usually be determined by its relationship to other entries. In dealing with a computer, however, it is not usually possible to fix the date of the input of data. Such information would be available only in those rare cases in which the source of the input was saved, stored, and dated or the date of entry was entered with the other data fed into the computer. To require proof of the time between the transaction or event and the time of the computer input would be unrealistic. The business must still prove that the inputs were made as a part of its day-to-day operations[58] before computer records are admissible. Statutes based on the Model Act and Uniform Act should be amended or interpreted to allow the introduction as business records of undated and non-time sequenced computer data. If a business has switched from conventional to computer recordkeeping, its print-outs should be admissible even if

[53] *Id.* "Faulty programming is [a] frequent source of inaccurate output." Freed, *supra* note 2, § 15, at 298.
[54] *See* Palmer v. Hoffman, 318 U.S. 109 (1943).
[55] Transport Indem. Co. v. Seib, 178 Neb. 253, 260, 132 N.W.2d 871, 875 (1965).
[56] See notes 15 & 16 *supra.*
[57] Fuller v. White, 33 Cal. 2d 236, 201 P.2d 16 (1948).
[58] Palmer v. Hoffman, 318 U.S. 109, 113-14 (1943).

some time has elapsed between the transaction and its recordation by computer. Businesses should not be penalized for automating and modernizing their operations.

The authentication of computer data may also present a problem. Clearly a business record must be identified and authenticated by a proper witness for the proponent of its introduction.[59] If data stored in the computer is printed out without any processing by the arithmetical unit, no serious authentication problem normally will arise. In such a situation, the authentication requirements are the same as are required in cases involving conventional business records. The only additional factor is the qualification of the computer system as being reliable in reproducing the record.

More serious authentication problems arise when the computer's arithmetical function alters the stored input data. The witness may then be required to reconcile the accuracy of the original stored data with the processed figures shown on the computer business record.[60] Normally authentication is a simple task, but cases may arise when it is virtually impossible. The computer can process data at speeds much faster than a man can perform the same operation. Computers also deal more accurately with complicated formulas. It could take hours of testimony to authenticate computer data in some cases. If the accuracy of the system and procedures used to make the record have been established to the trial judge's satisfaction, he should be given the discretion to dispense with authentication of the processed data.

Despite the general reliability of computer business records, in certain controversies there is a need for independent evidence not produced by computer of the underlying transaction. The following is an example. Customer *A* receives from a large department store *B* a bill for one-thousand dollars for goods allegedly purchased on a certain date. *B* offers its computer record as evidence of the purchase along with an unsigned computer input card impressed with *A*'s name and account number. It is apparent that *A* is in a very poor position to defend himself and that *B* very easily could have fabricated the unsigned input card. *A* should be protected from such possible fabrication by the court's requiring non-computer-produced evidence of the original transaction by *B* with *A*.

[59] Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 35, 125 S.E.2d 326, 329 (1962).

[60] Transport Indem. Co. v. Seib, 178 Neb. 253, 258, 132 N.W.2d 871, 875 (1965).

Once the purchase is established, subsequent payments may properly be proved solely by computer records. *A*'s cancelled checks or cash receipts should offer him sufficient protection in contesting the amount of payments. But there is a real need for protecting the consumer by requiring independent evidence of the sale because a reasonable businessman would make an independent record of the transaction that would bear the customer's signature.

The decisions in *King* and *Transport* show that computer records can and will be admitted into evidence as routinely as conventional business records have been in the past. But as fewer "conventional" records remain in use to support the computer's product, courts will have to be more diligent in examining whether the computer business record is satisfactorily qualified and authenticated for admission. The impersonal and automatic computer, which is the servant of the businessman, must also be the servant of justice and not the master of men and their laws.

NORMAN E. SMITH

Federal Estate Taxation—Application of the Reciprocal Trusts Doctrine Under the New Objective Standard

A typical reciprocal or crossed trusts situation occurs when *A* sets up an irrevocable trust to pay *B* the income for life, remainder to *C*, and *B* does likewise for the benefit of *A* for life with the remainder to *C* (or *D*). In the usual situation *A* and *B* are members of the same family. At one time it was thought that such an arrangement would avoid taxation under the retained-interest rule of section 811(c)(1) of the Internal Revenue Code of 1939—now section 2036 of the 1954 Internal Revenue Code. These sections provide that certain transferred property in which the decedent has retained a life interest is to be included in his gross estate. The general purpose underlying both sections is to insure taxation of transfers that are essentially testamentary—that is, transfers in which the transferor retained a significant interest or control over property transferred during his lifetime.

But the reciprocal trusts doctrine, which was advanced in *Lehman v. Commissioner*,[1] dissolved the belief that creation of reciprocal trusts held the answers to successful evasion of estate taxes.[2] Though the reciprocal

[1] 109 F.2d 99 (2d Cir.), *cert. denied*, 310 U.S. 637 (1940).

[2] For a complete history of the development of the reciprocal trusts doctrine

trusts situation did, in form at least, fall outside the literal terms of section 811(c)(1) (since the transferor had transferred away all of his interest in the trust property), the court in *Lehman* recognized that each settlor remained in exactly the same economic position in which he would have been had he created a trust with himself as life beneficiary. Under the rationale of the court in *Lehman*, each settlor is transposed and treated as the grantor of the trust over which he holds various incidents of ownership, at least to the extent that the two trusts are equal in value.[3] "The fact that the trusts were reciprocated or 'crossed' is a trifle, quite lacking in practical or legal significance . . . . The law searches out the reality and is not concerned with form."[4] The court in *Lehman* based its holding on statements made by leading commentators on trusts that said, "A person who furnishes the consideration for the creation of a trust is the settlor, even though in form the trust is created by another person."[5]

Thus in the example, *A* is treated as the settlor of the trust actually created by *B*, and vice versa. Since *A* is treated in this way,[6] the trust over which *A* is seen as the settlor (the trust actually created by *B*) must be included in *A*'s gross estate under section 811(c)(1)—today section 2036—because under this view *A* is considered to have retained a life estate.[7]

As the reciprocal trusts doctrine developed,[8] two divergent views

see Colgan & Molloy, *Converse Trusts—The Rise and Fall of a Tax Avoidance Device*, 3 TAX L. REV. 271, 273-76 (1948) [hereinafter cited as *Converse Trusts*].

[3] If reciprocal trusts are created with one trust being larger than the other, the amount of the trust created by *B* which is greater than the trust created by *A* is taxable as a gift of *B* under § 2511(a), INT. REV. CODE of 1954. C. LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES 605 (2d ed. 1962) [hereinafter cited as LOWNDES & KRAMER].

[4] 109 F.2d at 100.

[5] 2 A. SCOTT, THE LAW OF TRUSTS § 156.3 (3d ed. 1967); 1 G. BOGERT, TRUSTS AND TRUSTEES § 41 (2d ed. 1965).

[6] "By switching the grantors of reciprocal trusts, the courts also escape the objection that the transfers were not taxable because they were made for an adequate and full consideration in money or money's worth." LOWNDES & KRAMER 193 n.36 *citing Converse Trusts, supra* note 2, at 275.

[7] "[I]t is important to notice that the fact that trusts are reciprocal does not make them taxable under the estate tax unless after switching grantors there is the basis for such a tax." LOWNDES & KRAMER 193.

[8] The reciprocal trusts doctrine was given congressional approval in the Technical Changes Act of Oct. 25, 1949, ch. 720, § 6, 63 Stat. 893. "Congress has, in effect, approved the doctrine's effort to close the loophole. In the Technical Changes Act . . . it permitted those who had used the device prior to 1940 to give up their control over a reciprocal trust without paying a gift tax on the relinquishment." Estate of Grace v. United States, 393 F.2d 939, 950-51 n.4 (Ct. Cl. 1968)

arose as to what was the proper test for invoking it. One group of cases,[9] coming mainly from the third and seventh circuits, held that before the reciprocal trusts doctrine could be invoked, it must be shown that each of the crossed trusts was established as the *quid pro quo* consideration for the other; that is, each trust must have been established in return for the creation of the other trust. A second theory, advanced mainly in the second and eighth circuits,[10] was that the presence of consideration need not be shown explicitly but can be inferred from certain objective factors such as the establishment of two similar trusts at about the same time, the presence of a tax-avoidance motive, or the fact that the same attorney drafted both trust instruments.[11] With each of these distinctions, the

(dissenting opinion). For a discussion of the effects of this section of the Technical Changes Act, see 48 MICH. L. REV. 688 (1950).

[9] Estate of Moreno v. Commissioner, 260 F.2d 389 (8th Cir. 1958); Guenzel v. Commissioner, 258 F.2d 248 (8th Cir. 1958); McClain v. Jarecki, 232 F.2d 211 (7th Cir. 1956); Newberry's Estate v. Commissioner, 201 F.2d 874 (3d Cir. 1953); *In re* Leuder's Estate, 164 F.2d 128 (3d Cir. 1947).

[10] Orvis v. Higgins, 180 F.2d 537 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950); Hanauer's Estate v. Commissioner, 149 F.2d 857 (2d Cir.), *cert. denied*, 326 U.S. 770 (1945); Cole's Estate v. Commissioner, 140 F.2d 636 (8th Cir. 1944).

[11] The case of Newberry's Estate v. Commissioner, 201 F.2d 874 (3d Cir. 1953), presents a good example of the divergent views. Newberry and his wife at the same time set up identical trusts of identical amounts for the benefit of their children. Each settlor was given certain interests and powers over the other settlor's trust. Periodically these powers were amended so that at the time of Mrs. Newberry's death each settlor had only the power to shift interests in the other settlor's trust among their children and certain charities. When Mrs. Newberry died, the Commissioner contended that the trusts were reciprocal and should be taxed accordingly. Before the Tax Court, Mr. Newberry testified that he and his wife were independently wealthy and that they had created these trusts for the benefit of their children and not to obtain any personal benefit. He further testified that he would have set up his trust even if his wife had not created her trust. The Tax Court upheld the Commissioner and included Mr. Newberry's trust in Mrs. Newberry's gross estate.

> [T]he basis of the Tax Court's decision seems to have been that the objective facts of the trusts, the identity of their terms, amounts and times of creation, and the fact that husband and wife got the same reciprocal advantages from each other's transfer raised such a strong inference that they were created in consideration of each other that viewing the evidence as a whole the estate had failed to prove that they were not.

LOWNDES & KRAMER, *supra* note 3, at 195. This reasoning has been followed mainly in the second and eighth circuits.

The Court of Appeals for the Third Circuit took the other view and held that the reciprocal trusts doctrine should not have been applied in this case. It held that since Mr. Newberry would have established his trust without regard to what Mrs. Newberry did and that since the purpose of the trusts was to benefit the children rather than the settlors, the consideration for Mr. Newberry's trust was not the trust of his wife and his trust was not, therefore, taxable to her estate. *Id.* at 194.

doctrine, which had been intended to fill a tax loophole, was narrowed and thus made less effective in preventing avoidance of estate taxes. In an effort to resolve the conflicts between the circuits and to establish concrete rules for the application of the reciprocal trusts doctrine, the Supreme Court recently decided *United States v. Estate of Grace*.[12]

On December 15, 1931, the decedent, Joseph Grace, executed a trust (the Joseph trust) that was to pay the income and any of the principal the trustees might deem advisable to decedent's wife, Janet Grace, for life. Janet was given the power to designate, by will or deed, the manner in which the trust estate remaining at her death was to be distributed to Joseph and their children. Joseph appointed himself as one of the three trusteees.

On December 30, 1931, Janet Grace executed a trust (the Janet trust) that was virtually the same as the Joseph trust. All the property in this trust had been conveyed to Janet during the preceding twenty-three years by the decedent.[13] Both trusts were prepared by one of the decedent's employees in accordance with the decedent's plan, and Janet executed her trust in accordance with the decedent's wishes.

The Joseph trust was terminated by Janet Grace's death in 1937. Janet Grace's federal estate tax return showed the Janet trust but reported it as a nontaxable transfer.[14] The Commissioner asserted that the Janet and Joseph trusts were "reciprocal" and asserted a deficiency to the extent of the mutual value. Compromises on unrelated matters[15] resulted

[12] 395 U.S. 316 (1969).

[13] That the property was given to Janet by her husband should have been irrelevant in deciding whether the reciprocal trusts doctrine applied. However, the Supreme Court mentioned this fact several times in its opinion, probably because the lower court considered it important to show a pattern of family giving that dispelled an inference of consideration. The Court, by hearing a case in which there was a pattern of family giving and by asserting the reciprocal trusts doctrine in the face of it, emphasized that the doctrine will be applied regardless of the presence of consideration.

[14] *But see* Justice Douglas' dissent in *Grace* in which he asserts that the Janet trust should have been included in Janet Grace's gross estate. 395 U.S. at 325-26.

[15] During the course of these negotiations, the representatives of the estate countered the contention of the Internal Revenue Service by contending that the gross estate should be adjusted by (1) a reduction in value . . . of [certain] shares of stock . . . owned by Janet Grace at the date of her death . . . and (3) elimination from the assets shown on the return as Janet Grace's property of certain household effects which . . . [allegedly] belonged to the decedent.

Estate of Grace v. United States, 393 F.2d 939, 963-64 (Ct. Cl. 1968).

in fifty-five per cent of the *value* of the Janet trust being included in Janet Grace's gross estate.[16]

Joseph Grace died in 1950. His federal estate tax return also disclosed both trusts. The Joseph trust was shown as a non-taxable transfer; the Janet trust was reported as a trust under which the decedent held a limited power of appointment.[17] Neither trust was included in the decedent's gross estate. The Commissioner determined that the trusts were "reciprocal" and included the amount of the Janet trust in the decedent's gross estate. This deficiency was paid by the estate and a claim for refund was filed.

The United States Court of Claims held that the reciprocal trusts doctrine should not have been applied. Using certain language in *Lehman* and decisions[18] from the Courts of Appeals for the Third and Seventh Circuits, the majority of the court held that the crucial factor was whether the decedent had established his trust as consideration for the establishment of the trust of which he was the beneficiary. The court then held that each trust had not been established as the *quid pro quo* for the other trust but that they were merely part of an established pattern of family giving.[19] The plaintiff, decedent's estate, was thus entitled to recover the amount of overpayment plus interest.

The Supreme Court, rather than adopting either of the two major views regarding reciprocal trusts, advanced an objective test that dis-

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[16] In discussing the issue as to the reciprocity of the Janet Grace trust and the Joseph Grace trust . . . the negotiators believed that the value of the Janet Grace trust was less than the value of the Joseph Grace trust, and that if the doctrine of reciprocal trusts were applicable, it would be the *value* of the lesser trust, *i.e.*, the Janet Grace trust, that would be taxable as part of the estate of Janet Grace.

Id. at 964 (emphasis added).

[17] The power of appointment given to Joseph Grace in the Janet trust is not taxable since it is not a general power as defined by INT. REV. CODE of 1954, § 2041 (b)(1). Property over which decedent holds a power of appointment is includable in his gross estate only if he holds a *general* power of appointment. As defined in section 2041(b)(1), a general power of appointment is a power that is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. Since Joseph Grace could only appoint the remainder of the trust among his wife and children, this power does not fall within the definition of a general power.

[18] McLain v. Jarecki, 232 F.2d 211 (7th Cir. 1956); Newberry's Estate v. Commissioner, 201 F.2d 874 (3d Cir. 1953); *In re* Leuder's Estate, 164 F.2d 128 (3d Cir. 1947).

[19] The court rejected the "inferred consideration" test, but said in passing that if this test had been used, inference of consideration was rebutted by the evidence in the case. 393 F.2d at 946-47.

regards consideration completely.[20] The Court concluded that the Court of Claims had placed too much emphasis on the decedent's subjective intent and had thus hindered the proper application of the federal estate tax laws. The Court again stressed what it said in *Estate of Spiegel v. Commissioner*:[21] "any requirement [of] a post-death attempt to prove the settlor's thought in regard to the transfer, would partially impair the effectiveness of [section 811(c)] as an instrument to frustrate estate tax evasion."[22] Therefore, it is important that the courts look not to the settlor's motives but to the nature and operative facts of the trust transfer.

The Court found that it was particularly important that the objective facts control in the reciprocal-trust situation because (1) inquiries into subjective intent, especially in interfamily transfers, are particularly perilous; (2) there is a high probability that such a trust arrangement is for a tax-avoidance motive;[23] (3) even if there is no tax-avoidance motive, the settlor did actually retain an economic interest while purporting to give away his property; (4) and, finally, it is unrealistic to think that the settlors of trusts such as this, usually members of the same family, would create a trust as the bargained-for consideration for the other trust since such traditional consideration does not normally enter into intrafamily transfers.[24] For all of these reasons the Supreme Court held that there was no need to show that each trust was created as the *quid pro quo* for the other because such a showing of consideration would require too great a delving into the settlor's subjective intent. The Court

[20] This test, which was advocated by Judge Davis in his dissenting opinion to the Court of Claims decision in *Grace*, 393 F.2d at 948-54, had been advanced by Professor Lowndes. Lowndes, *Consideration and the Federal Estate and Gift Taxes: Transfers for Partial Consideration, Relinquishment of Marital Rights, Family Annuities, the Widow's Election, and Reciprocal Trusts*, 35 GEO. WASH. L. REV. 50, 76-81 (1966).

> [T]esting the taxability of the transfers by any doctrine of consideration which depends on the subjective intentions of the transferors to bargain at the time they made the transfers is completely unrealistic. It is impossible to determine what the transferors actually had in mind. . . . It would be more sensible to impose a tax upon the basis of the objective operation of reciprocal transfers. . . . [If the transferor ends up in the same economic position] there is no obvious inequity in treating him as though he made the transfer in which he acquired a taxable interest.

Id. at 80.

[21] 335 U.S. 701 (1949).

[22] *Id.* at 705-06.

[23] In fact, "[I]t is hard to see why anyone would indulge in this sort of transaction except to avoid taxes . . . ." LOWNDES & KRAMER, *supra* note 3, at 200.

[24] See Lowndes, *supra* note 20, at 79-80.

determined for the same reason that there was no need to show a tax-avoidance motive.

The Supreme Court in *Grace* required that only two tests must be met before the reciprocal trusts doctrine can be applied. First, the trusts must be interrelated.[25] Second, the arrangement, to the extent of mutual value, must leave the settlors in approximately the same economic position in which they would have been had they created trusts naming themselves as life beneficiaries.

Applying these principles to the facts of *Grace*, the Court held that the value of the Janet trust must be included in the decedent's gross estate. The two trusts were obviously interrelated. They were identical in terms and were created at approximately the same time. They were part of a single transaction designed and carried out by the decedent. Second, the two trusts objectively left each settlor, to the extent of mutual value, in the same economic position. "Joseph Grace's estate remained undiminished to the extent of the value of his wife's trust and the value of his estate must accordingly be increased by the value of that trust."[26]

While the Court's decision is laudable in that it requires objective factors be used in determining when the reciprocal trusts doctrine is to be invoked, it is regretable that the Court selected *Grace* in which to present this holding. Justice Douglas seems correct in his analysis that "the use of a reciprocal trust device to aid the avoidance of an estate tax is simply not presented by this case."[27]

The purpose in setting up reciprocal trusts is to evade federal estate taxation by having a settlor rid himself of all taxable power over the trust that he has created while he remains in the same economic position because of the trust set up in his favor by the other settlor. In *Grace*, though the trusts were reciprocal under the standards enunciated, neither settlor ridded himself of all taxable powers over the trust he himself had created. Each trust could have been included in the gross estate of the actual settlor under section 811(d)(2) of the 1939 Code—section 2038

[25] In determining whether there is an interrelation, it is important to look only to objective factors. An examination of the settlor's subjective intent must be avoided or the courts will find themselves in the same dilemma that existed before *Grace*. A few appropriate factors (but by no means a complete listing) to be considered include: whether the terms, amounts, or times of creation of the trusts are nearly identical; whether the trusts were drafted by the same attorney; and whether both trusts were created as part of a single transaction.

[26] 395 U.S. at 325.

[27] *Id.* at 326 (dissenting opinion).

(a)(2) of the 1954 Internal Revenue Code. Under these sections the gross estate must include the value of all property transferred by the decedent over which he had at his death the power to alter, amend, revoke, or terminate the enjoyment, alone or in conjunction with any other person. Since Janet Grace as one of the trustees of the trust she had created (or Joseph Grace as one of the trustees of the trust he had created) could pay, with the approval of one of the other trustees, any of the principal of the trust to the main beneficiary, section 811(d)(2) (now section 2038(a)(2)) would apply to include this trust in her (or his) gross estate. Without invoking the reciprocal trusts doctrine, each trust could have been taxed to the estate of the actual settlor.[28] There being no tax evasion possible in this case, the use of the reciprocal trusts doctrine must be seen as inappropriate.

If the use of the reciprocal trusts doctrine was inappropriate in *Grace*, when exactly should it be invoked? It should be used only in those cases in which tax evasion would be made possible merely because crossed trusts were used. The original purpose of the reciprocal trusts doctrine was to make tax evasion in the crossed trusts situation impossible, and this purpose should still be given effect. Justice Douglas believed that the reciprocal trusts doctrine should not have been invoked in *Grace* because it may have been possible to tax the trusts to the respective estates under a statutory provision. If this reasoning is followed, it would mean that in any crossed trusts situation in which the settlors have retained taxable powers over their own established trusts, the reciprocal trusts doctrine is to be abandoned and the statute applied. However, Justice Douglas' reasoning should not be utilized so broadly, for to do so would open, in certain situations, the possibility for estate-tax avoidance.

[28] However, if the reciprocal trusts doctrine was not applied in this case, neither trust could have been included in Joseph Grace's gross estate. This exclusion would have occurred because Joseph Grace had only a non-taxable interest in the Janet trust (see note 17 *supra*) and because completion of the transfer of the Joseph trust before Joseph Grace's death left him with no taxable power over it.

Justice Douglas pointed out in his dissent that Janet Grace held at her death a reserved power to amend the trust that she had created and, therefore, that this trust should have been included in her gross estate under § 811(d)(2). *Id.* at 325-26 (1969). There was a similar provision in the Joseph trust, and if the transfer set up there had not been completed before Joseph Grace's death (if Janet Grace had not predeceased him), the Joseph trust could have been included in his gross estate for the same reasons. Thus, except for these factors, the trusts could have been included in his gross estate without invoking the reciprocal trusts doctrine. That they would not have been included is the result not of a tax-evasion plan, but of permissible methods of minimizing estate taxation that Congress has written into the federal estate tax laws.

There are many situations today in which settlors intentionally retain a taxable power over property that they have transferred but still set up their estates in such a way that estate taxes are avoided. Such schemes obviously defeat the purposes of the federal estate tax. In dealing with crossed trusts, the courts, therefore, should insure that the purposes of the estate tax are met by applying the reciprocal trusts doctrine rather than the statutory scheme when by such action estate-tax evasion can be thwarted. When taxation under the statutory scheme would adequately meet the policies behind the estate tax, this method should be followed, just as Justice Douglas has suggested, even though the reciprocal trusts doctrine could be invoked. But when following the statutory scheme would result in estate-tax avoidance, Justice Douglas' reasoning should be abandoned and taxation imposed under the reciprocal trusts doctrine.

It is important to realize that application of the above principles does not require a consideration of possible tax-avoidance motives of the settlor—a line of inquiry ruled out in *Grace* as a controlling factor in deciding when the reciprocal trusts doctrine should apply. Rather, adoption of these principles would be in accordance with the majority's admonition to look to the objective factors in the case. One of these factors should be whether there are tax-evasion *consequences* because the trusts are reciprocal. If there are no tax-evasion *consequences*, and taxation is possible under the statutory scheme, courts should not invoke the reciprocal trusts doctrine, but should allow taxation under the applicable statute.

J. DAVID JAMES

Federal Jurisdiction—Suits Against Federal Officers for Violation of the Fourth Amendment

When an individual is injured at the hands of federal officers conducting an unlawful search and seizure in violation of the fourth amendment, what redress does the law provide for injuries to his person and to his property? Clearly, the Federal Tort Claims Act[1] would not provide compensation for the plaintiff because immunity to the government from suit[2] is specifically granted by the Act for the very injuries that a plaintiff

[1] The Federal Tort Claims Act is scattered throughout 28 U.S.C. (1964).

[2] *Cf.* West v. Cabell, 153 U.S. 78 (1894), a case in which a United States marshal was sued on his bond. A violation of the fourth amendment's proscription that a warrant shall particularly describe the person to be seized was deemed a breach of the bond. *Id.* at 87.

suffers as the result of an unlawful search and seizure.[3] In order to avoid dismissal because of tort immunity, a plaintiff should not sue the United States under the Federal Tort Claims Act for the acts of one of its agents. Rather, he must forego the "deep-pocket" approach and sue the officer as a private individual.[4]

If the plaintiff elects to hold the federal officer privately accountable for the injuries that he has suffered, he may bring suit in a state court of appropriate jurisdiction and rely on the common-law causes of action for trespass and false imprisonment. However, a federal officer, naturally desirous of placing himself in a more favorable forum, can easily have the case removed to a federal district court.[5] The removal statute perhaps provides a federal officer with an unassailable haven. It allows the officer to remove not only when he is sued directly in a state court[6] but also when he is sued as a third-party defendant.[7] Because any one federal officer can cause the suit to be removed to a federal court, it is not necessary that other defendants join in the removal petition.[8] Upon removal of the case to a federal court, the parties to the suit will be governed by the Federal Rules of Civil Procedure although the federal court will adjudicate the plaintiff's claim according to state substantive law.

The primary reason that Congress authorized removal in suits against federal officers was fear of prejudicial application of local laws.[9] In *Tennessee v. Davis*,[10] Justice Strong reasoned that the operations of the

[3] Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1964), provides tort immunity for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

[4] Presumably, by suing the officer as a private individual rather than suing the United States, the plaintiff deprives the officer of the tort immunity provided by the Act. However, the officer can still plead that he was acting under color of federal law as an affirmative defense.

[5] 28 U.S.C. § 1442(a)(1) (1964), provides in part:

> A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States . . . (1) Any Officer of the United States . . . for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

[6] *E.g.*, Camero v. Kostos, 253 F. Supp. 331, 335 (D.N.J. 1966).

[7] Goldfarb v. Muller, 181 F. Supp. 41, 43 (D.N.J. 1959) (petition for removal denied for other reasons).

[8] Bradford v. Harding, 284 F.2d 307, 310 (2d Cir. 1960).

[9] Strayhorn, *The Immunity of Federal Officers From State Prosecutions*, 6 N.C.L. REV. 123, 124 (1927).

[10] 100 U.S. 257 (1879).

federal government might well grind to a halt if federal officers could be tried in state forums without the benefit of federal judicial intervention.[11] Chief Justice Taft believed that "[t]he constitutional validity of [the removal statute] rests on the right and power of the United States to secure the efficient execution of its laws and to prevent interference therewith . . . ."[12] It should be noted that the federal officer must demonstrate in his petition for removal that he was acting under "color of office."[13] However, one can expect a liberal application of the "color-of-office" test recently enunciated by the Supreme Court;[14] as a practical matter, a motion for remand will not be granted even in the most doubtful of cases.[15]

Given the likelihood that a federal court will ultimately adjudicate a suit brought against a federal officer, the issue naturally arises whether the plaintiff may bring suit directly in a federal court alleging that a violation of the fourth amendment creates a federal claim for relief. It is clear that if diversity of citizenship exists, suit can be brought under the appropriate jurisdictional statute,[16] but diversity seldom is present in the typical case. Obviously suit cannot be brought in a federal court on the bare allegation of a state claim. In such a situation, the federal court would dismiss for lack of a substantial federal question. Hence, it is necessary to allege some federal ground in order to generate subject-matter jurisdiction at the federal level.

In *Bell v. Hood*,[17] the United States Supreme Court dealt with the question of whether a federal court had jurisdiction to entertain a civil action alleging a violation of the fourth amendment. The Court held

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[11] *Id.* at 263.

[12] Maryland v. Soper, 270 U.S. 9, 32 (1926).

[13] *See* note 5 *supra.*

[14] In Willingham v. Morgan, 395 U.S. 402 (1969), the Court stated that:

> [T]he right of removal . . . is made absolute whenever a suit in a state court is for any act "under color" of federal office, regardless of whether the suit could originally have been brought in a federal court.
>
> The federal officer removal statute is not "narrow" or "limited." . . . At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law.

Id. at 406-07.

[15] *Compare* City of Norfolk v. McFarland, 143 F. Supp. 587, 589 (E.D. Va. 1956) *with* Tennessee v. Keenan, 13 F. Supp. 784, 791 (W.D. Tenn. 1936).

[16] 28 U.S.C. § 1332(a) (1964), provides in part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy . . . is between—(1) citizens of different States . . . ."

[17] 327 U.S. 678 (1946).

that there was jurisdiction under section 1331 of title 28 of the United States Code.[18] On remand the district court dismissed the suit for failure to state a claim even though it had jurisdiction to hear the case.[19] The district court reasoned that the purpose of the fourth amendment is to protect an individual from governmental action; that whenever a federal officer exceeds his authority, he no longer represents the government, but acts in a private capacity; that inasmuch as the fourth amendment does not apply to private conduct, the violation of the amendment by individuals acting in a private capacity could hardly form the basis of a claim for relief.[20]

In the recent case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[21] federal officers entered the home of Webster Bivens without a search warrant. After a thorough search, Bivens was arrested for an alleged narcotics-law violation. At the federal court building he was photographed, fingerprinted, interrogated, and detained against his will. However, the United States commissioner dismissed the charges against him. Bivens then brought suit in a federal district court against the individual officers alleging that his fourth amendment rights had been violated and that he was entitled to money-damages as a consequence of this unwarranted federal action. The district court dismissed both for lack of jurisdiction and for failure to state a claim upon which relief could be granted. On appeal the Court of Appeals for the Second Circuit held, on the basis of *Bell*, that there was jurisdiction to adjudicate under section 1331 of title 28 of the United States Code. However, the court affirmed the district court's determination that Bivens failed to state a claim.[22] The court held that in the absence of a statute permitting suit in a federal district court, there was no federally created claim for money-damages inherent in the fourth amendment.[23]

It is notable that the court in *Bivens* explicitly disagreed with the rationale of the district court in *Bell* concerning governmental action.[24] The court concluded that action by federal officers in violation of the fourth amendment amounts to governmental action by any definition of

[18] 28 U.S.C. § 1331(a) (1964), provides in part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States."

[19] Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947).

[20] *Id.* at 817.

[21] 409 F.2d 718 (2d Cir. 1969).

[22] *Id.* at 720.

[23] *Id.* at 719.

[24] *Id.* at 720-21.

the term. Although this conclusion might indicate a predilection on the part of the court in favor of allowing the suit to be maintained, it chose to abstain in light of Congressional silence on the subject. Arguably, the court was correct in its decision not to create a claim for relief in an area in which Congress had not acted. However, Congress *has* acted to impose criminal sanctions for abuse of the fourth amendment[25] and, more recently, has created a remedy specifying money-damages for unauthorized interception of private communications by electronic eavesdropping devices.[26] Congress should certainly continue this trend by passing legislation allowing an individual to bring suit against a federal officer for violation of the fourth amendment. Not only will firm guidelines thus be established, but uniformity in the law will be achieved.

In *Bivens*, the Second Circuit held that the case was not one in which federal common law should be applied.[27] Rather, the court felt that until Congress did act, the exclusionary rule, the possibility of injunctive relief, and resort to the state courts served to vindicate the plaintiff's interests. While it is beyond the scope of this discussion to propose a judicially-created claim for relief for violation of the fourth amendment by a federal officer, the court's rationale concerning vindication of the plaintiff's interests cannot withstand close scrutiny.

Although the exclusionary rule operates to prevent a person from being convicted due to the fruits of an unlawful search, it is only applicable in criminal prosecutions. It does not secure a person's property from future seizure, nor does it recompense one for damages occasioned by the distraint. Similarly, while injunctive relief may prevent future intrusions, it does not remedy the wrong that has been suffered due to the past actions of federal officers. The court seemingly disregarded that at the heart of a complaint alleging an infringement of fourth amendment rights is the probability that there has been an illegal seizure of the person; *i.e.*, the plaintiff has been the victim of a false imprisonment and has undergone the consequent humiliation and attendant mental suffering characteristic of such an experience. It is difficult to see how

[25] *E.g.*, 18 U.S.C. § 2234 (1964) (executing a search warrant with unnecesary force); 18 U.S.C. § 2235 (1964) (procuring the issuance of a search warrant with malice and without probable cause); 18 U.S.C. § 2236 (1964) (searching an occupied private building without a warrant).

[26] *See generally* Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. § 2520 (Supp. 1970).

[27] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 409 F.2d 718, 722 (2d Cir. 1969).

the exclusionary rule and the injunctive device would provide proper relief for a plaintiff so injured.

In the absence of diversity of citizenship and a federal statute giving plaintiffs a substantive claim for relief for violation of the fourth amendment, and in light of the courts' refusal to apply federal common law, is there still some method by which an individual can bring suit initially in a federal forum to litigate his state-created claim for relief? Perhaps one solution would be for Congress to pass a federal jurisdictional statute under the guise of "protective jurisdiction."[28] Such a statute would allow a plaintiff to bring suit directly in federal court whenever he wishes to litigate a state-created claim for relief against a federal officer. The statute would correct two present imbalances. On the one hand, it would serve to put a plaintiff on an equal footing with a federal officer who can claim the benefits of the present removal statute. On the other, it would serve to equalize the plaintiff in a non-diversity of citizenship situation with the plaintiff who can sue under the diversity statute.

Until Congress does act an alternative solution would be the utilization by the federal courts of the doctrine of pendent jurisdiction in the interest of judicial economy. Rather than perpetuating inefficiency by forcing the plaintiff to sue in a state court, only to have the federal officer remove to a federal court, the concept of pendent jurisdiction could have been used by the federal courts to retain the case and dispose of it on state grounds.[29]

It should be emphasized that, after *Bell*, the problem facing the plaintiff is not jurisdictional,[30] but basically one of asserting a claim upon which federal relief can be granted. Thus the concept of pendent jurisdiction becomes particularly important and can be used effectively. The basic theory underlying pendent jurisdiction was set forth by the

[28] In Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957), Justice Frankfurter said:

> Called 'protective jurisdiction,' the suggestion is that in any case for which Congress has the constitutional power to perscribe federal rules of decision and thus confer 'true' federal question jurisdiction, it may, without so doing, enact a jurisdictional statute, which will provide a federal forum for the application of state statute and decisional law.

Id. at 473 (dissenting opinion).

[29] It is interesting to note that the dissenter in Bell v. Hood, 327 U.S. 678 (1946), recognized this possibility. "For even though it be decided that petitioners have no right to damages under the Constitution, the district court will be required to pass upon the question whether the facts . . . give rise to a cause of action for trespass under state law." *Id.* at 686 (dissenting opinion).

[30] As previously noted, jurisdiction exists under 28 U.S.C. § 1331(a) (1964).

Supreme Court in *Hurn v. Oursler*:[31] "[A] case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question . . . "[32] could properly invoke federal jurisdiction as to both claims. The Court went on to say that "where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground* . . . ."[33] Taking this statement by itself, it is arguable that pendent jurisdiction might not be available in a case such as *Bivens* due to the rigid requirement that a substantial federal question is necessary to justify retention and disposition of the controversy on non-federal grounds.[34] However, the requirements of *Hurn* have been broadened by the Court's latest exposition of the doctrine. In *United Mine Workers of America v. Gibbs*,[35] the Court pointed out that the concept of pendent jurisdiction was grounded "in considerations of judicial economy, convenience and fairness to litigants . . . ."[36] The Court further stated:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws . . . , and Treaties . . ." and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court . . . . The state and federal claims must derive from a common nucleus of operative fact.[37]

One can only conclude after *Gibbs* that the standards for the legitimate exercise of pendent jurisdiction are not as rigid as those set forth in *Hurn*. Quite certainly the Court still requires that the federal claim have

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[31] 289 U.S. 238 (1933).
[32] *Id.* at 246.
[33] *Id.*
[34] The district court in Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947), thought that the concept of pendent jurisdiction could not be invoked to dispose of that case on state grounds because the concept had been applied only in equity cases. Further, the court held that it could assume jurisdiction over the state claim only if there was also a federal claim alleged. *Id.* at 820. This construction of the doctrine of pendent jurisdiction is clearly erroneous. *See generally* Mishkin, *The Federal "Question" In The District Courts*, 53 COLUM. L. REV. 157, 167 (1953). *See also* Wheeldin v. Wheeler, 373 U.S. 647, 657 (1963) (dissenting opinion).
[35] 383 U.S. 715 (1966).
[36] *Id.* at 726.
[37] *Id.* at 725 (footnotes omitted).

substance. However, more emphasis is placed on judicial economy and the overriding consideration of complete disposition of a case before a single tribunal. It may well be that the requirement of substance can be rather easily satisfied, as the Court indicated, by simply alleging a claim arising under the Constitution. The Court acknowledged that there may "be situations in which the state claim is so closely tied to the questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong."[38] The situation encountered in *Bivens* presents just such a state claim. The federal courts should utilize the concept of pendent jurisdiction to dispose of such a matter at the federal level in the interest of judicial efficiency and overall fairness.[39]

Pendent jurisdiction is not a panacea for every problem presented by a case such as *Bivens*. Admittedly there are some drawbacks to the doctrine that serve to limit its effectiveness. Primarily, it is a discretionary tool that a federal court can invoke as it sees fit.[40] Moreover, an adverse decision on the state claim by the court can have the preclusive effect of res judicata. Thus the plaintiff is required to gamble if he wishes to invoke the concept in a federal court. It is far more advisable initially to bring suit in a state court since one knows that the federal officer almost certainly will remove to federal court. The advantage of this procedure, from the plaintiff's standpoint, is that state law will definitely apply to the case. The disadvantage is found in the pro forma

[38] *Id.* at 727.

[39] Perhaps one of the reasons that a federal court is reluctant to act in the absence of congressional legislation authorizing a suit for a violation of the fourth amendment is the fear of having to establish federal common law. The basis of the decision in Erie R.R. v. Tomkins, 304 U.S. 64 (1938), was to alleviate the forum-shopping opportunity spawned by the existence of federal common law. However, in cases such as *Bivens*, this fear is unfounded because the tort law of trespass and false imprisonment varies little from jurisdiction to jurisdiction. *See generally*, W. PROSSER, LAW OF TORTS 54-89 (3d ed. 1964). In any event, it would seem that in pendent-jurisdiction cases, state law should be dispositive of state claims. Although the *Erie* doctrine is arguably limited to diversity actions, it has been suggested that the doctrine has been applied by federal courts to state claims in pendent-jurisdiction cases. *See* Note, *Problems of Parallel State And Federal Remedies*, 71 HARV. L. REV. 513, 517 (1958).

Another facet of pendent jurisdiction often overlooked is the necessity that the plaintiff plead his alternative state grounds for recovery. Presumably, this step was not taken in *Bivens*. However, had the federal court desired to invoke the doctrine, it could have allowed amendment of the pleadings in keeping with the liberality of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 15(a).

[40] *E.g.*, Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497, 501 (1st Cir. 1950).

legal maneuvers in which the plaintiff must indulge.[41] Congress should act in this situation to allow an individual to sue directly in a federal court. However, until Congress does act, a suit that is brought directly in a federal court should be retained by the court and disposed of on non-federal grounds under the concept of pendent jurisdiction.

JOSEPH E. ELROD III

Torts—Responsibility of Landlords for Criminal Acts of Third Persons

In *Ramsay v. Morrisette*[1] the District of Columbia Court of Appeals decided that it was appropriate to re-evaluate the scope of a landlord's duty to protect his tenants from the criminal acts of third persons. The plaintiff, a tenant in the defendant's apartment house, was assaulted by a man who broke into her apartment. She alleged that the landlord was negligent in not taking reasonable steps to protect his tenants in light of his knowledge of prior criminal activity. Specifically, she alleged that the defendant-landlord was negligent for his failure to supply a full time resident manager, to lock the front door, and to prevent intruders from sleeping in the halls of the apartment house.[2] The trial court granted the landlord's motion for summary judgment. The court of appeals reversed,

[41] Although no pattern has been discerned that will support a hard and fast rule, a caveat is appropriate at this point. It is notable that in cases in which removal was allowed, none was found in which the federal officer was found liable on the claim against him. It would be erroneous to conclude, however, that the "color-of-office" requirement necessary for removal under 28 U.S.C. § 1442 is sufficient to give a federal officer tort immunity, *i.e.*, to conclude that if the federal officer was acting under "color of office" sufficient to allow removal, then he was acting under "color of office" sufficient to allow tort immunity. While a federal officer can be acting under "color of office" sufficient to allow removal, it is recognized that his acts may be so in excess of his authority that he can be held individually liable for them. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), wherein the Court stated:

> [T]he action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.

Id. at 701-02.

See also Willingham v. Morgan, 395 U.S. 402 (1969), in which the Court said that "one of the most important reasons for removal is to have the validity of the defense of official immunity *tried* in a federal court." *Id.* at 407 (emphasis added).

[1] 252 A.2d 509 (D.C. App. 1969).

[2] *Id.* at 512.

holding that the tenant's allegations of negligence were sufficient to preclude summary judgment.[3]

In deciding whether a landlord should be held responsible for the criminal acts of third persons, the court could have approached the problem in various ways. There is case law holding that the landlord has a duty to use reasonable care in keeping safe for his tenants those areas over which he has retained control.[4] However, mere ownership of the premises does not make the landlord an insurer of tenants' safety.[5] Instead, the standard is one of due care in light of the circumstances. Liability based upon the principle of retained control has generally been confined to responsibility for *physical defects* in the premises.[6] The acts of third persons was the central issue in *Ramsay*, and, arguably, the principle of retained control should not be extended to include liability for the criminal acts of third persons:

> That liability predicated on the "dangerous conditions" theory should be limited to defects in the land becomes clear when one examines the considerations which gave rise to a duty in such situations: Where repair is necessary, it is only the landlord who is able to remedy such defects. . . . His control and ability to remedy are exclusive. Where the source of injury is not inherent in the land and where control is not exclusive—where the considerations involved are not those of land ownership but rather those of social relationships—the essential meaning of the principle of control is inapplicable.[7]

A second approach often used by the courts faced with a criminal act by a third person is an inquiry into "proximate causation." The traditional rule is that one is not bound to anticipate the criminal acts of others[8] unless he could have foreseen such a result as the consequence

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[3] *Id.*

[4] *E.g.*, Kay v. Cain, 154 F.2d 305 (D.C. Cir. 1946). *See generally* W. PROSSER, LAW OF TORTS 418 (3d ed. 1964) [hereinafter cited as PROSSER].

[5] *E.g.*, Elmar Gardens, Inc. v. Odell, 227 Md. 455, 177 A.2d 263 (1962).

[6] *E.g.*, Taneian v. Meghrigian, 15 N.J. 267, 104 A.2d 689 (1954); *see* PROSSER 418-21. *But cf.* Mayer v. Housing Authority, 84 N.J. Super. 411, 202 A.2d 439 (App. Div. 1964), in which the court relied upon the theory of retained control in finding a landlord liable for the act of a third person. In *Mayer* a child was hit by a rock while playing on the housing authority's playground. The court held that the jury could find the housing authority had been negligent in failing to provide adequate supervision for the playground and consequently was liable for the child's injury.

[7] 20 RUTGERS L. REV. 140, 143 (1965). The note criticizes the application of the retained-control theory in *Mayer*.

[8] *E.g.*, Andrews & Co. v. Kinsell, 114 Ga. 390, 40 S.E. 300 (1901); *see* PROSSER 173-79.

of his own actions.[9] For example, in *McCappin v. Park Capitol Corp.*,[10] in which the tenant sued the landlord to recover money stolen from the tenant's apartment, the court denied recovery on the grounds that the tenant-plaintiff had failed to establish proximate cause. The thief had apparently stolen a key to the tenant's apartment from the landlord. The court, in basing its decision on proximate cause, did not affirmatively decide whether the landlord had been negligent in the first instance.

Consideration of proximate cause before negligence serves only to obscure the real issue.[11] Legal responsibility or proximate cause deals with the issue of liability of a negligent actor and in proper analysis does not arise until the negligence of the actor has been established. More specifically, proximate cause analysis entails determination of the various policy considerations that go together to define the scope of the negligent defendant's responsibility for his actions. Courts seizing upon proximate cause as a means for disposing of cases similar to *Ramsay* assume without proper evaluation of the facts that the defendant has been negligent.

Few cases have dealt with whether a landlord owes a duty of protection to his tenants in a factual context closely analogous to that in *Ramsay*.[12] The majority of courts that have reached the issue have found no duty on the part of the landlord.[13] One of the major reasons behind this conclusion is the long prevailing argument that the tenant can have in his lease provisions for protection by the landlord against third persons. In *DeKoven v. 780 West End Realty*,[14] for example, the court held that the landlord was under no duty to provide a doorman for his apartment building in the absence of a contractual obligation. The

[9] *See* PROSSER 178.

[10] 42 N.J. Super. 169, 126 A.2d 51 (App. Div. 1956).

[11] *See* Mosley v. Arden Farms Co., 26 Cal. 2d 213, 220, 157 P.2d 372, 376 (1945) (Traynor, J., concurring); Green, *Merlov v. Public Service Co.—A Study in Proximate Cause*, 37 ILL. L. REV. 429 (1943); Note, 24 MINN. L. REV. 666 (1940).

[12] The court in *Ramsay* cited Kendall v. Gore Properties, Inc., 236 F.2d 673 (D.C. Cir. 1956), as supporting a finding of a duty to protect. The case involved a landlord's employee with a criminal record killing a tenant. The court in *Kendall* held that the landlord was negligent in not checking the employee's past criminal record. In reaching its decision the court stated that the tenant, under her lease, paid for both shelter and protection. However, this case is clearly distinguishable since it deals with the crime of an employee.

[13] Applebaum v. Kidwell, 12 F.2d 846 (D.C. Cir. 1926); De Foe v. Sloane, 99 A.2d 639 (D.C. App. 1953); Goldberg v. Housing Authority, 70 N.J. Super. 245, 175 A.2d 433 (App. Div.), *rev'd*, 38 N.J. 578, 186 A.2d 291 (1962). *But see* Bass v. City of New York, 38 U.S.L.W. 2345 (N.Y. Sup. Ct., Dec. 10, 1969).

[14] 48 Misc. 2d 951, 266 N.Y.S.2d 463 (1965).

landlord had brought an action against various tenants for nonpayment of rent, and the defense offered was that various criminal activities by third persons had been committed within the apartment building because the landlord negligently failed to provide a doorman. The court stated:

> [I]ncidents of crime, perpetrated by third persons within the premises, impose no obligation upon the landlord to provide doorman service, especially where there has been no contractual obligation or obligation imposed by statute to provide the same.[15]

Ramsay, at least implicitly, rejected the theory that if the tenant desires protection from the landlord, he can provide for it in the lease. This theory is clearly unrealistic in the modern world. The landlord is almost always in a superior bargaining position vis-à-vis the tenant. Because the demand for adequate housing continues to rapidly fall farther behind the available supply, it is clear that the tenant will probably never be able to insist on a provision in his lease requiring protection by the landlord. Furthermore, the landlord is in a better position to take protective measures and to absorb their cost through redistributing it. Obviously, judges do not have to close their eyes to the realities of present-day life. They can and probably should take judicial notice of the overall shortage of available housing and the inequality of bargaining power between landlord and tenant.

The fact that the prospective tenant has no power over the lease offered him supports the position taken in *Ramsay*—that it is now time to impose a duty of reasonable care on the landlord to protect his tenant—in short, to make him liable for negligence. Judicial determination that one party

[15] *Id.* at —, 266 N.Y.S.2d at 466. There are several cases that implicity rely upon the view that any duty to protect must be imposed by the lease or not at all. This consideration seemingly underlies the reasoning that the landlord has not committed a wrongful act by his failure to take reasonable steps to protect his tenants. Applebaum v. Kidwell, 12 F.2d 846 (D.C. Cir. 1926); De Foe v. Sloane, 99 A.2d 639 (D.C. App. 1953). The landlords in both cases were held not liable for criminal activity despite the fact that they had inadvertently provided the opportunity for the crime.

In *DeKoven*, *Applebaum*, and *De Foe* the landlords did not have notice of prior criminal activity; thus the cases can arguably be distinguished from the situation in *Ramsay* where the landlord-defendant had notice. However, the question of notice may be a distinction without a difference. *See* Goldberg v. Housing Authority, 70 N.J. Super. 245, 175 A.2d 433, *rev'd*, 38 N.J. 578, 186 A.2d 291 (1962), in which notice of prior criminal activity was disregarded by the court. *But see* Mayer v. Housing Authority, 84 N.J. Super. 411, 202 A.2d 439 (App. Div. 1964), in which the court apparently found notice to be a significant factor in imposing liability on the landlord.

owes a duty of protection to another is certainly not novel. Over time the courts have found various social relationships to be of such a nature that public policy justifies the imposition of a duty to protect. These relationships include: carrier and passenger, innkeeper and guest, business proprietor and invitee, school district and pupil, and employer and employee.[16]

The real issue in *Ramsey* and similar cases is whether the landlord breached the duty of reasonable care. The ultimate decision in the determination of negligence is reached by balancing the burden to be imposed on the landlord with the extent of the risk to the tenant.[17] Applying such an analysis, most courts will either direct a verdict for the landlord or will submit the question to the jury for determination. Submission to the jury raises the question of its competence to pass on the various policy questions involved in such cases. Therefore, the jury should be fully informed of those questions either by court instruction or by counsel in argument to the jury.

In considering the application of the formula of due care, it is worth looking to some of the more obvious aspects of a landlord's actions or non-actions that may well be found to fall short of the standard of reasonable care. It is such narrowly defined behavior to which the court and jury must look in determining whether the landlord has in fact exercised due care.

For example, the failure of the landlord to supply adequate locks for apartment doors should be sufficient to show a lack of reasonable care. Provision of adequate lighting, both inside and outside the building, may also be considered a minimum burden for the landlord. Further, a failure to provide a manager (perhaps a resident manager) may also be a failure to use due care in protecting tenants. A manager would have the authority to supervise common areas and prevent the situation that existed in *Ramsay*.

In determining the extent of care that the landlord must exercise to fulfill the duty to protect, it also seems reasonable to consider the location of the apartment house. Landlords in neighborhoods with past histories of criminal activity should be held to a stricter standard of protection than are those in areas in which there has been little or no prior criminal activity.

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[16] PROSSER 177.
[17] *Id.* 152.

It is obvious that any substantial requirement of protection will result in a proportionate increase in rents charged tenants. In other words, the burden of any duty likely will fall on those who can least afford it. This adverse economic consequence undoubtedly will result primarily from increased liability insurance costs and the costs of protective measures.

Another factor that must be considered in weighing the economic consequences of imposing a duty of protection on the landlord is the fact that some areas are subject to rent control. In those areas a landlord will not be able to increase his rents to cover the increase in costs by spreading the risk among all tenants. To conpensate for the increased costs, the landlord may reduce maintenance or other essential services. Moreover, all other things being equal, the decreasing profit margins will undoubtedly lead to a decrease in the supply of housing, clearly an undesirable result.[18]

The importance of the economic ramifications from the imposition of a duty on the landlord to protect his tenants against criminal actions of third persons militates against permitting the jury to decide the question of duty. The jury is simply not prepared to receive and comprehend the economic factors that should be considered thoroughly. The courts are obviously more qualified. The question arises, however, whether even the courts are sufficiently qualified; for it may well be that the resolution of this problem requires the type of intensive inquiry that only the legislatures can provide. The legislature of a state can provide a uniform policy that its courts cannot. If the proper solution of the problem involves governmental expenditures, the legislature is clearly the proper body to consider such measures.

While the actual end-solution to the problem of crime in the cities, if there is one, will depend upon legislative processes, it is not unreasonable for the courts to require a landlord to take some protective measures on behalf of his tenants, especially if he has notice of prior criminal activity on the premises. At the least, tort law should require landlords to provide some forms of minimum protection for individual tenants.

MICHAEL R. BECKER

[18] *See* P. SAMUELSON, ECONOMICS 385-89 (6th ed. 1964).