UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 47 | Number 2 Article 5

2-1-1969

Notes

North Carolina Law Review

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation

North Carolina Law Review, *Notes*, 47 N.C. L. Rev. 393 (1969).
Available at: http://scholarship.law.unc.edu/nclr/vol47/iss2/5

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

NOTES

Civil Procedure—Determining the Adequacy of Representation in a Class Action

According to the Court of Appeals for the Second Circuit, it is possible for a single representative to represent adequately a class of between three and four million members. The court in *Eisen v. Carlisle & Jacquelin*[1] held that a determination of the adequacy of representation in a class action brought under Rule 23 of the Federal Rules of Civil Procedure[2] should not hinge on quantitative elements.[3]

Plaintiff, an odd-lot[4] investor on the New York Stock Exchange, brought a class action on behalf of himself and about 3.7 million other odd-lot investors against odd-lot dealers Carlisle & Jacquelin and DeCoppet & Doremus,[5] and against the Exchange. Alleging that the two firms conspired together to monopolize odd-lot trading and to fix the odd-lot differential at an excessive rate in violation of the Sherman Anti-Trust Act,[6] and that the Exchange failed its statutory duty under the Securities Exchange Act of 1934[7] to adopt rules protecting odd-lot investors, he sought treble damages and injunctive relief. Plaintiff was the sole representative of the class in the action; his damages were estimated at seventy dollars.[8]

The trial court dismissed the action as to the class, holding that plaintiff, as "sole representative" with only a "miniscule" interest, could

[1] 391 F.2d 555 (2d Cir. 1968) (Medina, J.).

[2] FED. R. CIV. P. 23. For an extensive treatment of the law regarding class actions, see 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 561-72 (Rules ed. 1961, Supp. 1967) [hereinafter cited as BARRON & HOLTZOFF]; 3A J. MOORE, FEDERAL PRACTICE ¶¶ 23.01 to .24 (2d ed. 1968) [hereinafter cited as MOORE].

[3] 391 F.2d at 563.

[4] The normal unit of trade on the exchange, usually 100 shares, is called a "round-lot"; the term "odd-lot" refers to transactions involving fewer than the full round-lot unit. Odd-lots are purchased through odd-lot dealers who charge a per-share fee, called a differential, for their services. See C. ROSENBERG, STOCK MARKET PRIMER 22-23 (1962).

[5] The two defendant firms handle about 99 percent of the odd-lot business on the New York Stock Exchange. 391 F.2d at 559. For information regarding odd-lot trading practices on which this suit is based, see SEC, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. Doc. No. 95, PT. 2, 88th Cong., 1st Sess. 171-202 (1963).

[6] 15 U.S.C. §§ 1, 2 (1964).

[7] 15 U.S.C. §§ 78(f)(b), 78(f)(d) & 78(s)(a) (1964).

[8] 391 F.2d at 564 n.8.

not represent it fairly and adequately as required by the rule.[9] The Court of Appeals for the Second Circuit reversed,[10] holding that "reliance on quantitative elements to determine adequacy of representation, as was done by the District Court, is unwarranted."[11] It noted that newly amended Rule 23 had received "somewhat less than an enthusiastic reception in the District Courts,"[12] and called for a more liberal interpretation:

> If we have to rely on one litigant to assert the rights of a large class then rely we must. The dismissal of the suit out of hand for lack of proper representation in a case such as this is too summary a procedure and cannot be reconciled with the letter and spirit of the new rule.[13]

The court observed that if Eisen were not allowed to bring the suit as a class action, it was unlikely the claim could be litigated at all. It reasoned that no odd-lot investor "would have sustained sufficient damages to warrant, as a practical matter, individual prosecution of his claim."[14] Defendants argued that a successful antitrust plaintiff could collect reasonable attorneys fees despite his small damages, and thus could individually seek a recovery. But the court regarded the possibility of a significant award for counsel as too remote to make feasible this method of pursuing the claim.[15]

---

[9] Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966). While holding that "[t]his alone is enough for this court to make a determination that this action cannot be maintained as a class action," the court gave other reasons: plaintiff could not give the required notice because of financial prohibitions; questions common to the class did not predominate over questions affecting individual members; fair and proper management of the suit likely would be impossible. *Id.* at 150.

[10] The Second Circuit Court of Appeals retained jurisdiction and remanded the case to the district court for an evidentiary hearing "on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper." 391 F.2d at 570.

[11] 391 F.2d at 563.

[12] For an example of "less than an enthusiastic reception" to the new rule, see School Dist. of Philadelphia v. Harper & Row Publ., Inc., 267 F. Supp. 1001 (1967), where the court's disenchantment with the rule is readily apparent:

> Such a radical extension by [*sic*] this Court's jurisdiction by the mere inaction of a non-appearing, non-resident citizen is, in our view, unprecedented. . . . We have some doubt, too, of the propriety of a rule which extends the binding, substantive effect of a judgment to absent, but 'described,' class members as well as to 'identified' class members.

Id. at 1005.

[13] 391 F.2d at 563.

[14] *Id.* at 566.

[15] *Id.* In a prior ruling that the trial court's dismissal of the class action in *Eisen* was an appealable order, the court of appeals had held: "We can safely

A small claimant such as Eisen is therefore limited, for all practical purposes, to asserting his rights only through a class action. An analysis of the typical case of this kind indicates that reliance on quantitative standards for determining the adequacy of representation would prohibit his use of this device also, thus entirely precluding him from litigating his claim. In the small claimant situation, the wrongful conduct usually causes minor individual damages to a large number of people. Since each individual's interest is small, there is normally little enthusiasm for attempting to vindicate the claims through a class action or otherwise. Should some claimants attempt to bring such an action, they would likely be few in number[16] and the amount of their interest would be relatively insignificant.

There is a need then to provide the small claimant with some remedy.[17] One of the avowed functions of the class action device is to "provide small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation."[18] Reliance on quantitative factors, however, precludes the use of the class action by the small claimant thereby defeating a primary purpose of the rule.

The general question of adequacy of representation in a class action has assumed particular importance since the adoption of new Rule 23 in 1966. *Eisen* qualified for class litigation under subsection (b)(3) of the new rule,[19] which corresponds to the former "spurious" class action.[20]

---

assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen." Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 120 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). The court in the present action regarded this earlier finding that a class action was Eisen's only remedy as "law of this case" and binding upon it. 391 F.2d at 567. For an argument similar to the one made by defendants here—and a similar result—see Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968).

[16] 391 F.2d at 563.

[17] *See* Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *see generally* Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684 (1941).

[18] 391 F.2d at 560. See also the comments in *Advisory Committee's Note*, 39 F.R.D. at 104 (1966).

[19] To bring a class action under new Rule 23 all the factors in section (a) of the rule must be present:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition, at least one of the prerequisites listed in section (b) must be met. Subsection (b)(3) arises when "the court finds that the questions of law or fact common to the members of the class predominate over

Adequacy of representation was not considered crucial under the old rule, since it was generally held that the spurious action was merely a permissive joinder device and only those actually before the court were bound by the judgment.[21] However, under the amended Rule 23, all members of the (b)(3) class are bound unless they request exclusion.[22] Further, due process requires that absentee class members not be bound unless they were adequately represented in the action.[23] Thus, under the new rule adequate representation of the class is required in all actions, not only by the rule's own terms,[24] but also by this constitutional consideration.

Courts in the past have looked at various factors to determine whether or not representation of a class was adequate.[25] These included: (1) whether the interests of the representatives conflicted with the interests of the class;[26] (2) whether the likelihood of collusion was eliminated so far as possible;[27] (3) whether the number of representatives was sufficient as compared to the numerical size of the class;[28] and (4) whether the representatives' self-interest in the suit was substantial.[29]

There are two distinct quantitative factors that can be singled out from these traditional standards: (1) the number of representatives as compared to the numerical size of the class, and (2) the amount of the representatives' self-interest in the suit. In *Eisen* neither the district court nor the court of appeals made any clear differentiation between these two concepts, although each court apparently took both into account.[30]

---

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." *Id.* at 23(b)(3).

[20] Under the former rule, the "spurious" category arose "when the character of the right sought to be enforced for or against the class is . . . 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), 28 U.S.C. App. (1964). Compare current FED. R. CIV. P. 23(b)(3).

[21] *See, e.g.,* Oppenheimer v. F.J. Young & Co., 144 F.2d 387 (2d Cir. 1944).

[22] FED. R. CIV. P. 23(c)(2)(B).

[23] *See* Hansberry v. Lee, 311 U.S. 32 (1940).

[24] FED. R. CIV. P. 23(a)(4).

[25] *See generally* 2 BARRON & HOLTZOFF § 567; 3A MOORE ¶ 23.07.

[26] *See, e.g.,* Hansberry v. Lee, 311 U.S. 32 (1940); Anderson v. Moorer, 372 F.2d 747 (5th Cir. 1967).

[27] *See, e.g.,* P.W. Husserl, Inc. v. Simplicity Pattern Co., 25 F.R.D. 264 (S.D.N.Y. 1960).

[28] *See, e.g.,* Pelelas v. Caterpillar Trac. Co., 113 F.2d 629 (7th Cir.), *cert. denied,* 311 U.S. 700 (1940).

[29] *See* Aalco Laundry & Cleaning Co. v. Laundry Linen & Towel Chauffeurs & Helpers Union, 115 S.W.2d 89 (Mo. App. 1938).

[30] The district court's language shows the two concepts intertwined:

Eisen's inadequacy as a representative of the asserted class is further under-

These quantitative standards are not ends in themselves, but logically may be viewed as objective indices that the more fundamental requirements of adequate representation are present. The number of representatives as compared to the size of the class provides some evidence that diverse interests among the class members are represented before the court; the amount of the representatives' self-interest can reasonably be viewed as a factor in guarding against collusion among the litigants.

Elimination of the use of quantitative factors will probably make more difficult the task of determining adequate representation, but it should not be allowed to detract from the fundamental criteria of such representation. Indeed, although the court of appeals discarded the quantitative tests, it retained the underlying elements they represented. It made clear that a determination should still be made as to whether plaintiff's claim is typical and his interests not antagonistic to those of the remainder of the class, and whether the likelihood of collusion has been eliminated so far as possible.[31] In addition, it suggested "that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation."[32] This consideration appears to be in keeping with the court's practical approach to the problem: it was the attorney, and not the plaintiff, who would in fact represent the interests of the class in court. It has been suggested that problems will arise from the use of the qualifications of the attorney as a test of adequate representation, since judges will be hesitant to state their belief that an attorney is not qualified to conduct the litigation.[33] The trial court, rather than

> scored by the obvious fact that his interest, as sole plaintiff, is miniscule compared to the interests of the class as a whole. The number of plaintiffs bringing a class action in relation to the numerical size of the class, of course, should not be the sole basis for determining the existence or nonexistence of a class action; however, it can be a valid and important factor in assessing plaintiff's ability to adequately represent an entire class. . . . [I]t is impossible to assume that he alone with a comparatively miniscule and limited interest in odd-lot transactions can represent that large a class, many of whose members necessarily have larger and different interests.

Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 150-51 (S.D.N.Y. 1966). The court of appeals, in condemning the use of quantitative factors, also failed to distinguish the two concepts involved, at one point disapproving of "[l]anguage to the effect that a small number of claimants cannot adequately represent an entire class . . ." and immediately thereafter noting that "one of the primary functions of the class suit is to provide 'a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group.'" 391 F.2d at 563. In the first instance, the court is talking about the number of representatives, and in the latter, apparently the amount of the representatives' interest is the factor considered.

[31] 391 F.2d at 562-63.

[32] *Id.* at 562.

[33] *See* Comment, *Adequate Representation, Notice and the New Class Action*

looking at the attorney's ability, should look instead at his economic qualifications—"the ability of the attorney to spend a sufficient amount of time and money to discover all the necessary facts, to line up expert witnesses and to handle the other demands imposed by the proper conduct of complex litigation."[34] The court in *Eisen* was perhaps alluding to such factors by its assertion that the attorney should be "generally able to conduct the proposed litigation."[35]

An added source of protection for the rights of absentees, as the court noted, is found in Rule 23 itself, which gives the trial court extensive and flexible control over the class action.[36] Thus, judicial

Rule: Effectuating Remedies Provided by the Securities Laws, 116 U. PA. L. REV. 889 (1968).

[34] *Id.* at 904.

[35] 391 F.2d at 562. *But see* Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968), a decision that follows *Eisen*. There the court apparently considered the attorney's abilities rather than his economic qualifications:

> It is to be noted though that chief counsel for the Third Division plaintiffs is an experienced antitrust lawyer, having only recently left the Antitrust Division of the Department of Justice. He represents the second largest city in Minnesota, a large school district, two significant housing authorities, and now the Metropolitan Airport Commission. It is apparent that his representation will be fair, adequate and prosecuted with vigor.

Id. at 567-68. Here is the way the court in Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), handled the problem:

> Until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession. In point of fact, irrefutable evidence of his competence and fervor is reflected in the papers and arguments thus far submitted by the plaintiff's attorney. He has demonstrated that he is both willing and competent to undertake the responsibilities which this litigation entails.

Id. at 496.

[36] 391 F.2d at 564. See FED. R. CIV. P. 23(c), (d), (e). The court's order allowing the action to be maintained as a class action "may be conditional, and may be altered or amended before the decision on the merits." FED. R. CIV. P. 23(c). The court may require

> for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action. . . .

FED. R. CIV. P. 23(d)(2). The court may "impose conditions on the representative parties or on intervenors. . . ." FED. R. CIV. P. 23(d)(3). Court approval of any settlement or compromise is required. FED. R. CIV. P. 23(e).

Still another way that the interests of absentees are protected in class actions is through the requirement of initial notice of the action to absentees. New Rule 23 requires a particular standard of notice for actions brought under subsection (b)(3).

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. . . .

supervision as well as representation in advocacy is provided to safeguard the interests of the class.[37] However, the elimination of the use of quantitative factors, by taking away easily applied criteria, may tend to cause the courts to rely too heavily on these powers given them under the rule. The consequent danger is that they may fail sufficiently to assess the representatives' qualifications, thereby not only undercutting the function of the class representatives, but also imperiling the court's own role as impartial arbiter of the litigation.

This tendency already is apparent in recent cases brought under new Rule 23 (both before and after *Eisen*), where despite a wide divergence of views as to what standards the representative must meet, emphasis is uniformly placed on the power of the court to protect absentees. In *Dolgow v. Anderson*,[38] it was held that plaintiff must share the interests of the class and must be willing to "put up a real fight"[39] to qualify as representative, while the court noted it had "a broad range of discretion to assure adequacy of representation according to the individual circumstances of every case."[40] In *Siegel v. Chicken Delight, Inc.*,[41] adequacy of representation was seen to depend on the size of the class and the nature of the action, and the uniqueness of the relationship between the representative and the class. Reliance on overly stringent standards was not deemed necessary, "for it underestimates the ability of a court to safeguard the interests of all parties."[42] In an action[43] brought by the former owner of two of some 4,700 shares of stock which allegedly were fraudulently purchased from about 1,000 minority stockholders, the court

---

FED. R. CIV. P. 23(c)(2). The trial court in *Eisen* interpreted the standard to mean, under the facts there, that published notice would not be acceptable. Since other forms of notice would be financially prohibitive, the district court ruled that the suit could not continue as a class action. The court of appeals, however, suggested that published notice might be acceptable, "particularly where requirement of a different form of notice would, in effect, prevent potentially meritorious claims from being litigated." *Id.* at 570. A thorough analysis of the notice problem in *Eisen* is beyond the scope of this note; it is discussed in Comment, note 33 *supra*. *See also* Comment, *Spurious Class Actions Based Upon Securities Frauds Under the Revised Federal Rules of Civil Procedure*, 35 FORD. L. REV. 295, 309-11 (1966), where it is suggested that adoption of the trial court's view in *Eisen* of the notice requirement would make large class actions impossible; and *see* Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629 (1965).

[37] *See generally*, Z. CHAFEE, SOME PROBLEMS OF EQUITY 199-295 (1950).

[38] 43 F.R.D. 472 (E.D.N.Y. 1968).

[39] *Id.* at 494.

[40] *Id.* at 496.

[41] 271 F. Supp. 722 (N.D. Cal. 1967).

[42] *Id.* at 727.

[43] Zeigler v. Gibralter Life Ins. Co. of America, 43 F.R.D. 169 (D.S.D. 1967).

questioned plaintiff's ability to represent the class on the basis of either of two factors, "be it the number of plaintiffs in relation to the number of claimants or the interest of the plaintiff in relation to the interest of the group. . . ."[44] The court allowed plaintiff to represent the class, however, because "if, at a later date, sufficient doubt is raised as to the adequacy of representation, this court is empowered to act accordingly."[45] In *Kronenberg v. Hotel Governor Clinton, Inc.*,[46] the court allowed plaintiffs to represent the class: "At this juncture, it cannot be said that the named plaintiffs do not adequately represent the class. In any event, the power remains with the court to insure the adequate representation of the class."[47]

The reliance on the court's power to protect absentees is apparent in these cases, as is the lack of clearly defined standards to determine the plaintiff's ability to adequately represent the class. With the discarding of the use of quantitative factors, it will now be necessary for the court to analyze closely at the outset of the action the scope and the interests of the class, and the interests and abilities of the representatives, so that the two may be compared and a reasonable assessment made of the representatives' ability to protect the absentee class members. Such a determination by the court of the representatives' qualifications should be considered essential in all class actions. In this way greater reliance can be placed on the representatives to protect the class during the course of the litigation; the court will be left with a lesser role in this area, thereby minimizing any jeopardization of its traditional impartiality.

Eisen presents an especially difficult situation for use of the class action device in view of the obvious problems in managing and administering so large a class.[48] Nevertheless, the decision should open the way for greater utilization of Rule 23 where there are numerous class members, all with small claims. And if a comprehensive evaluation of the class representatives' qualifications to represent the class is made by the court, there should be no lessening in the protection afforded absentees.

JOHN M. MURCHISON, JR.

---

[44] *Id.* at 174.
[45] *Id.*
[46] 41 F.R.D. 42 (S.D.N.Y. 1966).
[47] *Id.* at 46.
[48] The problems of administrating such an action as the *Eisen* case led dissenting Chief Judge Lumbard to describe it as a "Frankenstein monster posing as a class action." 391 F.2d at 572.

Civil Procedure—Discovery of Expert Information

A party's effective preparation for trial may depend on his ability to discover facts and opinions from his adversary's experts. Although modern discovery in many respects is broad, discovery of experts' information often tends to be quite narrow. A recent case, *Security Industries, Inc. v. Fickus*,[1] rejected various arguments for protecting against such pre-trial disclosure. An analysis of the decision points up recent trends and approaches taken to the problem.

Plaintiff was injured and two family members were asphyxiated while using a camper unit that contained gas utilities manufactured by four separate companies. Upon suit for the resulting deaths and injuries, one firm moved under Federal Rule of Civil Procedure 34 for production of all parties' written reports concerning "any examination, testing, operation, or observation"[2] of any part of the camper unit, including the gas utility oven. The gas oven's manufacturer filed opposition, and the superior court denied the discovery motion. In reversing this ruling, the Alaska Supreme Court considered the three grounds most frequently advanced in advocating protection from discovery of expert information: the work-product doctrine, the attorney-client privilege, and the asserted unfairness of disclosure. The court rejected the applicability of the work-product rule, stating that discovery of an expert's opinions and conclusions does not violate the lawyer-privacy rationale of the *Hickman v. Taylor* rule.[3] In holding that no attorney-client privilege was being violated by the discovery, the court declared that "communication of relevant facts by an expert to an attorney should not place such facts beyond the ambit of discovery procedures."[4] Assertions of unfairness were dismissed as subordinate to the attainment of discovery objectives such as "elimination of surprise at trial, location and preservation of evidence, and the encouragement of settlement or expeditious trial of litigation."[5] The discovery rules invest in trial judges sufficient discretion and power, the court submitted, to minimize any actual unfairness.[6]

Other courts, both state and federal, have frequently been confronted

---

[1] 439 P.2d 172 (Alas. 1968).
[2] 439 P.2d at 173 (Alas. 1968).
[3] 329 U.S. 495 (1947).
[4] 439 P.2d at 177-78.
[5] *Id.* at 178. The court quoted from a previous decision, Miller v. Harpster, 392 P.2d 21 (Alas. 1964), in the disposition of this point.
[6] 439 P.2d at 178.

with the work-product rule, the attorney-client privilege, and considerations of unfairness as grounds for extending protection from discovery of expert information; widely disparate conclusions have been reached.

In considering the work-product contention, some courts have held expert information to be within the protection of the rule.[7] Of over thirty states that have substantially adopted the federal discovery system,[8] fifteen[9] have adopted either by rule or decision the "Hickman Amendment."[10] These provisions extend work-product protection to written trial preparations of attorneys, agents, and experts unless discovery is justified by a showing of unfair prejudice, undue hardship, or injustice. Four states[11] omit any provision for a showing that allows disclosure

---

[7] United Air Lines, Inc. v. United States, 26 F.R.D. 213 (D. Del. 1960); United States v. Certain Parcels of Land, 25 F.R.D. 192 (N.D. Cal. 1959); White Pine Copper Co. v. Continental Ins. Co., 166 F. Supp. 148 (W.D. Mich. 1958); Empire Box Corp. v. Illinois Cereal Mills, 47 Del. 283, 90 A.2d 672 (Super. Ct. 1952); Ford Motor Co. v. Havee, 123 So. 2d 572 (Fla. Dist. Ct. App. 1960). *See* Berkley v. Clark Equip. Co., 26 F.R.D. 153 (E.D.N.Y. 1960); Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954).

[8] ALAS. R. CIV. P. 26-37; ARIZ. R. CIV. P. 26-37; ARK. STAT. ANN. §§ 28-348 to -361 (1962); CAL. CODE CIV. PROC. §§ 2019-34 (West 1955); COLO. R. CIV. P. 26-37; DEL. CH. R. 26-37 and DEL. SUPER. CT. (CIV.) R. 26-37; FLA. R. CIV. P. §§ 1.280-.400 (1967); GA. CODE ANN. tit. 81A, §§ 126-37 (Supp. 1967); HAWAII R. CIV. P. 26-37; IDAHO R. CIV. P. 26-37; ILL. ANN. STAT. ch. 110A, §§ 201-19 (1967); IOWA R. CIV. P. 121-34, 140-44 (Supp. 1968); KY. R. CIV. P. 26-37; LA. CODE CIV. PROC. ANN. tit. 3, art. 1421-1515 (1960); ME. R. CIV. P. 26-37; MD. R.P. 400-22; MINN. R. CIV. P. 26-37; MO. R. CIV. P. 56-61; MONT. REV. CODE ANN. ch. 2701, Rules 26-37 (1960); NEB. REV. STAT. §§ 25-1267.01 - .44 (1956); NEV. R. CIV. P. 26-37; N.J. SUPER. CT. CIV. PRAC. R. 4:16-:27; N.M. STAT. ANN. §§ 21-1-1(26)- (37) (1953); N.D.R. CIV. P. 26-37; ORE. REV. STAT. §§ 41.615, 41.625, 45.181-.250 (1953); PA. R. CIV. P. 4001-20; S.D. CODE §§ 36.0501-.0532, 36.0601-.0607 (1939); TEX R. CIV. P. 167-70, 186a, 186b, 187-88; UTAH R. CIV. P. 26-37; VT. STAT. ANN. tit. 12, §§ 1231-67 (1959), *as amended,* (Supp. 1968); WASH. R. PLEADING, PRAC. & PROC. 26-37; W. VA. R. CIV. P. 26-37; WYO. R. CIV. P. 26-37. North Carolina's version, N.C. GEN. STAT. § 1A-1, Rules 26-37, becomes effective July 1, 1969.

[9] KY. R. CIV. P. 30.02, 37.02; IDAHO R. CIV. P. 26(b); IOWA R. CIV. P. 141(a); LA. CODE CIV. PROC. ANN. tit. 3, art. 1452 (1960); ME. R. CIV. P. 26(b); MINN. R. CIV. P. 26.02; MO. R. CIV. P. 57.01(b); NEV. R. CIV. P. 30(b); N.J. SUPER. CT. CIV. PRAC. R. 4:16-2; PA. R. CIV. P. 4011(d); TEX. R. CIV. P. 167, 186a; UTAH R. CIV. P. 30(b); WASH. R. PLEADING, PRAC. & PROC. 26(b); W. VA. R. CIV. P. 26(b), 34(b). MD. R.P. 410d is another such provision, but Rule 410c expressly subjects experts' reports to discovery. Illinois has superseded its "Hickman Amendment," ILL. ANN. STAT. ch. 110, § 101.19-5 (1956), with a provision for more liberal discovery: ILL. ANN. STAT. ch. 110A, § 201(b)2 (1967).

[10] ADVISORY COMM. ON RULES FOR CIVIL PROC., REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROC. FOR THE DISTRICT COURTS OF THE UNITED STATES 39-40 (1946). The United States Supreme Court, in deciding *Hickman,* implicitly rejected the proposed amendment, showing a preference for resolution by decision rather than by rule.

[11] MINN. R. CIV. P. 26.02; MO. R. CIV. P. 57.01(b); PA. R. CIV. P. 4011(d); TEX. R. CIV. P. 167, 186a.

and thereby absolutely preclude discovery of an expert's written trial preparation materials.[12] Several of the courts which extend work-product protection to expert information distinguish, however, between expert "opinion" and "fact," barring discovery of the former while permitting disclosure of the latter.[13] Other courts, entertaining the ultimate ascertainment of the truth and the correct adjudication as their primary concerns, have refused to apply work-product protection to expert information.[14]

Since hired experts' reports are usually made to aid attorneys in preparing for trial, these reports are ordinarily protected from discovery by the attorney-client privilege, unless a showing of special justification is made.[15] A distinction between communications and knowledge has often been noted;[16] with some exceptions[17] discovery of knowledge held by expert witnesses has been allowed.[18] Perhaps a fair statement is that the majority deny blanket application of the attorney-client privilege where such an application could operate to suppress admissible evidence.

Recently a third contention based on assertions of unfairness has gained headway. Two theories underlie this contention. Arguably the information is the expert's property, and hence belongs to the party who "buys" it from him.[19] Also, it is asserted that a system of unlimited

---

[12] For an extreme result reached through applying this rule, see *Ex parte* Ladon, 160 Tex. 7, 325 S.W.2d 121 (1959), where a driver-compiled list of names and addresses of witnesses to a bus accident was protected as work-product.

[13] Berkley v. Clark Equip. Co., 26 F.R.D. 153 (E.D.N.Y. 1960); United States v. Certain Parcels of Land, 25 F.R.D. 192 (N.D. Cal. 1959); White Pine Copper Co. v. Continental Ins. Co., 166 F. Supp. 148 (W.D. Mich. 1958); Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954).

[14] Sachs v. Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948); United States v. Nysco Labs., Inc., 26 F.R.D. 159 (E.D.N.Y. 1960); Leding v. United States Rubber Co., 23 F.R.D. 220 (D. Mont. 1959); *cf.* Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961).

[15] Schuyler v. United Air Lines, Inc., 10 F.R.D. 111 (M.D. Pa. 1950); Empire Box Corp. v. Illinois Cereal Mills, 47 Del. 283, 90 A.2d 672 (Super. Ct. 1952); City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 143 N.E.2d 40 (1957).

[16] *E.g.*, Guilford Nat'l Bank v. Southern Ry., 24 F.R.D. 493 (M.D.N.C. 1960); Lewis v. United Air Lines Transp. Corp., 31 F. Supp. 617 (W.D. Pa.), *modified*, 32 F. Supp. 21 (W.D. Pa. 1940).

[17] American Oil Co. v. Pennsylvania Pet. Prods. Co., 23 F.R.D. 680 (D.R.I. 1959); Cold Metal Proc. Co. v. Aluminum Co. of America, 7 F.R.D. 684 (D. Mass. 1947); City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 143 N.E.2d 40 (1957).

[18] *E.g.*, United States v. McKay, 372 F.2d 174 (5th Cir. 1967); Cold Metal Proc. Co. v. Aluminum Co. of America, 7 F.R.D. 425 (N.D. Ohio 1947); United States v. 50.34 Acres of Land, 13 F.R.D. 19 (E.D.N.Y. 1952). For a complete analysis, see Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962).

[19] *See* Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954).

discovery would promote laziness and encourage parties, by waiting for the other to hire the necessary experts, to jockey for position.[20] As regards the "property right" concept, where a party subpoenas an expert as an ordinary witness, the majority of courts hold that the expert must give knowledge already acquired,[21] but not information that requires additional research.[22] A number of courts apparently are greatly influenced by arguments that expertise is property, and compensation must be made for its taking; these courts permit the expert to refuse to testify as to his opinions and conclusions[23] unless compensated for such testimony.[24] The fear that laziness and tactical sparring would result from open discovery of experts' reports seems justified where the discovering party seeks to use the expert's disclosures to support his case at trial. But where discovery is sought to prepare for cross-examination of the expert at trial, this fear is not well-founded; several cases have allowed the motion for discovery on this basis.[25]

Confusion and disagreement obviously pervade existing case law; the Advisory Committee on Civil Rules recently proposed amendments to the Federal Rules to clarify the situation and resolve discovery problems.[26] One amendment would require a showing of "good cause" for obtaining discovery of all trial preparation materials, except that statements con-

---

[20] *See* Schuyler v. United Air Lines, Inc., 10 F.R.D. 111 (M.D. Pa. 1950).

[21] *E.g.*, *Ex parte* Dement, 53 Ala. 389 (1875); City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951); *In re* Estate of James, 10 Ill. App. 2d 232, 134 N.E.2d 638 (1956); *In re* Hayes, 200 N.C. 133, 156 S.E. 791 (1931).

[22] *Ex parte* Dement, 53 Ala. 389 (1875) (dictum); Brown County v. Hall, 61 S.D. 568, 249 N.W. 253 (1933) (dictum); Ealy v. Shetler Ice Cream Co., 108 W. Va. 184, 150 S.E. 539 (1929).

[23] Hoagland v. TVA, 34 F.R.D. 458 (E.D. Tenn. 1963); Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954); Buchman v. State, 59 Ind. 1 (1877); People *ex rel.* Kraushaar Bros. v. Thorpe, 296 N.Y. 223, 72 N.E.2d 165 (1947); Cooper v. Norfolk Redev. & Housing Auth., 197 Va. 653, 90 S.E.2d 788 (1956) (dictum).

[24] City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951); Buchman v. State, 59 Ind. 1 (1877). Other cases, *e.g.*, Boynton v. R.J. Reynolds Tob. Co., 36 F. Supp. 593 (D. Mass. 1941), allow an expert to refuse to testify concerning his opinions and conclusions even when offered compensation therefor.

[25] United States v. Meyer, 398 F.2d 66 (9th Cir. 1968); Franks v. National Dairy Prods. Corp., 41 F.R.D. 234 (W.D. Tex. 1966); Seven-Up Bottling Co. v. United States, 39 F.R.D. 1 (D. Colo. 1966); United States v. 23.76 Acres of Land, 32 F.R.D. 593 (D. Md. 1963); United States v. 62.50 Acres of Land, 23 F.R.D. 287 (N.D. Ohio 1959).

[26] See COMMITTEE ON RULES OF PRAC. AND PROC. OF THE JUD. CONF. OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROC. FOR THE UNITED STATES DISTRICT COURTS RELATING TO DEPOSITION AND DISCOVERY, 43 F.R.D. 211 (1967).

cerning the action previously given by the party seeking discovery would require no showing to be discovered.[27] The Advisory Committee omits the "good cause" showing from Federal Rule 34, effectively transposing the requirement, as developed by case law, from the production of documents generally to the area of trial preparation materials alone. This proposal would protect from discovery materials prepared for litigation by attorneys, consultants, sureties, insurers, indemnitors, and agents, unless the required showing of good cause could be made. While the Advisory Committee purports to give greater protection to some trial preparation materials (especially those of attorneys) than to others,[28] the probable effect of implementing the new proposal might well be a constriction of the scope of discovery of trial preparation materials in those more "liberal" jurisdictions.

The Advisory Committee further proposes changes specifically relating to discovery of experts' trial preparations;[29] they distinguish between experts who have been retained or specially employed and those whom a party expects to call as trial witnesses. As to the former, a showing that denial of discovery would result in undue hardship or manifest injustice is required. The Advisory Committee asserts that discovery of material acquired outside trial preparation (*i.e.*, knowledge previously acquired) is not thereby precluded, but only discovery from experts informally consulted is barred.[30] As to experts expected to testify at trial, due notice of their identity and field of expertise is required. Discovery of both fact and opinion relevant to the stated subject matter is permitted, and such discovery as would be allowed could be conditioned upon payment of a portion of the expert's fees and expenses.

The Advisory Committee submits that any unfairness would thereby be minimized, as discovery would usually be limited to witnesses, and "obtained at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his own case out of his

[27] *Id.* at 225, Proposed Rule 26(b)(3).
[28] *Id.* at 232 (Advisory Comm.'s Notes).
[29] *Id.* at 225-26, Proposed Rule 26(b)(4).
[30] *Id.* at 234. The Advisory Committee, *id.* at 233, purports to "reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine," yet the required showing for discovery of specially retained experts, said to be based on the doctrine of "unfairness," is substantially the same as that required under work-product.

opponent's experts. Discovery is limited to opinions previously given by the expert or to be given by him on direct examination at trial."[31] The courts, of course, have power to regulate any abuses.

The proposed amendment in relation to expert trial witnesses appears to be a useful addition to federal discovery procedures; where expert testimony is crucial it will be allowed; and the proposal adequately provides for fairness to the respective parties. The amendment in relation to retained experts not expected to appear as witnesses, however, seems to threaten an increased protection from disclosure. Any foreclosure of discovery of expert information by rule is unwarranted. Numerous cases have been resolved on the basis of experts' findings; pre-trial discovery of such findings will be vital in future cases, and could be curtailed by the proposed rule's comparative inflexibility. The proposed amendment has been criticized in a recent decision,[32] which postulated that the showing required for discovery of retained experts is too harsh. Since a party does not know what such experts have learned or what opinions they have formed, how can he show that denial of discovery will result in "undue hardship" or "manifest injustice?" The first party to reach and "buy" an expert, because of the stringent showing required for discovery of non-testifying experts, would be able to suppress unfavorable findings of that expert simply by declining to offer his testimony at trial. This possibility should compel further consideration of the proposed amendment. Premature adoption of the provision might lead courts out of the confusion of the present case law, but the discovery system could be damaged in the extrication.

Confrontation with the morass of case law on discovery of expert information should dispel a court's temptation to resolve a case solely on the basis of precedent. Surely decisions can best be reached through consideration of each case's individual circumstances in the light of underlying discovery policy. The *Fickus* court found that, where expert information was needed for correct ajudication, "[g]ood cause has been demonstrated in the need to eliminate surprise at trial, and the related need for full and effective cross-examination of opponents' expert witnesses."[33] The finding is to be commended.

DAVID G. CROCKETT

---

[31] *Id.* at 235.
[32] United States v. Meyer, 398 F.2d 66, 76 (9th Cir. 1968).
[33] Security Indus., Inc. v. Fickus, 439 P.2d 172, 180 (Alas. 1968).

Conflict of Laws—Choice-of-Laws: The Greatest Interest Rule

The vacillating and often conflicting theories regarding choice-of-law[1] that have developed since *Babcock v. Jackson*[2] were reconsidered in the recent New York case of *Miller v. Miller*.[3] In *Miller*, by a four to three decision, the New York Court of Appeals expanded its earlier *Babcock* ruling and adopted a "greatest interest rule" for its choice-of-law conflicts rule. By its new rule the court sought to avoid the anomalies that can occur by adherence to one particular theory or by an *ad hoc* determination of particular cases.

Mr. Earl Miller, a New York resident, was on a business trip in Maine, where he and his brother had mutual business interests. While a passenger in a car driven by his brother and owned by his sister-in-law, Mr. Miller was killed when the vehicle struck a bridge located in Maine. The automobile trip began and was to end in Maine. Later, decedent's brother and sister-in-law, who were Maine residents at the time of the accident, moved to New York state. Thereafter, the decedent's wife commenced in New York a wrongful death action against his brother and sister-in-law. As a partial defense, the defendants asserted the Maine statute that limits wrongful death recoveries to 20,000 dollars, which had been in effect in Maine at the time of the accident, but which had since

[1] When a true conflict exists, commentators have offered different approaches: (a) The forum's law should always be applied to effectuate forum policy, even though the policy of another jurisdiction would thereby be defeated. B. Currie, Selected Essays on the Conflict of Laws 181-87 (1963) [hereinafter cited as Selected Essays]; Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflicts of Laws*, 63 Colum. L. Rev. 1212, 1242-43 (1963) (this collection of comments by several authors on Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), will be hereinafter cited as *Comments on Babcock v. Jackson*, with a parenthetical indication of the appropriate author). (b) The forum should weigh the interests and apply the dominant one. Reese, *Conflict of Laws and the Restatement Second*, 28 Law & Contemp. Prob. 679, 688 (1963). (c) The law of the state with the most significant relationship should control. Restatement (Second) of Conflict of Laws § 379 (Tent. Draft No. 9, 1964). (d) Apply the forum's law except when variations are necessary to accommodate the interests of the parties. A. Ehrenzweig, Conflict of Laws § 101-20 (1962); *Comments on Babcock v. Jackson* (Ehrenzweig) 1246. (e) Courts should work out rules of preference, applying the "lower standard of conduct or of a financial protection" in the absence of a pre-existing relationship between the parties. D. Cavers, The Choice-of-Law Process 114 (1965) [hereinafter cited as The Choice-of-Law Process]; Cavers, *The Two "Local-Law" Theories*, 63 Harv. L. Rev. 822 (1950); Weintraub, *A Method for Solving Conflicts Problems*, 21 U. Pitt. L. Rev. 573, 580 (1960).

[2] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[3] 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1963).

been repealed.[4] On a motion to dismiss the partial defense, the trial court allowed the motion. The New York Court of Appeals affirmed, choosing New York law, which allowed full and unlimited recovery for a wrongful death action.

In reaching its decision, the court traced the development of its present choice-of-law rule. At the outset it conceded that "candor requires the admission that our past decisions have lacked a precise consistency . . . ."[5] The first case considered by the *Miller* court in its chronological chart was *Babcock*, a 1963 decision.[6] In *Babcock*, the court refused to apply an Ontario guest statute barring recovery because all the parties involved were New York residents; the car was garaged, licensed, and insured in New York; the trip began and was to end in New York; and Ontario was merely the place of the accident. The rule of *Babcock* was that "[j]ustice, fairness, and 'the best practical result' . . . may best be achieved by giving controlling effect to the law of the jurisdiction, which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."[7] The *Babcock* rule, denominated under such various headings as "grouping of contacts" and "center of gravity,"[8] had its origin in earlier New York tort cases.[9] In a 1954 contracts case the emphasis was put upon the law of the place "which has the most significant contacts with the matter in dispute."[10] *Babcock* unequivocally rejected the traditional choice-of-law rule, *lex loci delicti*, which looked invariably to the substantive law of the place of the tort. The traditional rule "ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues."[11] It could be contended that *Babcock* discarded the rigid and mechanical lex loci rule and replaced it with another mechanical rule, *i.e.*, a mere quantitative grouping

[4] No Maine decisions deal with the retroactivity of the amendment, but the prevailing rule is that such amendments are substantive in nature, and, without clear contrary legislation or legislative intent, are not applied retroactively. *See generally* Annot., 98 A.L.R.2d 1105 (1964).

[5] 22 N.Y.2d at —, 237 N.E.2d at 879, 290 N.Y.S.2d at 737.

[6] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[7] *Id.* at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

[8] *Id.*

[9] *See* Pearson v. Northeast Airlines, Inc., 307 F.2d 131 (2d Cir. 1962), *reviewed in* Currie, *Conflict, Crises and Confusion in New York*, 1963 DUKE L.J. 1, *noted in* Note, 111 U. PA. L. REV. 371 (1963); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), *noted in* Note, *Selection of Law Governing Measure of Damages for Wrongful Death*, 61 COLUM. L. REV. 1497 (1961).

[10] Auten v. Auten, 308 N.Y. 155, 160, 124 N.E.2d 99, 102 (1954).

[11] 12 N.Y.2d 473, 478, 191 N.E.2d 279, 281, 240 N.Y.S.2d 743, 746 (1963).

of contacts whereby the court adds the contacts of the two states and the state with the greatest number of contacts has its law applied. However, in *In re Estate of Crichton*[12] and *In re Estate of Clark*,[13] the court rejected such an approach and stated that "[c]ontacts obtain significance only to the extent that they relate to the policies and purposes sought to be vindicated by the conflicting laws."[14] Thus, the *Miller* case gave the court an opportunity to explain further and demonstrate its rule as it has evolved. The court set forth its new choice-of-law rule as follows:

> [T]he rule which has evolved clearly in our most recent decisions is that the law of the jurisdiction having the greatest interest in the litigation will be applied and the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict.[15]

This doctrine might be denominated the "greatest interest rule."

After defining its new rule, the court demonstrated its application. New York, by its Constitution, not only permits full recovery for wrongful death, but also prohibits any legislative act providing otherwise.[16] Thus, New York is vitally concerned with compensating the economic losses of a decedent's family, probably to protect its citizens from becoming wards of the state. Although this substantial New York interest per se might have allowed the courts to apply its law,[17] the new rule required a look into more general considerations, which should concern "a justice-dispensing court in a modern American State."[18]

These countervailing considerations include fairness to the nominal and real party defendant, expectations of the parties, possible interference

[12] 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967).

[13] 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968).

[14] 20 N.Y.2d at 135 n.8, 228 N.E.2d at 806 n.8, 281 N.Y.S.2d at 820 n.8; 21 N.Y.2d at 485-86, 236 N.E.2d at 156, 288 N.Y.S.2d at 998.

[15] 22 N.Y.2d at —, 237 N.E.2d at 879, 290 N.Y.S.2d at 736. *See* Reich v. Purcell, 63 Cal. Rptr. 31, 432 P.2d 727 (1967); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); *Comments on Babcock v. Jackson* (Currie) 1235; Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959).

[16] N.Y. CONST. art. I, § 18.

[17] SELECTED ESSAYS 181-87; *Comments on Babcock v. Jackson* (Currie) 1242-43. In the case of an unavoidable conflict between the legitimate interests of two sister states, Professor Currie would have the court apply the law of the forum. Many writers have commented on the Currie approach. *See* Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960); Traynor, *Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845 (1961); Whitman, *Conflict of Spousal Immunity Laws: The Legislature Takes A Hand*, 46 N.C.L. REV. 506 (1968).

[18] Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 295 (1966).

with a legitimate interest of a sister state, and the prevention of forum shopping. First, it would be unfair for the forum to apply its law to a party patterning his conduct upon another state's statute; however, in *Miller* the Maine statute limiting a wrongful death recovery is remedial in nature, obviously, and not a statute upon which a person would rely in governing his conduct. Second, the liability insurer, the real party in interest, might be harmed by the application of New York law. The court found through an analysis of the actuarial process and information gathered from the Insurance Commission of Maine that the presence of the 20,000 dollars limitation had no substantial effect on insurance rates, and that refusing to apply Maine law would have little, if any, effect on the insurance premiums in Maine.[19] Third, as to the expectations of the parties, the court considered it an obvious fiction that parties rely on certain statutes and expect their application in a lawsuit.[20]

> Though our nation is divided into fifty-one separate legal systems, our people act most of the time as if they live in a single one. They suffer from a chronic failure to take account of the differences in state laws.[21]

There are few speculations more difficult than assessment of the expectations of parties as to the laws applicable to their activities, and this is especially true when the expectations relate to the law of torts.[22] Fourth, Maine by its statutory limitation, showed a desire to protect its residents in wrongful death actions. The fact that the defendants in *Miller* were no longer Maine residents meant to the court that to apply New York law would not unduly interfere with a legitimate interest of Maine in regulating the rights of its citizens, since no judgment would be entered against a Maine resident. Finally, a court might ignore a change in domicile to prevent forum shopping, but apparently the court found that the defendants' move to New York was not made to achieve a more favorable legal climate. The *Miller* court compiled these various contacts relating them to the countervailing interests and expectations of the parties and of the two states. This approach is vastly different from a mere numerical or quantitative grouping of contacts and from the mechanical application of the law of the place of the tort.

[19] 22 N.Y.2d at —, 237 N.E.2d at 882, 290 N.Y.S.2d at 740. *See* Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight,* 70 YALE L.J. 554, 560-81 (1961).

[20] 22 N.Y.2d at —, 237 N.E.2d at 883, 290 N.Y.S.2d at 741.

[21] THE CHOICE-OF-LAW PROCESS 119.

[22] *Id.* at 302. *See also* Traynor, *Conflict of Laws in Time,* 1967 DUKE L.J. 713, 715.

Due to the myriad of writers and rules in the choice-of-law area, the "greatest interest rule," as defined in *Miller*, may still be misunderstood. Such potential misunderstanding is aptly demonstrated in the dissenting opinions in *Miller*. Two dissenters would have applied Maine law under either the "significant contacts rule" of *Babcock*, the principle of preference, or the newly emerging "greatest interest rule." The significant contacts in *Miller* would be that Maine was the place of the accident; the car was licensed and garaged in Maine; the trip was wholly in Maine; the trip was connected with Maine business; and, decedent's stay in Maine was not transient but was one of several recurring sojourns in connection with a business in Maine. Thus, Maine law would be applied under the *Babcock* doctrine since Maine had the most significant contacts.[23] As to Professor Caver's approach to a principle of preference,[24] both Maine and New York have an interest in applying their rules regarding damages, and therefore a true conflict exists. Under this analysis, the "lower standard of conduct or of a financial protection" of the state where defendant acted and the injury occurred should be applied in the absence of a previously existing relationship between the parties.[25] Lastly, these dissenters felt the majority had applied the interest analysis too rigidly and had given too much weight to the domicile of the parties seeking recovery. The dominant consideration in adjudication of multistate transactions is the "reasonable expectations of persons participating in transactions,"[26] since this lends justice to the determination. The majority, as previously mentioned, rejected the reasonable expectation argument as being based upon an obvious fiction that it is possible in tort cases to assess the parties' expectations of what law governs their actions.

In their consideration of the greatest interest rule, the dissenters thought the majority had adopted Professor Currie's approach of governmental interest analysis, which leads to the conclusion that a party carries most of the defenses and rights of his domiciliary law about with him.[27] States then must apply their law to protect legitimate objects of

[23] Babcock v. Jackson, 12 N.Y.2d 473, 481, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749 (1963).

[24] THE CHOICE-OF-LAW PROCESS 114-138; Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822 (1950); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

[25] See THE CHOICE-OF-LAW PROCESS 114; note 1(e) *supra*.

[26] 22 N.Y.2d at —, 237 N.E.2d at 886, 290 N.Y.S.2d at 747. *See* Rheinstein, Book Review, 32 U. CHI. L. REV. 369 (1965).

[27] 22 N.Y.2d at —, 237 N.E.2d at 885, 290 N.Y.S.2d at 746. For Professor Currie's analysis of the governmental interest approach, see SELECTED ESSAYS 183-84.

their legislative concern.[28] Professor Currie would have the court inquire into the policies of the respective conflicting laws and then "inquire into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies."[29] Yet, after the above construction and interpretation, if there is still a "conflict between the legitimate interests of the two states, . . . [Currie would] apply the law of the forum."[30] Certainly, the majority adopted aspects of several approaches, and in applying the rule illustrated the duty of a court to compare all countervailing considerations. The New York "greatest interest rule" then is more flexible than Professor Currie's approach, while containing similar features. The rule adequately analyzes the forum's relationship to the case in terms of possible forum interests and adds a flavor of individualized justice in its countervailing considerations.

North Carolina has not entered the battleground of the conflicting choice-of-law rules, choosing instead to retain the traditional *lex loci delicti* rule.[31] The reason for not abandoning lex loci is probably based upon a desire for stability and predictibility through stare decisis, and a desire that the legislature make any change in the present conflicts rule. In 1967, the North Carolina General Assembly did modify the state's traditional rule as it applies to spousal immunity.[32] It is evident that the North Carolina courts will not venture into what it has termed a "voy-

---

[28] *See* SELECTED ESSAYS 183-84; Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 221-22 (1958).

[29] *Comments on Babcock v. Jackson* (Currie) 1242.

[30] *Id.* at 1242-43.

[31] The reports are filled with cases that praise and follow lex loci. *See, e.g.*, Hutchins v. Day, 269 N.C. 607, 153 S.E.2d 132 (1967); Petrea v. Ryder, 264 N.C. 230, 141 S.E.2d 278 (1965); Doss v. Seawell, 257 N.C. 404, 125 S.E.2d 899 (1962); Harper v. Harper, 225 N.C. 260, 34 S.E.2d 185 (1945). *See* Wurfel, *Conflict of Laws, Survey of North Carolina Case Law*, 44 N.C.L. REV. 923 (1966). This traditional, mechanical choice of law rule of *lex loci delicti*, embodied in the first RESTATEMENT OF CONFLICT OF LAWS § 383 (1934), is that the substantive rights and liabilities arising out of a tortious occurrence are determinable by the law of the place of the tort. It has as its conceptual foundation the vested rights doctrine, namely, that a right to recover for a foreign tort owes its creation to the jurisdiction where the injury occurred and depends for its existence and extent solely on such law. Professor Beale explained that "[i]t is impossible for a plaintiff to recover in tort unless he has been given by some law a cause of action in tort; and this cause of action can be given only by the law of the place where the tort was committed. That is the place where the injurious event occurs, and its law is the law therefore which applies to it." 2 J. BEALE, CONFLICT OF LAWS § 378.1 (1935).

[32] N.C. GEN. STAT. § 52-5.1 (Supp. 1967). This statute and its implications upon existing choice-of-law doctrines has been discussed by Professor Whitman. He considers the Currie governmental interest analysis in depth and concludes that the legislature should further consider the choice-of-law problem on a case-by-case, fact-by-fact basis. *See* Whitman, *supra* note 17, at 519.

age into . . . an uncharted sea,"[33] preferring the comfortable predictibility of stare decisis to individualized justice. In this still inchoate area of law, however, a case-by-case development of rules without rigid adherence to any one theory is necessary in order to establish sound principles. "The objective is to achieve justice in a particular case and cases of like kind, avoiding ideology, on the one hand, and particularistic result-oriented determinations, on the other."[34] This rational approach would end ad hoc decisions. If a court, choosing between particular state laws, can identify the policies embodied in those laws and determine if a true conflict exists,[35] then it should use the facts or contacts to determine which state has a better claim, giving weight to the parties' expectations and other countervailing considerations. A few wide-sweeping rules could thus be avoided. This process would give hope that decisions founded upon discriminating assessments of policies and expectations will slowly build up a body of differentiated rules to which courts can adhere, bringing predictibility back into play. North Carolina for the present is content with lex loci. Perhaps a rule so well defined as the "greatest interest rule" will cause the court to reassess its status quo position and perceive the possible individualized justice for each case and a possible predictibility therein.

ERIC MILLS HOLMES

Constitutional Law—Reapportionment—One Man, One Vote Applied to Local Governing Bodies

The one man, one vote rule of the United States Supreme Court has been described as "the symbol of an aspiration for fairness, for avoidance of complexity and for intelligibility in our representational processes in our mass democracy."[1] By *Avery v. Midland County*,[2] the Court has expanded the equal representation concept of *Reynolds v. Sims*[3] and its

[33] Shaw v. Lee, 258 N.C. 609, 616, 129 S.E.2d 288, 293 (1963).

[34] 22 N.Y.2d at —, 237 N.E.2d at 890, 290 N.Y.S.2d at 752. *See also* THE CHOICE-OF-LAW PROCESS 121-23.

[35] *See generally*, Traynor, *supra* note 15; Comment, *False Conflicts*, 55 CALIF. L. REV. 74 (1967).

[1] Dixon, *Reapportionment Perspectives: What Is Fair Representation?*, 51 A.B.A.J. 319, 324 (1965).

[2] 390 U.S. 474 (1968).

[3] 377 U.S. 533 (1964). The Court said:

> [W]e conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.

companion cases[4] from the statehouses of the nation to thousands of county courthouses, city councils, school districts, and similar local governing bodies. Phrased simply, the decision means that many, if not most, representative bodies elected on the local level must be chosen under a scheme whereby the men who sit on them represent substantially equal numbers of people.[5] *Avery* itself did not commence the trend of applying the one man, one vote rule to local government; but it did settle the issue in favor of a line of state and lower federal court cases so extending the *Reynolds* principle.[6] The decision is significant[7] because the Court for a time declined any opportunity to apply the rule to local governments and governing boards after the *Reynolds* decision.[8]

The holding in *Avery* brings to a predictable conclusion the trend begun when the Court decided in *Baker v. Carr*[9] that apportionment and

> Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment. . . .

Id. at 566.

[4] Lucas v. Forty-Fourth Gen. Ass., 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Comm. for Fair Rep. v. Tawes, 377 U.S. 656 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

[5] 390 U.S. at 478-79.

[6] The majority opinion in *Avery* mentioned several cases from state supreme courts and federal district courts extending *Reynolds* to local governments. 390 U.S. at 479 n.3. *But see* Bianchi v. Griffing, 271 F. Supp. 497 (E.D.N.Y.), *cert. denied,* 389 U.S. 901 (1967); Moody v. Flowers, 256 F. Supp. 195 (M.D. Ala. 1966), *vacated and remanded,* 387 U.S. 97 (1967); Johnson v. Genesee County, 232 F. Supp. 567 (E.D. Mich. 1964); Simon v. Lafayette Parish Police Jury, 226 F. Supp. 301 (W.D. La. 1964). As the only state supreme court holdings contrary to its decision in *Avery,* the Court cited Brouwer v. Bronkema, 377 Mich. 616, 141 N.W.2d 98 (1966), where the Michigan court divided four to four on the issue; and the Texas Supreme Court decision in Avery v. Midland County, 406 S.W.2d 422 (Tex. 1966), which was vacated and remanded to the Texas court.

[7] In the month after the announcement of *Avery,* for instance, both the Colorado and Iowa supreme courts cited and followed it in deciding cases challenging the constitutionality of local governing boards. Hartman v. City & County of Denver,—— Colo. ——, 440 P.2d 778 (1968) (city council); Mandicino v. Kelly, —— Iowa ——, 158 N.W.2d 754 (1968) (county board of supervisors). *Avery* should also be a strong argument for the plaintiffs in a North Carolina reapportionment case, *Jacobs v. Gaston County,* filed in Gaston County Superior Court, challenging the constitutionality of the Gaston County Board of Commissioners. A news report of the suit is contained in The Charlotte Observer, Sept. 24, 1968, § 2, at 1, col. 1.

[8] Bianchi v. Griffing, 389 U.S. 901, *denying cert. to* 271 F. Supp. 497 (E.D.N.Y. 1967); Dusch v. Davis, 387 U.S. 112 (1967); Sailors v. Board of Educ., 387 U.S. 105 (1967); Moody v. Flowers, 387 U.S. 97 (1967), *vacating and remanding* 256 F. Supp. 195 (M.D. Ala. 1966). As will be discussed at length, the Court had valid, practical reasons for not extending the application of one man, one vote to local governments in both *Sailors* and *Dusch.*

[9] 369 U.S. 186 (1962).

districting is a justiciable issue in federal courts and not merely a political question. But the Court in *Avery* also crossed the line that remained after its decision in *Reynolds*. Was the crossing of that line a mistake that constitutes a rigid, unwise approach with respect to the multitude of local governmental units of varying sizes and purposes, having general governmental powers? Or does application of the mathematically simple one man, one vote rule to local entities still retain sufficient flexibility to enable courts to reach desirable solutions in reapportionment cases involving local governments?

Midland County, Texas, was governed by a five-member board called the Midland County Commissioners Court, which performed various legislative, executive, and judicial functions. One member, the county judge, was elected at large by the voters of the county; however, he could vote only in case of a tie. The other four commissioners were chosen from four districts with an estimated population of 67,906 for the city of Midland, and 852, 828, and 414 for the three rural districts.[10] Thus, the urban area containing 95 per cent of the population could at most elect two representatives (one of them the county judge) to the commissioners court. The commissioners were responsible for such general governmental functions as letting contracts in the name of the county; appointing minor county administrative officials; setting the county tax rate, including that of property owners in the city, within limits controlled by the state; issuing bonds; and determining the county budget.[11]

On these facts, Justice White reasoned for the majority: "[I]nstitutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens."[12] Using this policy for extending the one man, one vote principle to local governments, the Court held: "[T]he Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body."[13]

---

[10] Avery v. Midland County, 390 U.S. 474, 476 (1968).
[11] *Id.*
[12] *Id.* at 481.
[13] *Id.* at 484-85. The Court thus vacated the judgment of the Texas Supreme Court, which had ruled that the equal protection clause was violated by the apportionment of districts in Midland County but that factors other than population might be taken into account in reapportioning the county. 406 S.W.2d 422 (Tex. 1966). The Texas Supreme Court had reversed the Texas Court of Civil Appeals. That court, in turn, had reversed the trial court. 397 S.W.2d 919 (Tex. App. 1965).

Justices Harlan, Fortas, and Stewart dissented.[14] Justice Harlan restated his general disapproval of *Reynolds*[15] and also reasoned that local governing bodies are so diverse in their functions that they need to be more flexible in their structure than do state legislatures.[16] Justice Stewart's rationale was the same as in his dissenting opinion in *Lucas v. Colorado General Assembly*,[17] where he protested that the principle of one man, one vote as applied to even state legislatures meant a simplistic, arithmetical approach.

While agreeing that the application of the equal protection clause in reapportionment situations should not stop at the state level, Justice Fortas also emphasized that equal protection of voters on the local level requires more than a simplistic and blanket one man, one vote approach.[18] He appeared particularly impressed by the fact that testimony at the trial level disclosed county roads to be the main concern of the county commissioners. He also stressed that the state had placed a ceiling on the tax rate set by the commissioners.

The Fortas dissent cited both *Dusch v. Davis*[19] and *Sailors v. Board of Education*[20] to illustrate that the Court had not in the past insisted on a rigid application of one man, one vote to local government. Although the majority in *Avery* specifically pointed with favor to both of these cases,[21] the cases can be distinguished from *Avery* on their facts. *Sailors* involved what the Court characterized as an appointment of a county-wide school board by various local school boards representing variously populated districts; and *Dusch* involved an at large election of city council members, some of whom were required to reside in districts containing substantially unequal numbers of people.

Insofar as Justice Fortas relied on the legislative limitations on the county commissioners' powers, his dissent may be rebutted.

> If it is contended that unlimited discretion is necessary for the exercise of true legislative power, then no legislative body in the American system of government would qualify since each body receives its grants of power from constitutions and/or legislation which limits the scope of the power granted. . . . The current trend at the county

[14] All of the dissenters thought that the writ of certiorari had been improvidently granted.
[15] 390 U.S. at 487 (dissenting opinion).
[16] *Id.* at 490-92.
[17] 377 U.S. 713, 750 (1964) (dissenting opinion).
[18] 390 U.S. at 498-99 (dissenting opinion).
[19] 387 U.S. 112 (1967).
[20] 387 U.S. 105 (1967).
[21] 390 U.S. at 485.

governing level is toward more exercise of this legislative power since the modern urban county has been forced into exercising its legislative authority more and more in choosing which of a broad array of programs available to it will be effectuated in a county.[22]

Avery applies the one man, one vote formula to certain local governing bodies, but does not attempt to precisely define what local bodies may be included among those having "general governmental powers." Clearly the decision encompasses such entities as county governing boards and city councils with at least as much legislative power as was held by the county commissioners court in *Avery*. But there are myriad bodies exercising governmental power at the local level, many of them having only one function such as sanitation or education. The Court noted in *Avery* that in 1967 there were an estimated 81,304 units of government of "staggering diversity" throughout the nation.[23] One analyst of the Court's reapportionment decisions suggests three criteria for deciding whether the local body has "general governmental powers" over a geographic area: (1) What functions does the entity have? If few, the courts have justification for not applying the one man, one vote principle. (2) Is the organization a special purpose unit, such as a port authority? If so, a general local government is probably not involved. (3) To what extent is the selection of members of the unit based on equal representation? The more limited the unit's functions, the greater the variance that courts should allow from the one man, one vote formula.[24]

A lawyer attempting to predict whether a certain local governing body will come under *Avery* must apply the above criteria cautiously and critically. For instance, school boards generally have one basic function designed to fulfill a specific purpose; but where their members are elected, several courts have specifically held that they fall under the one man, one vote test;[25] and language in *Avery* itself indicates that the Supreme Court considered school boards to be among the type of local governmental entities it had in mind.[26] In fact, under the rationale of *Gray v.*

---

[22] Oden & Meek, *County Reapportionment: A Rebuttal*, 18 BAYLOR L. REV. 15, 16-17 (1966).

[23] 390 U.S. at 483.

[24] Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21, 32-33 (1965). This article contains an excellent discussion of the various types of local governmental units and the effect that extension of the one man, one vote rule would have on them.

[25] *E.g.*, Strickland v. Burns, 256 F. Supp. 824 (M.D. Tenn. 1966); Delozier v. Tyrone Area School Bd., 247 F. Supp. 30 (W.D. Pa. 1965).

[26] 390 U.S. at 480.

Sanders[27] all locally-elected officials—including those with strictly administrative duties—might be held to come under the one man, one vote principle. Until more case law develops in this area, predictions concerning specific categories of local governing bodies and officials may be difficult in close situations. Perhaps the only entities that will eventually escape application of the rule are those whose members sit as the result of a scheme more in the nature of appointment than of election.[28]

Avery probably has carried not only the *Reynolds* rule itself into the area of local government, but also the holdings of cases answering certain problems raised by *Reynolds*.[29] However, *Avery* did leave unsettled the population standard on which local representation is to be based. Is it sheer population figures? Or registered voters? Or the number of people who voted in the last election? Perhaps *Hartman v. City & County of Denver*,[30] a decision by the Colorado Supreme Court based primarily on *Avery*, provides the answer to these questions. The court said that reliance on the number of registered voters is not per se unconstitutional, but in applying such figures a local government cannot "depart significantly from population-oriented standards."[31]

The most difficult issue raised by *Avery* is the problem of applying the one man, one vote principle to obtain truly meaningful representation for the local electorate. To Mr. Justice Fortas, the decision in *Avery* meant that the county residents would be denied meaningful representation because only in the "most superficial sense" did the commissioners have general governmental powers,[32] their primary concern being the construction of county roads. Even if he were correct in his analysis of the facts, his well-reasoned dissent may be answered by the *Sailors* and *Dusch* cases along with the majority opinion in *Avery*. Together the

[27] 372 U.S. 368 (1963). The Court held that the Georgia system of voting for senators and other statewide elected officials, including the governor and other administrative officials, was violative of the fourteenth amendment since it resulted in a substantial dilution of the electors' votes.

[28] Sailors v. Board of Educ., 387 U.S. 105 (1967).

[29] For instance, it would appear that local governmental entities may establish multi-member districts so long as their use is not designed to discriminate against or cancel out some minority racial or political element. *See* Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965); Mann v. Davis, 245 F. Supp. 241 (E.D. Va.), *aff'd mem. sub. nom.* Burnette v. Davis, 382 U.S. 42 (1965). *But cf.* Drew v. Scranton, 229 F. Supp. 310 (M.D. Pa.), *vacated and remanded*, 379 U.S. 40 (1964); Butcher v. Bloom, 415 Pa. 438, 203 A.2d 556 (1964). It also appears that a local government must be reapportioned at least once every decennial based upon the census to satisfy the Constitutional requirement. *See* Reynolds v. Sims, 377 U.S. 533, 583-84 (1964).

[30] —— Colo. ——, 440 P.2d 778 (1968).

[31] *Id.* at ——, 440 P.2d at 783.

[32] 390 U.S. at 507 (dissenting opinion).

opinions in the three cases indicate that local governments do have some justification for experimentation and flexibility *if* they also recognize the equal protection principle. For instance, if it were conceded that the county commissioners' most important function in Midland County is maintaining county roads, a scheme whereby all commissioners were voted on at large but one or two of them were required to reside in a rural geographical area might well be satisfactory.[33] Such a scheme would approach the facts approved in *Dusch* and would recognize the one man, one vote principle since every citizen would have an equal vote in determining the makeup of the county commissioners. However, some flexibility would be preserved so that rural areas would have a voice on a matter of vital importance to them. In *Dusch,* the scheme, while giving rural areas a significant voice, nevertheless gave majority representation to the urban areas that contained most of the population. The Court will almost certainly demand that a majority of the population in any system keep a majority voice even if the minority is given representation greater than its mere numbers call for.

Thus, one solution to an inflexible and unjust application of the one man, one vote rule in a fact situation involving local districts is the use of residency requirements for political candidates. *Avery* leaves unanswered the problem of exactly what type of residency requirements will satisfy the equal protection principle. The facts of *Dusch* perhaps give the best indication of what the Court may be willing to accept if a valid and non-discriminatory reason underpins the scheme. In *Mandicino v. Kelly,*[34] the Supreme Court of Iowa, in the month following *Avery,* struck down a residency scheme under which a city with eighty per cent of a county's population could elect only two of the resident supervisors on the five-member county board. However, the Iowa court was careful to distinguish this fact situation from that in *Dusch.*[35]

The Iowa decision, as does *Avery,* has strong implications for a North Carolina local reapportionment case pending in Gaston County.[36]

---

[33] *See* Fortson v. Dorsey, 379 U.S. 433 (1965), which held that the Georgia Senate was properly apportioned. In that case, senators in certain large counties entitled to more than one senator could be nominated and elected by the county at large; but they were required to live within districts in the county. The Court deemed senators elected by an entire county to be representatives of the entire county.

[34] —— Iowa ——, 158 N.W.2d 754 (1968). *Cf.* Secretary of State v. Bryson, 244 Md. 418, 224 A.2d 277 (1966).

[35] —— Iowa at ——, 158 N.W.2d at 763.

[36] See the newspaper article, cited note 7 *supra,* for more details and background on the suit.

Gaston's Board of County Commissioners presently consists of six members elected at large, but each one must reside in a different township.[37] The townships allegedly vary substantially in population, with the largest—the city of Gastonia—containing 45 per cent of the total county population and the smallest having only six per cent.[38] While each township doubtless can point out valid policy reasons for being individually represented on the county board, the facts listed above appear much closer to *Mandicino v. Kelly* than to *Dusch.* Were Gaston County in some way to insure majority representation to the two townships having the large majority of the population, the North Carolina Supreme Court might decide that there would be no constitutional objection to the plan;[39] but Gaston County's present scheme is almost certain to be held violative of the equal protection clause of the fourteenth amendment.[40]

The broad language of *Avery* can clearly be misapplied to vitiate its policy of meaningful representation for citizens on the local level. Later in the month in which *Avery* was handed down, a federal court in *Gordon v. Meeks* applied it to uphold an Alabama law against "single shot" voting.[41] The plaintiff contended that the law denied him equal protection, since it in effect forced him to vote for certain candidates for Birmingham's city council whom he found unacceptable, or find his ballot for one or two candidates invalidated. The Fifth Circuit Court of Appeals turned the reasoning of *Avery* against the plaintiff and held that it would not permit "single shot" voting since the plaintiff's vote for one council position would count more than another's who voted to

[37] N.C. GEN. STAT. § 153-5 (Supp. 1967).

[38] Complaint at 3, Jacobs v. Gaston County, Gaston County Super. Ct. (1968).

[39] *See generally* Hobbs v. County of Moore, 267 N.C. 665, 149 S.E.2d 1 (1966), where the North Carolina Supreme Court approved residency requirements for five of seven members of the county board of education that were to be elected by the county at large. Because two members could reside anywhere in the county, and because two more had to live in the two cities in the county, the urban areas could elect four of the seven board members. Because all members were elected at large, the urban areas also had a voice in the selection of the other three. The suit in Gaston County is based upon Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967). The North Carolina Supreme Court there said the issue of whether the one man, one vote principle is applicable to county commissioners is justiciable in the North Carolina courts.

[40] See generally Sanders, *Equal Representation and the Board of County Commissioners,* POPULAR GOVERNMENT, April, 1965, at 1, for a discussion of the effect the one man, one vote rule is likely to have on various counties in North Carolina. The author predicts that the United States Supreme Court may eventually go so far as to hold that residency requirements on the local governmental level must be predicated on districts of substantially equal population. This, of course, might well destroy the flexibility the Court approved in *Dusch* and *Sailors.*

[41] 394 F.2d 3 (5th Cir. 1968) (per curiam).

fill every seat.[42] There was little doubt that the Alabama law was on the books to keep Negroes from "single shot" voting one of their race onto the city council. The court's application of *Avery* probably denied a significant racial minority a chance to gain at least one voice on Birmingham's city council. However, *Avery* dealt with a completely different circumstance than "single shot" voting, and it need not have been applied in such an inflexible manner to the set of facts found in *Gordon*. The court in *Gordon* actually took a portion of the language in *Avery* out of context to support its decision.[43]

Even in a situation where it is applied too rigidly, such as in *Gordon*, the one man, one vote rule has a saving feature. In American life there is really no such thing as a monolithic majority with one or a few overriding interests. "[T]he majority is but a coalition of minorities which must act in a moderate, broadly representative fashion to preserve itself."[44] In other words, the political majority cannot long ignore various minority interests in governing without offending all or some of the many minorities of which it itself is composed. Thus, there is a strong argument that the one man, one vote concept—while not perfect—nevertheless is the best rule in a representative democracy, even on the local level of government with its many complex governing bodies. But it should not be applied in inappropriate situations, as was done in *Gordon*, and the courts should apply it flexibly, using the rationale of *Dusch* where apposite.

THOMAS F. LOFLIN III

Criminal Law—*United States v. Jackson* and Its Impact Upon State Capital Punishment Legislation

INTRODUCTION

The provisions of the Federal Kidnapping Act[1] subject a defendant to the risk of death if he is tried by a jury, but to no more than life imprison-

[42] *Id.* at 4.

[43] Compare the paragraph in which the court in *Gordon* quotes *Avery*, 394 F.2d at 4, with the actual context of that language in *Avery* itself, 390 U.S. at 480-81.

[44] Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 52.

[1] 18 U.S.C. § 1201(a) (1964) provides that:

Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, ab-

ment if he waives a jury trial or pleads guilty. In *United States v. Jackson*,[2] the district court held that the threat of death "made costly" the assertion of the sixth amendment right to a jury trial, and was thus an impermissible burden upon the free exercise of that right. On appeal,[3] the Supreme Court of the United States not only agreed that the statutory scheme violated the sixth amendment right to a jury trial,[4] but indicated that the statute was also violative of the fifth amendment right "not to plead guilty."[5]

The significance of the district court opinion was apparent from the ensuing litigation[6] and commentary,[7] and, as predicted, the Supreme Court

> ducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

The Federal Kidnapping Act had withstood no less than eight challenges, on various grounds, to its constitutionality. Livers v. United States, 185 F.2d 807 (6th Cir. 1950) (failure to specify a minimum penalty does not render § 1201(a) unconstitutional); Robinson v. United States, 324 U.S. 282 (1945) (the phrase "liberated unharmed" is not so indefinite as to render § 1201(a) unconstitutional); United States v. Dressler, 112 F.2d 972 (7th Cir. 1940); Waley v. Johnston, 112 F.2d 749 (9th Cir.), *cert. denied*, 311 U.S. 649 (1940) (failure to specify a maximum term of imprisonment does not render § 1201(a) unconstitutional); Bates v. Johnston, 111 F.2d 966 (9th Cir.), *cert. denied*, 311 U.S. 646 (1940) (§ 1201(a) is not unconstitutional for failure to specify a maximum term for which an offender may be punished); Seadlund v. United States, 97 F.2d 742 (7th Cir. 1938) (§ 1201(a) is a valid exercise of the commerce power); Kelly v. United States, 76 F.2d 847 (10th Cir. 1935) (§ 1201(a) is a valid exercise of the commerce power); Bailey v. United States, 74 F.2d 451 (10th Cir. 1934) (§ 1201(a) is a valid exercise of the commerce power).

[2] 262 F. Supp. 716 (D. Conn. 1967).

[3] United States v. Jackson, 390 U.S. 570 (1968). The *Jackson* rationale has also been applied to invalidate the death penalty provisions of the Federal Bank Robbery Act. Pope v. United States, 392 U.S. 651 (1968).

[4] By Constitutional mandate, one accused of a crime has the right to a jury trial except in cases of impeachment. *E.g.*, Singer v. United States, 380 U.S. 24 (1965); Reid v. Covert, 354 U.S. 1 (1957); Patton v. United States, 281 U.S. 276 (1930); U.S. CONST. art. III, § 2; U.S. CONST. amend. VI. The essential elements of a trial by jury are derived from the common law: (1) a jury consisting of twelve men; (2) trial in the presence and under the supervision of a judge having power to instruct the jury as to the law and advise them in respect to the facts; (3) a unanimous verdict. *E.g.*, United States v. Wood, 299 U.S. 123 (1936); Patton v. United States, 281 U.S. 276 (1930); Thompson v. Utah, 170 U.S. 343 (1898).

[5] 390 U.S. at 581. It is well settled that due process forbids a conviction on the basis of a coerced guilty plea. *E.g.*, Herman v. Claudy, 350 U.S. 116 (1956).

[6] See Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968); McDowell v. United States, 274 F. Supp. 426 (E.D. Tenn. 1967); Laboy v. New Jersey, 266 F. Supp. 581 (D.N.J. 1967); Robinson v. United States, 264 F. Supp. 146 (W.D. Ky. 1967); Spillers v. State, — Nev. —, 436 P.2d 18 (1968).

[7] See Note, *The Federal Kidnapping Act is Unconstitutional in That It Impairs the Free Exercise of the Sixth Amendment Right to Trial by Jury*, 5 HOUSTON L. REV. 166 (1967); Note, *Constitutional Law—Criminal Procedure—Right to a Jury*

decision has provided a basis for challenges to state capital punishment legislation. While *Jackson* has been readily applied by some courts,[8] it has engendered considerable hostility in other forums.[9] The purpose of this note will be to comment on the *Jackson* decision and upon its implications for state statutory schemes that impose the death penalty through procedures that are arguably within the scope of its rationale.

The Jackson *Decision*

In *Jackson* the defendants were indicted in the district court under the provisions of the Federal Kidnapping Act.[10] Section 1201(a) of the Act authorized punishment "(1) by death if the kidnapped person has not been liberated unharmed,[11] and *if the verdict of the jury shall so recommend,*[12] or (2) by imprisonment for any term of years or for life, if the

---

Trial, 53 IOWA L. REV. 206 (1967); Comment, *Criminal Law—Jury Discretion Over Death Penalty—Unconstitutionality of Section (a) of the Federal Kidnapping Act,* 12 N.Y.L.F. 668 (1966) [hereinafter cited as Comment, 12 N.Y.L.F. 688 (1966)]; Comment, *United States v. Jackson: The Possible Consequences of Impairing the Right to Trial by Jury,* 22 RUTGERS L. REV. 167 (1967) [hereinafter cited as Comment, 22 RUTGERS L. REV. 167 (1967)]; Note, 1 SUFF. L. REV. 130 (1967).

[8] Alford v. North Carolina, — F.2d — (4th Cir. 1968); Spillers v. State, — Nev. —, 436 P.2d 18 (1968); State v. Harper, — S.C. —, 162 S.E.2d 712 (1968).

[9] State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968); State v. Peele, 274 N.C. 106, 161 S.E.2d 568 (1968).

[10] See note 1 *supra.*

[11] The provision invoking the death penalty only when the victim is not liberated unharmed was included in the statute as an inducement to the kidnapper to release his victim unharmed. *E.g.,* Robinson v. United States, 324 U.S. 282 (1945); United States v. Parker, 19 F. Supp. 450 (D.N.J.), *aff'd,* 103 F.2d 857 (3rd Cir. 1937), *cert. denied,* 307 U.S. 642 (1939); Finley, *The Lindberg Law,* 28 GEO. L.J. 908 (1939); Bomar, *The Lindberg Law,* 1 LAW & CONTEMP. PROB. 436 (1934).

[12] Various policy considerations have been advanced for allowing only a jury to impose the death penalty. In Laboy v. New Jersey, 266 F. Supp. 581 (D.N.J. 1967), it was suggested that the policy was not only to provide fairness for the defendant, but also to relieve the trial judge of the onerous burden of imposing the death penalty himself. It has also been stated:

> The practice of jury sentencing is most often explained as a desire to prevent jury nullification and a rejection of the mandatory death penalty concept. First, juries will often acquit or return verdicts for lesser crimes to avoid the death penalty notwithstanding the evidence of guilt. This practice, at the very least, frustrates the legislative intent and points dramatically to inadequacies in the law. By giving the jury control over the punishment, it can render its verdict on the merits of the case, without fear of the consequences.
>
> Second, the rejection of the policy that death sentences are mandatory for crimes which provide for the death penalty was concomitant with the acceptance, by legislatures, of the fact that some acts, which constitute capital offenses, do not merit the death penalty. This is reflective of the overall movement away from capital punishment.
>
> Where the death penalty has remained, it is almost always a discretionary matter for the jury.

Comment, 12 N.Y.L.F. 688, 691-92 (1966).

death penalty is not imposed."[13] Since only the jury could impose the death penalty, a defendant could either completely preclude or substantially reduce the risk of death by successfully waiving his rights to a jury trial or by pleading guilty.[14] Relying on the rationale of *Griffin v. California*,[15] in which it was held that a prosecutor's comment on a defendant's failure to testify "made costly" his fifth amendment right to silence, the district court reasoned that the "assertion of the equally fundamental right to trial by jury is made no less costly"[16] by the threat of death. The court then stayed the effectiveness of its judgment in order to allow an appeal directly to the United States Supreme Court pursuant to the provisions of 18 U.S.C. § 3731.[17]

On appeal the Government questioned the defendant's reliance on the

---

[13] 18 U.S.C. § 1201(a) (1964) (emphasis and footnotes added).

[14] In Waley v. United States, 233 F.2d 804 (9th Cir.), *cert. denied*, 352 U.S. 896 (1956), it had been suggested that a plea of guilty would preclude imposition of the death penalty, and presumably the same would be true in the event of a waiver of jury trial. However, in the earlier case of Seadlund v. United States, 97 F.2d 742 (7th Cir. 1938), it had been held that in the event of a guilty plea it was within the discretion of the trial judge to impanel a jury for the purpose of determining punishment. The same reasoning would seem to apply in cases where a defendant had waived jury trial. However, the district court in *Jackson* reasoned: "[E]ven if the trial court has the power to submit the issue of punishment to a jury, that power is discretionary, its exercise uncertain." United States v. Jackson, 262 F. Supp. 716, 717-18 (D. Conn. 1967). Thus the defendant who pleads guilty or waives jury trial is at least insulated by the discretion of the trial judge from jury-imposed capital punishment, while the defendant who submits the issue of guilt to the jury has no such protection. The district court thus found the possible conflict between *Waley* and *Seadlund* to be immaterial in that under either: "If defendants claim their fundamental Sixth Amendment right to a jury trial . . . they must risk their lives. That risk is at least substantially reduced if defendants waive their constitutional right to jury trial by claiming trial to the court or by pleading guilty." *Id.* at 717. For a penetrating analysis of the relative risks under both the *Waley* and *Seadlund* interpretations see Comment, 22 RUTGERS L. REV. 167 (1967). The Supreme Court finally resolved the conflict in statutory interpretation in favor of the *Waley* case.

Waiver of a jury trial must be affirmatively and intelligently made and requires the consent of the court and the prosecution. FED. R. CRIM. P. 23(a); Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Patton v. United States, 281 U.S. 276 (1930). A defendant in the federal system also has no absolute right to plead guilty. Lynch v. Overholser, 369 U.S. 705, 719 (1962).

[15] 380 U.S. 609 (1965). The *Griffin* rationale has been reaffirmed by the Supreme Court in Spevack v. Klein, 385 U.S. 511 (1967) (an attorney who asserted his right against self-incrimination at a judicial inquiry into his professional conduct may not be disbarred), and applied in a number of state and federal decisions. *E.g.*, Garrity v. New Jersey, 385 U.S. 493 (1967); Moraro v. United States, 374 F.2d 583 (1st Cir. 1967); People v. Henderson, 60 Cal.2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963); State v. Turner, 429 P.2d 565 (Ore. 1967).

[16] United States v. Jackson, 262 F. Supp. 716, 718 (D. Conn. 1967).

[17] 18 U.S.C. § 3731 (1964) allows the Government to make a direct appeal to the United States Supreme Court when a decision setting aside an indictment in a criminal proceeding is based on the invalidity of a federal statute.

Griffin rationale. Its contention was that intentional comment on a defendant's silence inures to the benefit of the prosecution, while requiring jury authorization for the death penalty operates as an alternative to mandatory capital punishment, thus having an ameliorative effect and inuring to the benefit of the defendant. The Government took the position that a statutory scheme implemented to mitigate the severity of punishment should not be invalidated because of an incidental and unintentional inducement to forego constitutional rights.[18] The Court rejected this argument, emphasizing that the desirable policy underlying jury-imposed capital punishment[19] could be implemented by alternative statutory schemes that do not penalize those who assert their right to a jury trial or to refrain from pleading guilty. As the Court observed, there are statutes which leave the decision on capital punishment to a jury in every case, regardless of how guilt is determined. For example, in cases where a defendant is convicted after trial by a judge or upon a plea of guilty, statutes could authorize the impaneling of a jury convened especially for the purpose of passing on the propriety of capital punishment. Thus all defendants would be subjected to an equal risk of death, regardless of whether their guilt had been determined by jury, judge or upon their own admission. With this and other available alternatives,[20] which implement capital punishment in such a way that there is no inducement to forfeit valuable constitutional rights, the question became not whether the inducement was "incidental rather than intentional,"[21] but whether it was "unnecessary and therefore excessive."[22]

Even if the threat of death did act as an inducement to waive jury trial or to plead guilty, the Government argued that the trial judge's power to reject coerced waivers or guilty pleas would act as an effective safeguard.[23] However, the Court saw the problem as not necessarily one of *coerced* guilty pleas and waivers, but rather that the statute *"needlessly encourages* them."[24] Thus, while the power of rejection may "alleviate

[18] Reply Brief for Appellant at 2, n.1; Brief for Appellant at 6-9, United States v. Jackson, 390 U.S. 570 (1968).

[19] The policy considerations which underly the practice of allowing only a jury to impose capital punishment are enumerated in note 12 *supra.*

[20] For other suggested schemes see Comment, 22 RUTGERS L. REV. 167, 195-96 (1967).

[21] 390 U.S. at 582.

[22] *Id.*

[23] As previously pointed out, a defendant has no absolute right to waive jury trial or to plead guilty. See note 14 *supra.*

[24] 390 U.S. at 583 (emphasis added).

. . . it cannot totally eliminate"[25] the improper inducement which is inherent in § 1201(a) of the Federal Kidnapping Act.

In a last attempt to uphold the constitutionality of the Act, the Government submitted the alternative proposal that all federal judges should be instructed to refuse to accept any waiver of jury trial or guilty plea in a kidnapping case.[26] Admittedly this alternative would subject all defendants to an equal risk of death, and thus eliminate any unconstitutional incentive to forego trial by jury or to plead guilty. But it would also have the undesirable effect of forcing all defendants to submit to a full trial on the merits. The Court was not receptive to this proposal. It emphasized that it would be "cruel" to require a trial of those defendants who prefer not to contest their guilt, and that the automatic rejection of all guilty pleas would "rob the criminal process of much of its flexibility."[27]

However, the Court held that the unconstitutionality of a part of the statute did not necessarily render the remaining portion invalid. The offensive portion could be severed from the remainder unless analysis of the legislative intent indicated otherwise.[28] The Court held that the death penalty provision was a "functionally independent" part of the Act, and that it could be severed, leaving the remainder in full force.

The Aftermath of the Jackson *Decision*

Following the Supreme Court decision in *Jackson*, defendants were quick to attack other statutory schemes in which the operative effect was similar to that of the Kidnapping Act. *State v. Harper*,[29] *State v. Peele*,[30] and *State v. Forcella*[31] are three post-*Jackson* cases in which state courts have been faced with challenges to their states' capital punishment statutes, and in *Alford v. North Carolina*[32] the Court of Appeals for the Fourth Circuit had the opportunity to pass upon the issue. While there are minor variations in each state's statutory scheme,[33] two characteristics

[25] *Id.*

[26] Reply Brief for Appellant at 5, United States v. Jackson, 290 U.S. 570 (1968).

[27] 390 U.S. at 584.

[28] If the unconstitutional provisions of a statute are severable from the rest in such a way that the legislature would be presumed to have enacted the valid portion without the invalid, then the entire statute will not be held unconstitutional. See 16 AM. JUR. 2D *Constitutional Law* § 186, at 414-15 (1962).

[29] — S.C. —, 162 S.E.2d 712 (1968).

[30] 274 N.C. 106, 161 S.E.2d 568 (1968). The *Peele* decision was followed in Parker v. State, 1 N.C. App. 27 (1968), and State v. Spence, — N.C. —, — S.E.2d —, (1968). *But see* Alford v. North Carolina, — F.2d — (4th Cir. 1968), in which the court of appeals disagreed with the *Peele* decision.

[31] 52 N.J. 263, 245 A.2d 181 (1968).

[32] — F.2d — (4th Cir. 1968).

[33] The South Carolina statutory scheme is as follows:

are common to all: (1) upon conviction the death penalty is mandatory, unless the jury recommends life imprisonment; (2) a defendant may enter a plea of guilty (or *non vult* under the New Jersey statute), which, if accepted, will preclude imposition of the death penalty. Thus, unlike

---

> Punishment for murder—Whoever is guilty of murder shall suffer the punishment of death; *provided however*, that in any case in which the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the Penitentiary with hard labor during the whole lifetime of the prisoner.

S.C. CODE ANN. § 16-52 (1962).

> Sentencing in cases of guilty pleas—In all cases where by law the punishment is affected by the jury recommending the accused to the mercy of the court, and a *plea of guilty is accepted with the approval of the court, the accused shall be sentenced in like manner as if the jury in a trial had recommended him to the mercy of the court.*

S.C. CODE ANN. § 17-553.4 (Supp. 1967) (emphasis added). The North Carolina statutory scheme for the crime of rape is as follows:

> Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.

N.C. GEN. STAT. § 14-21 (1953).

> (a) Any person, when charged in a bill of indictment with the felony of murder in the first degree, or burglary in the first degree, or arson, or rape, when represented by counsel whether employed by the defendant or appointed by the court under G.S. 15-4 and 15-5, may, after arraignment, tender in writing, signed by such person and his counsel, a plea of guilty of such crime; and the State, with the approval of the court, may accept such plea. Upon rejection of such plea, the trial shall be upon the defendant's plea of not guilty, and such tender shall have no legal significance.
> (b) In the event such plea is accepted, the tender and acceptance thereof *shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life* . . . .

N.C. GEN. STAT. § 15-162.1 (1965) (emphasis added). The New Jersey statutory scheme is as follows:

> Every person convicted of murder in the first degree . . . shall suffer death *unless the jury shall by its verdict . . . recommend life imprisonment*, in which case this and no greater punishment shall be imposed.

N.J. STAT. ANN. § 2A:113-4 (1951) (emphasis added).

> In no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such plea is offered, it shall be disregarded, and the plea of not guilty entered, and a jury, duly impaneled, shall try the case.
> Nothing herein contained shall prevent the accused from pleading *non vult* or *nolo contendere* to the indictment; *the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.*

N.J. STAT. ANN. § 2A:113-3 (1951) (emphasis added). (N.J STAT. ANN. § 2A: 113-4 (1951) provides for a maximum sentence of thirty years imprisonment for a conviction of murder in the second degree).

the Kidnapping Act, under these statutes the possibility of death does not turn on whether trial is by a jury or by the court. Indeed it cannot, for apparently none of these states allow a defendant to waive jury trial in a capital case.[34] Thus, while the Kidnapping Act offered two avenues of escape from the death penalty—by either a waiver of jury trial or by a guilty plea—the latter is the only means of escape for the state defendant.

Since the accused *must* be tried, if at all, by a jury, the *Forcella* court saw the sixth amendment as irrelevant, the issue being not the right to a jury trial, but rather the "right to defend."[35] Thus the sole basis for challenging the New Jersey statute was deemed to be whether the inducement to plead guilty violated the fifth amendment.

The language of *Harper* indicates that the South Carolina court was also cognizant of the distinction recognized in *Forcella,* for the court stated that:

> The death penalty provisions of the Federal Kidnapping Act were . . . declared unconstitutional because the death penalty under the Act was "applicable only to those defendants who assert the right *to contest their guilt before a jury.*"
>
> The question before us then is whether the provisions of our statutes render the death penalty for murder . . . applicable only to those defendants who assert the right *to plead not guilty.*[36]

And, although in *Peele* the distinction is less clearly articulated, it seems that the court there was also dealing in terms of only the fifth amendment.[37]

---

[34] In North Carolina "no person shall be convicted of any crime but by the unanimous verdict of a jury . . . in open court." N.C. CONST. art. I, § 13. This right cannot be waived. *E.g.,* State v. Muse, 219 N.C. 226, 13 S.E.2d 229 (1941); State v. Hill, 209 N.C. 53, 182 S.E. 716 (1935). The New Jersey court expressly stated: "Indeed the right to trial by jury cannot be waived." State v. Forcella, 52 N.J. 263, —, 245 A.2d 181, 184 (1968). Apparently jury trial could not have been waived in the *Harper* case either, for the South Carolina court stated: "[H]ereafter . . . the choice between life imprisonment and the death penalty must be left . . . to the jury in *every* case . . . regardless of how the defendant's guilt has been determined, whether by the *verdict of the jury* or by a *plea of guilty.*" State v. Harper, — S.C. —, —, 162 S.E.2d 712, 715 (1968) (emphasis added).

[35] 52 N.J. at —, 245 A.2d at 185.

[36] — S.C. at —, 162 S.E.2d at 713 (emphasis added).

[37] The North Carolina Supreme Court stated that:

> We think there are certain material differences in the Federal Kidnapping Act and in North Carolina Statutes 14-21 and 15-162.1, and that *Jackson* is not authority for holding the death penalty in North Carolina may not be imposed under any circumstances for the crime of rape. In the kidnapping act the law fixes imprisonment in the penitentiary, but provides that the jury may impose the death penalty. The North Carolina rape statute provides

Both the South Carolina and the North Carolina courts read *Jackson* as holding that § 1201(a) of the Kidnapping Act was repugnant not only to the sixth amendment right to jury trial, but that it was *independently* violative of the fifth amendment right "not to plead guilty." Recognition of the two independent bases for invalidation of § 1201(a) was expressly stated in the *Peele decision.*[38] It is implicit in the result reached in *Harper*, for the court summarily observed that if the South Carolina statutes rendered the death penalty applicable only to those defendants who plead not guilty, "then the *Jackson* decision renders . . . the statutes in question unconstitutional . . . ."[39] However, the *Forcella* court took a different approach. It recognized that there were two possible grounds on which § 1201(a) could have been held unconstitutional, and the court conceded the fact that the statute was a clear violation of the sixth amendment right to a jury trial.[40] But it was unwilling to interpret *Jackson* as holding that there was a *separate and independent* violation of the fifth amendment right "not to plead guilty." Since the fifth amendment was considered the only basis on which the New Jersey scheme could be challenged, it was held that *Jackson* did not implicate the state statute.

In *Alford*, the Court of Appeals for the Fourth Circuit, in the course of rejecting the *Peele* decision and applying *Jackson* to invalidate the North Carolina statutory scheme,[41] also disagreed with the *Forcella* interpretation. Not only did the circuit court read *Jackson* as

---

> that the death penalty shall be ordered unless the jury, at the time it renders its verdict of guilty, as a part thereof fixes the punishment at life imprisonment. True, G.S. § 15-162.1 provides that a defendant charged with rape, if represented by counsel, may tender a plea of guilty which, if accepted by the State with the approval of the Court, shall have the effect of a verdict of guilty by the jury with a recommendation the [sic] punishment be life imprisonment. The State, acting through its solicitor, may refuse to accept the plea, or the judge may decline to approve it. In either event, there must be a jury trial, although the facts are not in serious dispute.

State v. Peele, 274 N.C. 106, 111, 161 S.E.2d 568, 572 (1968).

[38] "The *Jackson* case holds the death penalty provision of the kidnapping act . . . violates fundamental rights guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States." *Id.* at 110, 161 S.E.2d at 571.

[39] — S.C. at —, 162 S.E.2d at 713.

[40] 52 N.J. at —, 245 A.2d at 184.

[41] In addition to holding that the North Carolina statutory scheme was invalid, the circuit court went two steps further. In *Jackson* the Supreme Court indicated that the mere fact that a defendant may plead guilty to a charge under the Kidnapping Act does not necessarily render his plea involuntary and require reversal of the conviction. *Alford* involved a habeas corpus proceeding in which the defendant contended that his plea of guilty to *second degree murder* had been coerced by the threat of death, which would have existed had he asserted his right to trial on the issue of first degree murder. From a review of the record the circuit court was satisfied that petitioner's guilty plea had been motivated by the desire to avoid the risk of death and that such a plea was involuntary.

rendering the death penalty provisions of the Federal Kidnapping Act unconstitutional on two separate grounds, but, contrary to the position taken in *Forcella, Peele,* and *Harper,* the court held that the state statutes in question could be challenged on both grounds. As to the first point the circuit court seems correct. The *Forcella* court's interpretation that the Kidnapping Act was not a separate and independent violation of both the fifth and sixth amendments seems a bit tenuous, particularly in light of some of the express language of the *Jackson* opinion. For example, the Supreme Court, in speaking of the death penalty provision of the Kidnapping Act, stated: "The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty *and* to deter exercise of the Sixth Amendment right to demand a jury trial."[42] And later in its opinion the Court stated that "the evil in the federal statute is not that it necessarily *coerces* guilty pleas *and* jury waivers but simply that it needlessly *encourages* them."[43] In each instance the Court spoke in terms of both the fifth and sixth amendments, and in view of this language it is difficult to accept the *Forcella* court's interpretation.

In respect to the circuit court's second point—that the state statutes may involve sixth as well as fifth amendment infirmities—the question is not so easily resolved. As previously noted,[44] under none of the state statutes involved can a defendant waive his right to be tried by a jury and thereby secure trial by the court. If a defendant decides to contest his guilt, trial *must* be by a jury. For this reason the *Forcella* opinion expressly, and *Harper* and *Peele* by implication, treat the sixth amendment right as irrelevant, the only issue being whether the inducement to plead guilty violates the fifth amendment. It is arguable that the right to defend necessarily encompasses the right to defend via jury trial. But as a practical matter the jury trial-judge trial alternative can arise only after the initial decision to contest guilt. Furthermore, if the right to a jury trial is automatically violated by impeding the right to defend, then it may be argued with equal validity that other rights, such as the right of confrontation, are also impaired.

The Necessity of Balancing Conflicting Interests

Even if the *Alford* court was correct in its interpretation that the state statutes could be challenged on both fifth and sixth amendment

[42] 390 U.S. at 581 (emphasis added).
[43] *Id.* at 583 (emphasis added).
[44] See note 34 *supra,* and accompanying text.

grounds, there still may be a basis for questioning the applicability of the *Jackson* decision. The Court in *Jackson* emphasized that the inducement inherent in the Kidnapping Act was *needless* and *unnecessary*. This was so because the statutory alternative of allowing a jury to decide upon capital punishment in every case, regardless of how guilt is determined, could retain the policy of jury-imposed capital punishment and at the same time make the risk of death equal for all defendants. However, it may be that the alternative scheme will have the effect of destroying *other* policy considerations. If this is true, then the inducement was not needless or unnecessary, and these policies must be weighed against the degree of inducement.[45]

There are, of course, valid policy reasons for maintaining the practice of allowing only a jury to impose the death sentence. The *Jackson* Court observed that limiting the death penalty to cases in which the jury recommends death avoids the more drastic alternative of mandatory capital punishment.[46] Further, having only the jury as the sentence-imposing body relieves the trial judge of the onerous burden of imposing the death sentence himself. It has also been suggested that when juries have no control over sentencing they will often acquit or return verdicts for lesser included offenses, notwithstanding evidence of guilt, in order to avoid the possibility that the defendant will receive the death sentence. By having control over punishment the jury can render its decision on the merits without fear of the consequences.[47]

Recognizing the validity of allowing only the jury to impose death, the *Jackson* Court noted that there are statutes that authorize a jury to decide on the issue of punishment in every case, regardless of how guilt is determined.[48] Under such a scheme the risk of death would be equal for all defendants and no premium would be placed upon waiving a jury trial or on pleading guilty.

At this point it would be tempting to conclude summarily that there was actually no need to balance conflicting interests in the *Jackson* case—

[45] The evil inherent in the Federal Kidnapping Act was that its operative effect conditioned jury trial upon acceptance of the risk of death, thus discouraging the assertion of fifth and sixth amendment rights. Courts have shown increasing concern that constitutional rights may be chilled by the infliction of judicially or legislatively imposed penalties upon defendants who elect to exercise them. See Comment, 22 Rutgers L. Rev. 167, 172 (1967). Implicit in these decisions is the proposition that if the particular procedure that imposed the penalty served legitimate functions, then the utility of those functions must be weighed against the procedure's inhibiting effects.

[46] 390 U.S. at 581-82.

[47] See note 12 *supra*.

[48] 390 U.S. at 582.

that the burden on the assertion of constitutional rights *was* needless—because the statutory scheme recommended in lieu of § 1201(a) would eliminate the conflict. But such a conclusion would be premature without inquiry into the possible collateral effects of the proposed alternative scheme. It must be remembered that the procedural device of waiving trial by jury in order to obtain trial by the court, while not expressly embodied in the terms of § 1201(a), is, nevertheless, part and parcel of the total statutory scheme. Thus inquiry must be made into whether adoption of the alternative scheme would in any way destroy the reasons for allowing waiver of jury trial.[49] More simply stated, would the practice of allowing a jury to impose death following trial by the court be destructive of the reasons for allowing a waiver in the first place? In addition, it must be determined if there are valid policy considerations which will be thwarted if death is allowed to be imposed following a guilty plea.

It is generally recognized that there are situations in which an accused may feel that he will be better protected by choosing trial by the court rather than submitting his case to a jury. For example, a defendant may feel that a judge is more capable of understanding a complex case and of rendering an intelligent verdict.[50] Trial by the court may give the accused the opportunity to make a fuller presentation of his case because the judge will be more likely to relax the normal rules of evidence.[51] In addition there is the very real possibility that certain factors that might prejudice a jury will not sway the conditioned objectivity of a trial judge.[52] It would seem that none of these policy considerations would in any way be subverted by submitting the issue of capital punishment to a jury subsequent to a guilty verdict rendered by the court.

However, there are valid policy considerations that may be destroyed if the death penalty is allowed following a guilty plea. One policy favoring a death-free guilty plea can be illustrated by a review of the historical development of capital punishment legislation in New Jersey. Prior to 1893 death was mandatory upon a conviction of murder in the first degree,[53] and in ac-

[49] Waiver of jury trial is provided for by FED. R. CRIM. P. 23(a).

[50] Note, *Waiver of Trial Jury in Felony Cases in Kentucky*, 48 KY. L.J. 457, 461 (1960).

[51] *Id.* at 461-62.

[52] *Id.* at 462-63.

[53] The 1893 act was intended to ameliorate the course of capital punishment. Prior thereto, the penalty for murder in the first degree was mandatorily death, and if a defendant was convicted on confession in open court, the court had to "proceed, by examination of witnesses, to determine the degree of the crime and give sentence accordingly."

52 N.J. at —, 245 A.2d at 188.

cordance with the common law rule the death penalty could be imposed upon a plea of guilty.[54] However, judges were reluctant to impose death upon a defendant's own admission and often advised them to retract the plea and submit to trial.[55] In 1893 the legislature abolished the plea of guilty and authorized a plea of *non vult*, the sentence being the same as that imposed upon a conviction of second degree murder. In 1917 legislation was passed that eliminated mandatory capital punishment, giving the jury the authority to recommend life imprisonment. At the same time the penalty upon a plea of *non vult* was increased to life imprisonment.[56]

It can be seen, then, that the catalyst for adoption of the *non vult* statute was simply a reluctance to impose the death sentence upon a defendant's own admission. Thus the statute "served to 'substitute for the advice of the judge the mandate of the law, that the citizen shall not be adjudged to death upon his own confession, but that . . . the state shall prove in all respects to the satisfaction of a jury the crime laid in the indictment.' "[57] Apparently the *Forcella* court lost sight of the underlying policy that prompted the enactment of the *non vult* statute when it argued that the statute "was intended to benefit murder defendants, permitting the court . . . to accept a plea which would bar the death penalty."[58] The point is that the statute was not intended to provide a ready means of escape from the risk of death. Had the legislature thought the death penalty inappropriate it could have simply eliminated it. The *non vult* statute was merely a manifestation of legislative intent that the defendant who pleaded guilty should not suffer death. Of course, like § 1201(a) of the Kidnapping Act, the statute has the collateral effect of allowing defendants to escape the death penalty. In this respect it can be argued, as indeed it was in both *Forcella* and *Peele*, that statutes of this type are "beneficial."[59]

---

[54] At common law a defendant could enter a plea of guilty to any offense with which he was charged and apparently the court was bound to accept the plea if entered into voluntarily and with full knowledge of the consequences. See MODEL CODE OF CRIMINAL PROCEDURE § 225 (Official Draft, 1930), comment and cases cited therein.

[55] "[J]udges from the earliest times, abhorring to enter a death judgment on a defendant's admission, generally advised prisoners to retract the plea and to plead to the indictment." 52 N.J. at —, 245 A.2d at 188.

[56] *Id.* at —, 245 A.2d at 188-89.

[57] *Id.* at —, 245 A.2d at 188.

[58] *Id.* at —, 245 A.2d at 189.

[59] The North Carolina Supreme Court stated that:

> G.S. 15-162.1 is primarily for the benefit of a defendant. Its provisions may be invoked only on his written application. It provides that the State and the defendant, under rigid court supervision, may, without the ordeal of a trial, agree on a result which will vindicate the law and save the defendant's life.

274 N.C. at 111, 161 S.E.2d at 572. Both the *Peele* and *Forcella* courts also argued

This line of reasoning presupposes that leniency to those who otherwise would have been put to death outweighs the inducement of guilty pleas from defendants who otherwise would have been successful[60] in contesting their guilt. While analysis of this intriguing question is beyond the scope of this note, suffice it to say that there are few executions in this country, and for this reason the *Forcella* court's conclusion that a "justified leniency for the many"[61] should weigh more heavily is far from clear. While the *Jackson* Court did not engage in an express analysis of the relative benefit and burden, it is arguably implicit in the decision that this balance has been struck, and that elimination of the inducement outweighed any possible "benefit" to defendants as a class. But even though the *Jackson* decision itself seems to preclude use of the "benefit" rationale, it is still obvious that the Court's suggested alternative scheme is diametrically opposed to the notion that a defendant should not be put to death upon his own admission.

If the death penalty is to be allowed upon a defendant's own admission, then the practical effect may be a substantial reduction in the incidence of use of the guilty plea.[62] A defendant who pleads guilty would stand forewarned that he automatically faces the possibility of death. On the other hand, a defendant, by asserting his right to trial, would be assured that no punishment could be imposed unless the prosecution sustained the burden of affirmatively proving his guilt. Thus the possibility of an acquittal would insulate him from direct exposure to punishment, and even if he were convicted following a trial, the possible sanctions would

that the trial judges's power to reject coerced guilty pleas would act as a safeguard. However, the *Jackson* Court expressly repudiated this line of reasoning.

[60] In addition to acquittal, "successful" in this context means conviction of a lesser included offense, or a lighter sentence than would have been imposed had the defendant pleaded guilty.

[61] 52 N.J. at —, 245 A.2d at 188.

[62] Empirical support of this hypothesis would be desirable, but precise data on guilty pleas are difficult to establish. It has been estimated that ninety per cent of all criminal convictions are by pleas of guilty. D. NEWMAN, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 4 (1966). However, the percentage of guilty pleas in capital cases is substantially lower. A recent three year study in California, a state in which death may be imposed following a guilty plea, indicated that in murder cases there was a 32 per cent disposition by guilty plea. See J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY 113 (1966). Even this statistic may be misleading if it is taken as an indicator of the number of defendants who plead guilty in the face of a possible death sentence, for a portion of the 32 per cent may have entered the plea with the understanding that the prosecutor would not seek or the judge impose the death sentence. It would be interesting to compare the California statistics with those from a state that had a death-free guilty plea. While such data has not been found, it seems that the percentage of defendants who avail themselves of the death-free plea would be much higher.

be the same as they would have been on a guilty plea—either death or life imprisonment. Under this analysis, unless it could be shown that for some reason the probability of receiving the death sentence rather than life imprisonment would be substantially greater following a trial on the merits, a defendant would have much to gain and nothing to lose by contesting rather than admitting his guilt.

Concomitant with a reduction of guilty pleas is the erosion of many of the policy considerations upon which the plea is based. The additional burden on our already crowded courts that would result from a reduction of guilty pleas testifies to the need for maintaining the expediency that the plea lends to the guilt-determining process. And, quite apart from notions of expediency, it has been suggested that the determination of guilt without trial serves a number of other values.[63] It thus becomes paradoxical that *Jackson*, a decision in which the Court expressly recognized the utility of the guilty plea,[64] may have the practical effect of discouraging guilty pleas.

Since abolition of the death-free guilty plea may be destructive of legitimate interests, then the value of these interests should be weighed against the statutory scheme's inhibiting effect upon constitutional rights. In striking this balance it is significant to observe that the degree of inducement under the state statutes seems far more severe than that of the Kidnapping Act.[65] Under the provisions of the Kidnapping Act

---

[63]

> [T]he plea provides a means by which the defendant may acknowledge his guilt and manifest a willingness to assume responsibility for his conduct. Also, in some cases the plea will make it possible to avoid a public trial when the consequences of such publicity outweigh any legitimate need for a public trial. Pleas to lesser offenses make possible alternative correctional measures better adapted to achieving the purposes of correctional treatment, and often prevent undue harm to the defendant from the form of conviction. Such pleas also make it possible to grant concessions to a defendant who has given or offered cooperation in the prosecution of other offenders.
>
> . . . Such pleas tend to limit the trial process to deciding real disputes and, consequently, to reduce the need for funds and personnel. . . . Moreover, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence.
>
> It may thus be concluded that the frequency of conviction without trial not only permits the achievement of legitimate objectives . . . but also enhances the quality of justice in other cases as well.

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2-3 (Tent. Draft 1967).

[64] See note 27 *supra* and accompanying text.

[65] Brief for Appellant at 9, Alford v. North Carolina, — F.2d — (4th Cir. 1968). The circuit court in *Alford* agreed with appellant's contention. "Greater encouragement is inevitable in a New Jersey-type statute than in the federal statutes held invalid . . . in *Jackson* . . . ." Alford v. North Carolina, — F.2d — — (4th Cir. 1968).

a defendant had two avenues of escape from the death penalty—he could either plead guilty, or plead not guilty and waive jury trial. Under the latter alternative an accused could thus avoid the death penalty, while still retaining the right to contest his guilt. Thus, it would seem that a defendant who could escape the death penalty by agreeing to contest his guilt before a judge rather than a jury would be under little pressure to plead guilty. However, such is not the case in the context of the state statutory schemes. Under them the guilty plea is the only avenue of escape, and thus there is an inherently greater inducement to plead guilty.

Of course the most desirable solution (assuming a negative view as to the propriety of capital punishment) would be to abolish the use of the death penalty. Even the *Jackson* Court fell short of this. But an analysis of the legislative history of the Kidnapping Act did enable the *Jackson* Court to conclude that Congress would not have chosen "to discard the entire statute if informed that it could not include the death penalty clause now before us."[66] The answer was thus to sever the death penalty provision and leave the remainder of the Act as operative law, with the maximum penalty being life imprisonment. However, severance may not be the answer for many state court schemes. For example, the *Forcella* court pointed out the New Jersey dilemma: "[W]e could hardly accept the extraordinary proposition that the 1893 act or the 1917 act, or any general revision of the laws, spelled out an intent that the death penalty should fall if the introduction of the non vult plea created a constitutional impasse."[67]

Conclusion

In *Jackson* the Court stated that the provisions of the Federal Kidnapping Act *needlessly* encouraged waivers of jury trial and guilty pleas. Alternative statutory schemes can eliminate the inducement to forego these rights and at the same time preserve the policy reasons for having jury-imposed capital punishment. It is submitted, however, that the suggested alternative scheme may be destructive of other policies that favor a death-free guilty plea. It may be that "other values come into play and . . . demonstrate that the incidental impact . . . is not 'needless'. . . ."[68] The inhibiting effect of these statutes should be balanced against the policy that forbids imposition of the death penalty upon a defendant's own admission, and against the undesirable impact upon the administration of

[66] 390 U.S. at 586.
[67] 52 N.J. at —, 245 A.2d at 191.
[68] *Id.* at —, 245 A.2d at 186.

criminal justice that a reduction in guilty pleas would surely entail. It is therefore arguable that *Jackson* should not be read as a per se invalidation of state statutes such as the ones in question. With the abundance of litigation that the *Jackson* decision is engendering, the Supreme Court will undoubtedly have ample opportunity to address itself to these issues.

JAMES G. BILLINGS

Domestic Relations—Complementary Adjudication of Marital Incidents in Divorce Proceedings

The recent decision of the North Carolina Supreme Court in *Fleek v. Fleek*[1] illustrates once more that insisting that a divorce action and its incidents be made to fit precisely the traditional in rem-in personam categories may obscure the truly relevant jurisdictional factors inherent in divorce litigation.

Her husband having toured Switzerland and Italy some twelve years, Mrs. Fleek, a North Carolina domiciliary, sued in Durham County for divorce and child support. In accordance with the statute providing for service of process in proceedings "for . . . divorce . . . or other relief involving . . . domestic status . . . ,"[2] she published notice in the local newspapers and sent copies of the complaint and summons to his last known addresses. While granting her *ex parte* divorce, the trial court declined to order child support on the basis that the statute did not authorize a judgment in personam on such service. In affirming, the supreme court stated that "the court is without power to enter a judgment *in personam* unless and until the defendant is before the Court in person, that is, by personal service of process, or by a general appearance before the Court."[3] The underlying jurisdictional problem here is whether something more than domicile of the plaintiff-spouse—a sufficient basis, assuming due process notice out of the state, for jurisdiction to grant the divorce—is required to render valid a child support order against the absent spouse. The court's decision is technically correct; the statute invoked did not *specifically* authorize an exercise of jurisdiction on substituted service in the child support aspect of the case.[4] But to the extent the opinion

[1] 270 N.C. 736, 155 S.E.2d 290 (1967).
[2] N.C. GEN. STAT. § 1-98.2(3) (Supp. 1967).
[3] 270 N.C. at 738, 155 S.E.2d at 292.
[4] As a matter of simple statutory interpretation, no fundamental quarrel can be made with a holding that the language, "service of process by publication or

suggests that statutory authority for such an exercise of jurisdiction could not constitutionally be given, serious questions may be raised. The opinion reveals a continuing commitment to rigid traditional in rem-in personam categories of jurisdiction that events have long since discarded.

So long as these categories have of necessity been used, divorce actions have been considered in rem, concerning a relationship (the *res*) created or maintained within the state.[5] But the natural incidents of that relationship—property and support rights, for example—have continued to be considered in personam.[6] When the plaintiff in an *ex parte* divorce proceeding on constructive service of process has also demanded a money judgment, the court, after rendering its decision determining the continuing validity of the marital status, has considered itself without power to enter a personal judgment against the absent defendant; the service of process that was sufficient to raise jurisdiction over the marriage status was deemed insufficient to raise jurisdiction to adjudicate a personal obligation arising out of that status. Thus while a spouse might be able to have her marriage ties severed by the state of her domicile, it has remained quite possible that she would have to pursue her partner into a foreign state to secure a property settlement. Courts insisting upon the categorization of marital incidents within the in personam-in rem framework have thus committed themselves to the problems of divisible divorce—the incomplete adjudication of marital estates, the deprivation of support for the children of that estate, and the inconvenient judicial administration resulting from a multiplicity of suits.

The intransigence of this approach has long been recognized. "While jurisdiction over individuals and over corporations has, because of a willingness to reëxamine the relevant factors, been able to break away from the inadequate concept of 'power' as the sole basis of jurisdiction, a similar reëxamination has not occurred with regard to the concept of the marital *res* in the field of divorce jurisdiction."[7] Although the rule in

---

service outside the state may be had in . . . proceedings . . . (3) . . . for . . . divorce . . . or for any other relief involving the domestic status of the person to be served . . . ," does not include child support. N.C. GEN. STAT. § 1-98.2(3) (Supp. 1967).

[5] A. EHRENZWEIG & D. LOUISELL, JURISDICTION IN A NUTSHELL § 7, at 57-59 (2d ed. 1968); F. JAMES, CIVIL PROCEDURE § 12.1, at 612-13 (1965) [hereinafter cited as JAMES]; *cf.* Ballard v. Hunter, 204 U.S. 241, 262 (1907) (constructive service sufficient because owners usually keep themselves informed of what concerns their property).

[6] Shonk v. Shonk, 16 Ohio Misc. 123, 241 N.E.2d 178 (1968).

[7] *Developments in the Law: State Court Jurisdiction*, 73 HARV. L. REV. 909, 971 (1960).

Williams v. North Carolina,[8] that a court may adjudicate the continuing validity of the marital relationship whenever the bona fide domicile[9] of one of the spouses is established to be within the state, has facilitated divorce of absent spouses, it has also given rise to the anomaly of divisible divorce. Under the *Williams* rule, the possibility arises that that same court considered to have sufficient interest to adjudicate divorce is nevertheless without power to adjudicate the incidents of the marriage. Such an attitude seems less a solution to the problem than a refusal to recognize it. A better approach would say:

> The only legal question for our concern in this case is whether the other aspect of, and indeed an incident to, a proceeding for divorce, the property arrangement, is similar enough to the dissolution of the marital relation, with respect to both the interests of the parties and the nature of what is adjudicated, that constitutionally it may be treated alike.[10]

Even within the traditional categorization of divorce litigation within the in rem-in personam framework, divorce actions can constitutionally be adjudicated more completely than was *Fleek*. Generally speaking, both the North Carolina legislature and court[11] have been advertent to expanding notions of jurisdiction[12] that have departed from an earlier philosophy requiring physical power over the defendant in order to subject him to personal jurisdiction.[13] Satisfaction of the "minimum contacts" test and compliance with the requirements of due process, adequate

---

[8] 317 U.S. 287 (1942).

[9] A man has only one domicile, but he may have many residences. *See* Texas v. Florida, 306 U.S. 398, 432 (1939); *cf.* Milwaukee County v. M.E. White Co., 296 U.S. 268, 275 (1935).

[10] Vanderbilt v. Vanderbilt, 354 U.S. 416, 423 (1957) (dissenting opinion of Frankfurter, J.).

[11] *See, e.g.*, Shepherd v. Rheem Mfg. Co., 249 N.C. 454, 460, 106 S.E.2d 704, 709 (1959).

[12] International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See also*, Milliken v. Meyer, 311 U.S. 457 (1940); Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935); Hess v. Pawlowski, 274 U.S. 352 (1927); Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960).

[13] *E.g.*, Thomas v. Frosty Morn Meats, Inc., 266 N.C. 523, 146 S.E.2d 397 (1966) (substituted service not ipso facto invalid on mere showing defendant not personally served within the state); Harrison v. Hanvey, 265 N.C. 243, 248-49, 143 S.E.2d 593, 597 (1965) (constructive service valid if shown defendant left state to defraud creditors or avoid service of process); Surratt v. Surratt, 263 N.C. 466, 139 S.E.2d 720 (1965) (had defendant, in alimony case, been shown a resident, constructive service would have been valid); Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951) (affirming constitutionality of nonresident motorist statute); Cape Fear Rys. v. Cobb, 190 N.C. 375, 129 S.E. 828 (1925) (substituted service on local sales agent of foreign corporation sufficient to establish jurisdiction over that corporation).

notice and opportunity to be heard,[14] have become the modern requisites for the assertion of personal jurisdiction over nonresident corporations,[15] nonresidents found to be doing business within the state,[16] nonresident motorists,[17] and residents who had departed the state with intent to defraud creditors or to avoid service of process.[18] More recently, the drafters of the new North Carolina jurisdiction statute,[19] enacted in conjunction with the adoption of the new North Carolina Rules of Civil Procedure, cited these developments[20] in basing that statute on the fundamental state interest in the litigation and general principles of fairness and reasonableness.[21]

That a court may with justification insist on more than simply the domicile of the plaintiff-spouse as a jurisdictional basis for marital incident orders is not disputed. Indeed, the court might reasonably conclude that major problems of forum shopping by far from innocent spouses, encouraged by the notorious laxity in the divorce laws of some states, would tax such a framework beyond the benefits to be derived in terms of judicial efficiency. But where that something extra does exist—a spouse who has fled the state following culpable conduct,[22] or simply an absent domiciliary,[23] for instance—the court need not hesitate to exercise personal jurisdiction on the basis of these additional contacts with the marital relationship. This would take into account the modern factors of fairness and reasonableness in the determination of personal jurisdiction, and it would leave the court free to determine in each case whether the asserted domicile gives the state sufficient contact with the marriage, as a matter of due process, to assert personal jurisdiction over its partners with respect to the various incidents of the marriage.

Substantial difficulties may arise in any subsequent attempt to enforce Mr. Fleek's child support obligation, and in any event it will require an additional venture into court. Satisfactory resolution of the issue might

---

[14] *See* JAMES § 12.8, at 642-43; Allen, *What's New in the Law: Choice of Law . . . Greatest Interest Rule*, 54 A.B.A.J. 918 (1968); Kurland, *The Supreme Court, The Due Process Clause and In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958).

[15] N.C. GEN. STAT. § 55-145 (1965).

[16] N.C. GEN. STAT. § 1-97(5) (1953).

[17] N.C. GEN. STAT. § 1-105 (Supp. 1967).

[18] N.C. GEN. STAT. § 1-98.2(6) (Supp. 1967).

[19] N.C. GEN. STAT. § 1-75 (1967) (effective July 1, 1969).

[20] GEN. STATUTES COMMISSION, PROPOSED N.C. RULES OF CIVIL PROCEDURE 111 (1966).

[21] *Id.* at 112.

[22] N.C. GEN. STAT. § 1-98.2(6) (Supp. 1967).

[23] Smith v. Smith, 45 Cal. 2d 235, 288 P.2d 497 (1955).

legitimately have been possible in the previous divorce action, had a different statute[24] been invoked or had the court felt obliged to consider the problem in the light of fairness and due process and opportunity to be heard. The state's interests lie largely on the side of prompt and effective safeguarding of the children's welfare,[25] which seems sufficiently related to the marriage relationship to justify treatment along with its adjudication, once the court has affirmatively determined the contacts and reasonableness issues. Such an approach would certainly then satisfy the state's interest in assuring the integrity of its domestic institutions, while providing for the cleanup of those litigious problems often arising out of marital estrangement.

The policy and trend in the law of jurisdiction has favored the expansion of the concept of personal jurisdiction to the limits of fairness and reason.[26] It is to be hoped that the dictum in *Fleek* does not indicate an intransigent attitude, which, by "labelling the action with the question-begging phrase 'in personam,' "[27] will always deny a forum to plaintiff-spouses whose husbands are, for whatever reason, absent from the state.

ROBERT L. EPTING

Eminent Domain—An Expansion of the Definition of Taking

While it has been axiomatic since 1897 that state and municipal governments are bound by the due process clause of the fourteenth amendment to justly compensate for property taken for public use,[1] the conceptual problems involved in defining "taking" and "public use" have created uncertainty[2] and, in some cases, caused injustice.[3] It is clear that the

[24] N.C. GEN. STAT. § 1-98.2(6) (Supp. 1967) (departed debtor).

[25] Estin v. Estin, 334 U.S. 541, 546-47 (1948). *See also* State v. Bell, 184 N.C. 701, 115 S.E. 190 (1922) (divorce can neither terminate a father's relationship to his children nor his continuing obligation to support them). North Carolina statutory law also reflects the state's interest in the issue of child support. *See, e.g.,* N.C. GEN. STAT. § 14-325 (1953) (making nonsupport criminal); N.C. GEN. STAT. § 52A-6 (1953) (making nonsupport an extradictable offense).

[26] JAMES § 12.8, at 642-43.

[27] Vanderbilt v. Vanderbilt, 354 U.S. 416, 423 (1957) (dissenting opinion of Frankfurter, J.).

[1] Chicago, B. & O.R.R. v. City of Chicago, 166 U.S. 226, 241 (1897).

[2] *See* Sax, *Takings and the Police Power,* 74 YALE L.J. 36, 37-42 (1964), tracing the conflicting views of Justices Harlan and Holmes on the question of what constitutes a "taking" and introducing the original conflict between the doctrinal and functional or utilitarian approaches to "taking." *See also* 1 J. LEWIS, EMINENT DOMAIN (2d ed. 1900). The author states: "[W]hen we come to seek

public policy demanding flexibility in land use precludes any purely formalistic definition of "public use."[4] Thus, the term has outgrown the early restrictive requirement that the property sought be destined for actual "public employment." Rather, it has acquired an updated, policy-oriented "public benefit" aspect.[5] Although there has been an ever-broadening and socially responsive definition of "public use," the concomitant has not been true of the concept of "taking."[6] Certainly "taking" has changed from the antiquated view that government must assert an actual proprietary interest in the property before an owner may demand compensation.[7] The modern view is that any substantial interference with private property that destroys or significantly lessens its value is a "taking," even though title in the owner remains undisturbed.[8] But this seemingly broad definition has tended to be restricted and, on occasion, has failed to protect adequately private property from some of the aberrations of increased eminent domain power.[9] However, there have been several recent decisions that indicate that a new and broader definition of "taking" may be developing to aid the property owner.[10] In the most recent of these cases, *Sayre v. United States*,[11] the court approached "taking" with what appeared to be a doctrinal definition,[12] but which, upon closer scrutiny, proved utilitarian in application.

for the principles upon which the question of public use is to be determined, or to define the words, 'public use,' in the light of judicial decisions, we find ourselves utterly at sea." *Id.* at 410.

[3] For a survey of the reasons which most courts give for making the owner of property absorb the depreciation in the value of his land created by a taking of adjacent land, *see* 2 P. NICHOLS, EMINENT DOMAIN § 6.441 [1] (3d rev. ed. 1963) [hereinafter cited as NICHOLS].

[4] *See* Morris, *The Quiet Legal Revolution: Eminent Domain and Urban Redevelopment*, 52 A.B.A.J. 355, 356 (1966).

[5] *Id.*; Comment, *Urban Renewal: Acquisition of Redevelopment Property by Eminent Domain*, 1964 DUKE L.J. 123, 125; Note, *Real Property—Eminent Domain—The Public Use Requirement*, 46 N.C.L. REV. 663 (1968).

[6] *See* 26 AM. JUR. 2D *Eminent Domain* § 158 (1966) (concluding that the meaning of "taking" is of decreasing importance).

[7] *See* Sax, *supra* note 2, at 37-42.

[8] Eyherabide v. United States, 345 F.2d 565, 567 (Ct. Cl. 1965); 2 NICHOLS § 6.3.

[9] *See* Dolle, *Impending Condemnation and Stultification of Use*, 3 REAL PROP., PROB. & TRUST J. 106 (1968) [hereinafter cited as Dolle].

[10] Sayre v. United States, 282 F. Supp. 175 (N.D. Ohio 1967); Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966); City of Cleveland v. Carcione, 116 Ohio App. 525, 190 N.E.2d 52 (1963).

[11] 282 F. Supp. 175 (N.D. Ohio 1967).

[12] The term "doctrinal" is used to indicate an approach to the law wherein concepts are created into which facts must fit to enable the rule of law to apply. This provides certainty, but it does not provide well for change in circumstances nor does it facilitate policy decisions. Conversely, "utilitarian" is used to indicate a functional approach that is dynamic but provides little certainty.

Sayre involved the use of eminent domain power in urban redevelopment, an area of governmental power that has been substantially augmented by the expansion of the "public use" doctrine.[13] Pursuant to the Housing Act of 1949,[14] the Cleveland, Ohio, City Planning Commission sought in January, 1961, to obtain federal funds under a grant and loan contract by adopting an urban renewal plan.[15] After approval of the plan, the defendant City of Cleveland initiated the University-Euclid Urban Renewal Project I by sending notices to the residents and owners of the affected area of its intent to acquire their property.[16] Subsequently, the city made "prominent and frequent public announcements and publication through all local media of public communication of its intention to appropriate the properties."[17] Yet the city, thereafter, acquired only a small amount of the properties. At the same time, by following normal eminent domain procedure[18] and denying any compensation for repairs to property, the city effectively denied area owners, one of whom was the plaintiff's bankrupt, Liberty Mortgage Company, the right to repair their swiftly deteriorating realty.[19] On November 2, 1964, the Liberty Mortgage Company was declared bankrupt.[20] At that time the City of Cleveland had acquired not more than twelve of the scores of the company's properties within the project area.[21]

On these stipulated facts, the federal district court held as a matter of law that the city had abused its eminent domain power to an extent that amounted to a pro tanto "taking."[22] In apparent ratification of the doctrinal method, the court marshalled facts from the complaint which fulfilled the required elements of conceptual taking—governmental intention to appropriate and governmental action amounting to appropriation.[23] However, the paucity of facts upon which the court relied, coupled

[13] Morris, *supra* note 4, at 355-56.

[14] 42 U.S.C. § 1441 (1964).

[15] 282 F. Supp. at 178. See 42 U.S.C. § 1455(a) (1964), requiring the local government to approve an urban renewal plan for an area before any funds are made available.

[16] 282 F. Supp. at 178. See 42 U.S.C. § 1455(d) (1964), providing that "no land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place and purpose of such hearing."

[17] 282 F. Supp. at 179. See 42 U.S.C. § 1455(e) (1964).

[18] See Dolle.

[19] 282 F. Supp. at 179.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 192.

[23] *Id.* at 184, 185.

with the court's slight deviation from precise conceptualism, reveals the actual utilitarian approach of the opinion.

Quoting from *Biggs Realty Co. v. United States*,[24] the court in *Sayre* stated that " '[t]o constitute a taking there must be an intent on the part of the [defendant] to take plaintiff's properties, or at least an intention to do an act the natural consequences of which was to take property.' "[25] In *Foster v. City of Detroit*,[26] upon which *Sayre* most heavily relied, finding intent had been easy, since that fact was established by the completion of the appropriation proceedings.[27] Thus, the court in *Foster* merely had to decide at what point in time the taking had occurred. However, in *Sayre* the eminent domain proceedings, though commenced in accordance with law, had never been concluded,[28] and this complicated the question of intent.[29] The court held that publication of notices to the effect that the city intended, at some future time, to procure plaintiff's properties was sufficient to establish an intention to do an act the natural consequences of which was to take property.[30] This then was the first crack in the doctrinal wall surrounding the concept of "taking." The "natural consequences" test for intent introduced an element of reasonable expectation into the concept of "taking," and like most tests of reasonableness, it allowed for balancing policy considerations. Could not the City of Cleveland reasonably expect that publication of the notices, followed by city inaction, would result in the gradual abandonment by tenants of the Liberty Mortgage Company's properties within the project area and subsequent vandalism of the vacated properties? The outcome in *Sayre* hinged upon the answer to that question. However, to analyze the concept of "taking," it is the formulation of that question that is crucial.

Even with the intent to appropriate established, the court in *Sayre* had to find some act by the city sufficient to implement that intent. Again the court relied upon the reasoning in *Foster*[31] and concluded that Cleveland, by initiating steps to appropriate the bankrupt's properties without the proper planning for completing the appropriation, had abused its

[24] 353 F.2d 1013 (Ct. Cl. 1965).
[25] 282 F. Supp. at 185.
[26] Foster v. City of Detroit, 254 F. Supp. 655, 660 (E.D. Mich. 1966).
[27] 282 F. Supp. at 185. *See* Committee on New Developments in Real Estate Practice, *Inverse Condemnation*, 3 REAL PROP., PROB. & TRUST J. 173, 175 (1968).
[28] 282 F. Supp. at 185.
[29] *See Inverse Condemnation*, *supra* note 27, at 176.
[30] 282 F. Supp. at 185.
[31] Foster v. City of Detroit, 254 F. Supp. 655, 664 (E.D. Mich. 1966).

power.[32] However, the court stated that abuse of power alone was not enough to constitute an act of taking, where there had been no formal condemnation proceedings, unless that act of abuse "directly and proximately contributes to, hastens, and aggravates, acting alone or in combination with other causes, the deterioration and decline in value of the area and the subject property."[33] The court required this element of causation to fulfill the concept of "taking."

The court rendered its decision that the required concepts of intention and action were fulfilled by the facts pleaded and that they constituted a taking for which there had to be just compensation. But what were the crucial facts? The City of Cleveland published the notices of intent to acquire and then did nothing, and as a result there occurred the rapid depreciation of bankrupt's properties. Upon these same crucial facts, the law prior to *Sayre* was well settled that "land is not damaged or taken in a constitutional sense by reason of preliminary proceedings looking to its appropriation for a public use."[34] Furthermore, one district court,[35] in a widely quoted opinion,[36] had expressly rejected the proposition that the *institution* of condemnation proceedings could lead to such an interference with private property rights as to constitute a taking:

> The reasoning seems to be that the very filing of this suit interferes with the normal freedom of an owner to use and dispose of his property. But such interference is inherent in all condemnation proceedings. No case has been cited or found which supports the view that the condemnation action itself constitutes a taking. The court finds no merit in it.[37]

The court in *Sayre*, under the guise of conceptualism, has clearly promulgated a definition of "taking" that creates new law at least with reference to the conduct of eminent domain proceedings in urban redevelopment situations. This law stands as a warning to local governments that they must not abuse their power of eminent domain in substance or procedure so as to injuriously affect private property.

The utilitarian effect of this expanded definition of taking is twofold. First, it will help correct the major fault current in the eminent domain

---

[32] 282 F. Supp. at 192.

[33] *Id.* at 185.

[34] 26 AM. JUR. 2D *Eminent Domain* § 168 (1966). *See also* 2 NICHOLS § 6.13 [3]; Dolle 107.

[35] Government of the Virgin Islands v. 50.05 Acres of Land, 185 F. Supp. 495 (D.V.I. 1960).

[36] *See, e.g.*, 2 NICHOLS § 6.13 [3] n.9; Dolle 107.

[37] 185 F. Supp. at 498.

power—procedural inadequacy.[38] Second, it will prevent what has been called "stultifying the use of property"[39] and thereby protect private property rights more fully.

The inadequacies current in eminent domain procedures seem to be a by-product of the expanded "public use" doctrine. That doctrine has increased local government's power over land use while, simultaneously, federal funds have become increasingly available under the Housing Act of 1949. These developments have created an atmosphere that encourages increased use of eminent domain power, thereby effectuating society's need for land development.[40] Although these tendencies have resulted in a greater volume of public land acquisition, the methods for handling this increase have been left largely to the ingenuity of the local governments, except for those general guidelines upon which the federal grants are conditioned.[41] The strain on local procedures is most obvious in cases like *Sayre* and *Foster*, where property remains subject to condemnation for long periods of time.[42] Hence the mandate of the court in *Sayre* seems designed to make local governments either increase the number of personnel handling their existing condemnation procedures to accommodate this increased volume or renovate these procedures so that each acquisition might be more efficiently accomplished. To implement this mandate, the court establishes a definition of "taking" that will permit each property owner to redress procedural abuse to his property by demanding compensation for unreasonable delay in appropriation that results in demonstrable loss.

The stultification of land caused by impending condemnation usually manifests itself in two forms.[43] Either the owner is unable to sell his property because of public knowledge that it may be condemned, or he is effectively prevented from developing it by governmental denial of compensation for repairs. Thus, fundamental rights to control property are divested by the initiation of eminent domain proceedings. And the longer those proceedings take, the greater is the owner's deprivation. Consequently, the holding in *Sayre*, by demanding more expeditious condemnation procedures, also protects the owner's right to use his property as he wishes.

Perhaps the expansion of the concept of "taking" in *Sayre* can best be attributed to an abstract need to strike a balance between the public

[38] See Comment, *Urban Renewal, supra* note 5, at 124.
[39] Dolle 106.
[40] Comment, *Urban Renewal, supra* note 5. *See* Morris, *supra* note 4.
[41] See 42 U.S.C. § 1455 (1964).
[42] 282 F. Supp. at 178-79 (four years); 254 F. Supp. at 660 (thirteen years).
[43] Dolle 106.

good and the individual's right to be free from injury. As the expansion of the "public use" doctrine has greatly augmented government's power to implement the former, *Sayre* seems to be a reaction to this power increase, thereby protecting the latter. However, by protecting the individual's rights, *Sayre* has not impaired the public's interest, for the streamlining of eminent domain procedures assures a quicker implementation of that interest while avoiding any accelerated deterioration of the property that is the subject of that interest.

KENNETH B. HIPP

Federal Jurisdiction—The Delimitation of *Erie* and a Redefinition of "Laws"

In *Ivey Broadcasting Co. v. American Telephone & Telegraph*,[1] plaintiff brought an action in federal court to recover damages for negligence and breach of contract in the rendition of interstate telephone service. Diversity of citizenship not being present, both the complaint and a counterclaim for charges due for the same services were dismissed. The Court of Appeals for the Second Circuit reversed, holding that federal common law was applicable and that the district court had original jurisdiction under 28 U.S.C. § 1331.[2]

Reversing the normal order of analysis,[3] the court first held that federal law was controlling. It found that the field of interstate communications had been preëmpted by the federal government, especially where the outcome of the case might adversely affect the federal policy of uniformity of rates.[4] The court held that a congressional policy of uniformity of services could be implied from the congressional policy of uniformity of rates embodied in the Interstate Communications Act of

[1] 391 F.2d 486 (2d Cir. 1968), *rev'g* 234 F. Supp. 4 (N.D.N.Y. 1964).

[2] 28 U.S.C. § 1331(a) (1964) reads:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

[3] Usually the courts treat the jurisdictional question first because there is a presumption that the court lacks jurisdiction until it is shown that it has jurisdiction over the subject matter. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 14 (1963).

[4] *See* Western Union Tel. Co. v. Speight, 254 U.S. 17 (1920); Western Union Tel. Co. v. Boegli, 251 U.S. 315 (1920); Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co., 251 U.S. 27 (1919).

1934.[5] In the absence of federal statutory law governing negligence and breach of contract in interstate communications contracts, the federal law to be applied was that derived from federal judicial decisions. The court then interpreted the word "laws" in § 1331 to include such judicial decisions as a basis for original jurisdiction in the federal judicial system. The federal courts were thereby given jurisdiction where "the dispositive issues stated in the complaint require the application of federal common law. . . ."[6] The cases requiring this application of federal common law are those in which "a distinctive policy of an Act of Congress requires that federal principles control the disposition of the claim."[7]

This unusual approach by the court is indicative of the interrelationship between the jurisdictional issue and an important judicial development—the delimitation of the *Erie*[8] doctrine by the federal courts.[9] This development originated in a reëxamination of federal judicial competence by the federal courts.[10] The basic finding of that reëxamination was that the federal judiciary possesses the necessary competence to decide the rules of law to be applied in cases which are primarily concerned with the operation of congressional programs. *Erie* is read as holding only that there is insufficient federal judicial competence in those areas in which state law is in no way attributable to federal authority.[11] Professor Mishkin has gone so far as to say: "Such [federal judicial] competence is essential to the effective implementation of the legislative powers committed to the national government by the Constitution."[12]

The result of the new approach to *Erie* and federal judicial competence is the growth of a body of "specialized common law"[13] as opposed to the "federal general common law" that Justice Brandeis declared in *Erie* to be beyond federal judicial power.[14] This "specialized federal

[5] 48 Stat. 1064, *as amended* 47 U.S.C. §§ 151-609 (1964).

[6] 391 F.2d at 492.

[7] *Id.* at 493.

[8] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[9] *See generally* Friendly, *In Praise of Erie—and the New Federal Common Law,* 39 N.Y.U.L. REV. 383 (1964); Comment, *Erie Limited: The Confines of the State Law in the Federal Courts,* 40 CORNELL L.Q. 561 (1955); Comment, *Federal Common Law and Article III: A Jurisdictional Approach to Erie,* 74 YALE L.J. 325 (1964); Note, *Clearfield: Clouded Field of Federal Common Law,* 53 COLUM. L. REV. 991 (1953); Note, *Exceptions to Erie v. Tompkins: The Survival of Federal Common Law,* 59 HARV. L. REV. 966 (1946).

[10] *See, e.g.,* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

[11] Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules of Decision,* 105 U. PA. L. REV. 797 (1957).

[12] *Id.* at 797.

[13] Friendly, *supra* note 9, at 405.

[14] 304 U.S. at 78.

common law" is applied in areas so controlled by federal statutory laws that the courts can claim that those statutory laws, or the federal policies that they embody, are the source of federal judicial authority.

Sola Electric Co. v. Jefferson Electric Co.[15] and *Textile Workers Union of America v. Lincoln Mills*[16] exemplify the application of "specialized common law" in areas dominated by federal statutory law. The decisions in these two cases effectuate congressional policy and protect it from possible contravention by state laws. In *Sola,* the Supreme Court ruled that the plaintiff, in responding to a counterclaim, could not invoke a state common law doctrine estopping the licensee of a patent from challenging its validity. If the state estoppel doctrine had been applied the licensor of an invalid patent would have been able to enforce a price-fixing stipulation in a license. Such an arrangement would have been in conflict with the Sherman Act.[17] By applying the federal estoppel doctrine the Court allowed the defendant to challenge the validity of the patent and thus the validity of the price-fixing stipulation. It thereby helped protect and effectuate the federal policy against price restrictions not protected by a patent monopoly. *Sola* was in the federal courts on diversity of citizenship, but the courts have similarly applied "specialized common law" to effectuate a congressional policy where jurisdiction was based on a federal question.[18] In *Textile Workers,* the Supreme Court interpreted a jurisdictional statute as a license to construct a whole body of federal common law governing labor arbitration. The majority of the Court claimed to be implementing the federal policy of promoting industrial peace and order.[19] In both cases federal policy was controlling even though there was no specific statutory law governing the issue in controversy.

The negligence and breach of contract issues in the *Ivey* case are similar to issues in cases that are affected by the delimitation. The issues arise in federally preëmpted areas and are not precisely covered by a federal statute. Also, the resolution of the issues may adversely affect a federal policy. The principle to be drawn is that the federal courts will apply federal common law to fill the interstices of congressional legislation in order to effectuate congressional policy in federally preëmpted areas.[20]

[15] 317 U.S. 173 (1942).
[16] 353 U.S. 448 (1957).
[17] 15 U.S.C. §§ 1-7 (1964).
[18] *E.g.,* O'Dench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942); Deitrick v. Greany, 309 U.S. 190 (1940).
[19] 353 U.S. at 452-56.
[20] Comment, *Erie Limited, supra* note 9, at 565.

The federal courts feel particularly qualified to make this application where the decision calls for uniformity of rules or involves the interpretation of federal statutes or the intent of Congress[21]

In cases where this delimitation is operative, original federal jurisdiction becomes an asset, if not a necessity. Its value can best be seen by examining the consequences of the alternative solution the *Ivey* court might have accepted.[22] Since the state courts can be required to apply federal law where applicable,[23] the court could have allowed the negligence and breach of contract issues to arise through the state courts, with the Supreme Court reviewing any cases that might not conform with the desired uniform federal standard. This solution would face a potential problem of statutory interpretation, for the statute,[24] which, in such circumstances, accords the Supreme Court its appellate reviewing power, uses the word "statutes" instead of "laws." Thus, state decisions turning on federal judicial law would not appear to be reviewable. However, in reviewing state decisions interpreting judicially created maritime law, the Court seems either to have ignored the problem or not to have had it called to its attention.[25]

The alternative approach via state court litigation would also raise the practical problem of the grounds upon which review could be sought. With no written law established, an attorney would be placed in the unenviable position of claiming that a state decision did not conform to an as yet non-declared federal standard. In such a situation few litigants would want to spend the time or money appealing; thus, the state court decisions would be left as controlling in most cases. To undertake so large a task as the creation of a whole body of contract law through this slow process would leave the federal law undeclared for an indefinite period of time. Original jurisdiction for the lower federal courts would speed the development of an acceptable, uniform body of law and insure that federal principles controlled. There would be less need for review of lower court decisions since these courts, by virtue of their more frequent exposure to the problems of federal programs and congressional plans, would be better qualified to deal with them.[26]

---

[21] *Id.*

[22] Such an alternative was proposed by the appellants. Brief for Appellants at 10, Ivey Broadcasting Co. v. American Tel. & Tel., 391 F.2d 486 (2d Cir. 1968).

[23] Testa v. Katt, 330 U.S. 386 (1947).

[24] 28 U.S.C. § 1257(3) (1964).

[25] Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 HARV. L. REV. 817, 824 n.36 (1960).

[26] Mishkin, *The Federal "Question" in the District Court*, 53 COLUM. L. REV. 157, 195 (1953).

The *Ivey* court, seeing the need for such original jurisdiction, extracted the reasoning from Justice Brennan's dissent in *Romero* v. *International Terminal Operating Co.*[27] and made it the basis of their decision. Justice Brennan had argued that the word "laws" in § 1331 encompasses judicial decisions as well as statutes.[28] He argued that jurisdiction should be determined by the law that created the cause of action —whether statutory or judicial.[29] In *Romero,* the court neither accepted nor rejected Justice Brennan's argument.[30] The court in *Ivey* read the majority in *Romero* as holding only that since the Federal Judiciary Act of 1875[31] was intended to give the federal courts a new content of jurisdiction, it did not apply to maritime law over which they already had jurisdiction.[32]

There are valid arguments for and against Justice Brennan's interpretation. The *Ivey* court points out that the new interpretation is in accord with the purpose behind the Act of 1875,[33] which was to create a forum specifically to protect federally created rights. If the federal courts are going to make judicial law in the absence of statutes in federally preëmpted areas, the causes of action under those decisional laws should be accorded the same weight as causes of action arising under statutory law. In this respect the new interpretation embodies the idea that it is the *source* of the law—state or federal—and not the *form* that is of primary importance in deciding jurisdictional issues. There should be no distinction drawn between statutory and judicial law for jurisdictional purposes.

It can also be argued that the Supreme Court has almost found that federal jurisdiction can be acquired where a federal statute and its policy require that federal principles control the issues. In *Tunstall* v. *Brotherhood of Locomotive Firemen & Engineers,*[34] the emphasis placed on federal policy by the Court and its references to *Clearfield Trust Co.* v. *United States*[35] might be taken as indicative of a willingness to find that jurisdiction could be based on judicially created rights.

---

[27] 358 U.S. 354, 389 (1959) (Brennan, J., dissenting).

[28] *Id.* at 393.

[29] *Id.*

[30] Justice Brennan argued for his interpretation again in Wheeldin v. Wheeler, 373 U.S. 647, 653 (1963). Once again the majority did not accept or reject his argument; it based its decision on a finding of no federal cause of action.

[31] Federal Judiciary Act of March 3, 1875, ch. 137, 18 Stat. 470.

[32] 391 F.2d at 493.

[33] See ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 77-79 (Tent. Draft No. 5, 1967).

[34] 323 U.S. 210 (1944).

[35] 318 U.S. 363 (1943).

The fact remains, and weighs most heavily against the new interpretation, that in interpreting § 1331 no federal courts have ever used the word "laws" to mean judicial decisions.[36] Thus, there is neither substantial authority nor precedent for the inclusion of judicial decisions in the definition of "laws." It is true that in *Erie* the Supreme Court interpreted the Rules of Decision Act[37] as including judicial decisions in addition to statutory enactments.[38] But there the Court was reacting to evidence[39] that it believed made clear a congressional intent that the word "laws" be read to include judge-made law. The analogy is even further weakened by the holding in the case.[40] To accept the new interpretation, the Supreme Court will have to find a meaning in statutory language that neither the courts nor the Congress have found for almost a hundred years.

The future of the development of federal common law is uncertain. What is certain, however, is that if the development expands it will create an even greater need, and serve as further justification, for federal lower court jurisdiction in those cases controlled by federal principles. It will strengthen the attitude that it is the source of the law, not the form, that is controlling. This will tend to make the federal courts the overseers of the expansion of jurisdiction. In this respect, and also in their efforts to protect and effectuate congressional legislation, the federal courts are retreating from an established policy of leaving the extension of federal powers to the Congress.[41] The delimitation of *Erie* and the finding of original federal jurisdiction in this case indicate that federal law is no longer solely an interstitial product, building normally upon legal relations established by the states, but has a force and authority all its own.[42]

BEN F. TENNILLE

[36] Only two courts have expressly excluded judicial decisions from the definition and one of those was an admiralty case. Foster v. Herly, 330 F.2d 87, 90 (6th Cir. 1964); Jordine v. Walling, 185 F.2d 662, 667 (3rd Cir. 1950) (admiralty).

[37] Federal Judiciary Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73.

[38] 304 U.S. 64, 66-67 (1938).

[39] *See* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1924).

[40] Note, *The Expansion of Federal Question Jurisdiction to Maritime Claims: A New Jurisdictional Theory*, 66 HARV. L. REV. 315, 324 n.86 (1955).

[41] Mishkin, *supra* note 11, at 814 & n.64.

[42] Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 545 (1954).

Insurance—Liability of Insurer Beyond Policy Limits—The Danger of Strict Liability

A, the owner of a 10,000 dollars liability insurance policy with company *X*, is sued by *B*. Pursuant to the insurance contract, the company undertakes the defense of the lawsuit, controlling all aspects of the litigation including the right to settle. An offer to settle the case for the policy limits is made, which the insurer rejects. At the trial the jury awards the plaintiff a verdict of 100,000 dollars. After company *X* pays its 10,000 dollars, the defendant *A* is liable for the remainder of the judgment. *A* brings an action against the company for wrongful refusal to settle within the policy limits.

This fact situation, presented to the California Supreme Court in *Crisci v. Security Insurance Co.*,[1] confronts the parties to the insurance contract with an inherent conflict of interests. Since under the terms of the policy the insurer reserves the exclusive right to settle claims, an offer by the plaintiff at or near the policy limits gives rise to conflicting desires. "The insurer is interested in settling the claim at the lowest amount within the policy limit, while the insured desires to avoid any liability for the excess."[2] In affirming an award for the excess judgment and for 25,000 dollars for the insured's mental suffering,[3] the California court carefully considered the arguments for a strict liability rule in this area.[4] Simply stated, a strict liability rule would provide that "whenever an insurer receives an offer to settle within the policy limits and rejects it, the insurer should be liable in every case for the amount of any final judgment whether or not within policy limits."[5] After considering arguments for this proposed rule, the court declined "to determine whether there might be some countervailing considerations . . . because . . . the evidence[6] is clearly sufficient to support the determination [under the

---

[1] 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

[2] Terrell v. Western Cas & Sur. Co., 427 S.W.2d 827-28 (Ky. 1968).

[3] The award of 25,000 dollars for mental suffering raises an interesting question of whether damages for wrongful refusal to settle are to sound in contract or tort. Discussion of this point, however, is not within the scope of this note. See generally Note, *Excess Recovery—Liability Insurer Who Refused Settlement Within Policy Limits Held Liable for Excess Recovery and Mental Damages*, 43 N.Y.U.L. Rev. 199 (1968); Note, *Refusal to Settle Claim Below Policy Limits —Damages for Mental Suffering*, 22 Sw. L.J. 374, 377-79 (1968).

[4] There were a large number of *amicus curiae* briefs filed supporting the proposed rule.

[5] 66 Cal. 2d at 430, 426 P.2d at 177, 58 Cal. Rptr. at 17.

[6] The evidence was that the insurer knew that there was a strong likelihood

bad faith doctrine]."[7]

The California court is apparently the first court to give a strong indication that it might promulgate a strict liability rule in the excess judgment context.[8] While all courts hold that an insurance carrier will be liable for a wrongful refusal to settle under certain conditions,[9] the basic split heretofore has involved the question of whether the company is liable for mere negligence[10] in refusing to settle or solely for a bad faith[11] refusal. The central issue under either standard concerns the weight the carrier must give to the interests of the insured in determining not to settle. "The predominant majority rule is that the insurer must accord the interest of the insured the same faithful consideration it gives its own interests . . . ."[12] Although the tests will vary in terminology, most writers agree that the distinction between the negligence and bad faith standards is minimal,[13] for the insurer, as a professional in insurance litigation, is often held to a higher standard than the average practitioner.[14] Consequently, mere negligence by the average defender might constitute bad faith by the skilled insurer.[15]

---

of a large excess judgment. Its only hope of a favorable verdict was proof of the injured party's prior mental history. "Security was putting blind faith in the power of its psychiatrists to convince the jury when it knew that the accident could have caused the psychosis. . . ." *Id.* at 432, 426 P.2d at 178, 58 Cal. Rptr. at 18.

[7] *Id.* at 431, 426 P.2d at 177, 58 Cal. Rptr. at 17 (footnote added). These arguments will be discussed later in the note. See generally Comment, *Liability of Insurer for Judgment in Excess of Policy Limits,* 48 MICH. L. REV. 95 (1949); Comment, *Crisci's Dicta of Strict Liability for Insurer's Failure to Settle: A Move Toward Rational Settlement Behavior,* 43 WASH. L. REV. 799 (1968); Note, *Excess Liability: Reconsideration of California's Bad Faith Negglience Rule,* 18 STAN. L. REV. 475 (1966); Note, *Liability Insurer's Duty to Settle,* 13 U. CHI. L. REV. 105 (1945).

[8] Some courts have considered the doctrine and have rejected it. *E.g.,* Kaudern v. Allstate Ins. Co., 277 F. Supp. 83 (D.N.J. 1967).

[9] *See generally* Brown v. United States Fid. & Guar. Co., 314 F.2d 675 (2d Cir. 1963): 7A J. APPLEMAN, INSURANCE LAW AND PRACTICE §§ 4712-13 (1962, Supp. 1968) [hereinafter cited as APPLEMAN]; Annot., 40 A.L.R.2d 168 (1955); Keeton, *Liability Insurance and Responsibility for Settlement,* 67 HARV. L. REV. 1136 (1954) [hereinafter cited as Keeton]; Note, *Insurer's Liability for Refusal to Settle,* 42 ST. JOHNS L. REV. 544 (1968).

[10] *E.g.,* Smith v. Transit Cas. Co., 281 F. Supp. 661 (E.D. Tex. 1968).

[11] *E.g.,* Bowers v. Camden Fire Ins. Ass'n, 51 N.J. 62, 237 A.2d 857 (1968).

[12] Cowden v. Aetna Cas. & Sur. Co., 389 Pa. 459, 470, 134 A.2d 223, 228 (1957).

[13] *See* 7A APPLEMAN § 4712; Annot., *supra* note 9; Keeton.

[14] State Farm Mut. Auto. Ins. Co. v. Marcum, 420 S.W.2d 113, 120 (Ky. 1967); *accord,* Bowers v. Camden Fire Ins. Ass'n, 51 N.J. 62, 237 A.2d 857 (1968).

[15] 7A APPLEMAN § 4712. Following this reasoning one court has stated that "[T]he insurer is simply held to a standard of reasonable conduct and avoidance

An analysis of case law reveals that under both the good faith and negligence standards, no one factor is determinative of liability. A listing of relevant considerations includes the following:

> (1) the strength of the injured claimant's case on the issues of liability and damages; (2) attempts by the insurer to induce the insured to contribute to the settlement; (3) failure of the insurer to properly investigate the circumstances involved in the accident, which would result in its inability to effectively weigh the evidence against the insured; (4) the insurer's rejection of advice of its own attorney or agent; (5) failure of the insurer to inform the insured of the compromise offer; (6) the amount of financial risk to which each party is exposed in the event of a refusal to settle; and (7) the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts.[16]

Although it has been held that the insurer has no duty to initiate settlement negotiation,[17] the fact that no offer was made within policy limits is merely one factor to be considered in determining bad faith.[18] "It has been similarly established that an insurer's refusal to settle a case within maximum policy limits . . . does not render the insurer liable per se to its assured . . . ."[19] In view of the above considerations,[20] perhaps the insurer's best approach is to treat the settlement situation as though there were no policy limits.[21]

North Carolina is in accord with the majority of states in holding the insurer to a standard of good faith.[22] Its statute provides: "The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits. . . ."[23] Prior to the passage of this statute, the

---

of fraud, negligence, and/or bad faith. . . ." Powell v. Prudence Mut. Cas. Co., 88 Ill. App. 2d 343, 348, 232 N.E.2d 155, 158 (1967).

[16] Kaudern v. Allstate Ins. Co., 277 F. Supp. 83, 88-89 (D.N.J. 1967), *quoting from* Brown v. Guarantee Ins. Co., 155 Cal. App. 2d 679, 319 P.2d 69 (1957).

[17] Oda v. Highway Ins. Co., 44 Ill. App. 2d 235, 194 N.E.2d 489 (1963).

[18] State Auto. Ins. Co. v. Rowland, —— Tenn. ——, 427 S.W.2d 30 (1968); *accord*, Cernocky v. Indemnity Ins. Co. of N. America, 69 Ill. App. 2d 196, 216 N.E.2d 198 (1966).

[19] Powell v. Prudence Mut. Cas. Co., 88 Ill. App. 2d 343, 347-48, 232 N.E.2d 155, 158 (1967).

[20] The considerations mentioned are by no means intended to be an exhaustive listing of all relevant factors. See generally 7A APPLEMAN §§ 4712-13; Keeton.

[21] Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

[22] Annot., *supra* note 9.

[23] N.C. GEN. STAT. § 20-279.21(f)(3) (1953). See Bradford v. Kelly, 260 N.C. 382, 132 S.E.2d 886 (1963). Consider also the impact of the UNIFORM COMMERCIAL CODE which states that "the obligations of good faith, diligence, reason-

North Carolina Supreme Court had consistently followed the good faith test;[24] since its passage, the court has continued to follow it,[25] although on one occasion it specifically refused to decide whether the insurer was liable for negligence.[26] The most recent case dealing with North Carolina's standard is *Abernathy v. Utica Mutual Insurance Co.*[27] In this case the Fourth Circuit Court of Appeals reversed a nonsuit in the district court, and held that the mere refusal by the company to entertain an offer of settlement before trial was sufficient to carry the case to the jury on the issue of bad faith.[28] The court pointed out that all cases have at least a "nuisance" value and that the flat refusal to negotiate should be considered by the jury.[29] The practical effect of this decision is to give the insured a strong bargaining point in further negotiations with the insurer, since it is common knowledge that juries favor those suing insurance companies.[30]

In analyzing the case law, it becomes apparent that there are strong arguments both for and against the trend[31] towards a strict liability rule.

ableness and care prescribed by this chapter may not be disclaimed by agreement. . . ." N.C. GEN. STAT. § 25-1-102(3) (1965).

[24] Wynnewood Lumber Co. v. Travelers' Ins. Co., 173 N.C. 269, 91 S.E. 946 (1917); *accord*, State Auto. Mut. Ins. Co. v. York, 104 F.2d 730 (4th Cir. 1939).

[25] Henry v. Nationwide Ins. Co., 139 F. Supp. 806 (E.D.N.C. 1956); Bradford v. Kelly, 260 N.C. 382, 132 S.E.2d 886 (1963); Alford v. Textile Ins. Co., 248 N.C. 224, 103 S.E.2d 8 (1958).

[26] Alford v. Textile Ins. Co., 248 N.C. 224, 103 S.E.2d 8 (1958). The court has stated, however, that the carrier, when wrongfully refusing to defend, is liable only for a reasonable amount of the consent judgment in excess of limits. Nixon v. Liberty Mut. Ins. Co., 255 N.C. 106, 120 S.E.2d 430 (1961).

[27] 373 F.2d 565 (4th Cir. 1967).

[28] This case is quite interesting on its facts. Insured held a policy with 30,000 dollars maximum limit. Insured's car ran into the rear of another car which had previously hit a van in the rear. There were four fatalities and one serious injury. The main issue was whether the second accident was the proximate cause of any or all injuries sustained in the adverse party's car. Two wrongful death actions were consolidated for trial and the jury returned a verdict for the insured which was affirmed on appeal. Lawing v. Landis, 256 N.C. 677, 124 S.E.2d 877 (1962). The second suit was by the injured occupant, and the jury gave a 10,000 dollar verdict against the insured, which was also affirmed on appeal. Punch v. Landis, 258 N.C. 114, 128 S.E.2d 224 (1962). This left 20,000 dollars in insurance coverage. There was an offer to settle the last two wrongful death actions for 15,000 dollars. The company refused, and at the trial the injured passenger testified for the first time that he remembered all the occupants being alive after the first wreck, a critical issue. The judge advised insured's attorney that he should settle to which he replied that he did not have 50 dollars authority. 373 F.2d at 568.

[29] 373 F.2d at 569.

[30] It should be pointed out that the case was eventually settled for a substantial figure.

[31] At least one federal judge interprets it as a new trend saying that "the reasoning of the California Supreme Court seems to indicate a trend towards requiring insurance companies to act more responsibly towards their customers

The basic theme of the strict liability argument, as announced in *Crisci*, is that the rule would "eliminate the danger that an insurer, faced with a settlement offer at or near policy limits, will reject it and gamble with the insured's money to further its own interests."[32] This argument is seemingly answered, however, in the next sentence of the court's opinion where it states that "it is not entirely clear that the proposed rule would place a burden on insurers substantially greater than that which is present under existing laws."[33] Surely the burden would not be substantially greater if the carrier were truly gambling with the insured's money, due to the existing negligence and bad faith standards. But what of the notion that "a mistake [of judgment], honestly made does not subject the person to legal liability?"[34] Consider further the obvious change in the burden of proof. Absent some affirmative defense such as fraud, an insured would merely be required to prove the rejection of an offer that was within policy limits. Proponents of a strict liability rule argue that it would be simple to apply and would avoid determining whether the insurer's decision was reasonable.[35] This logic would obviate a function that juries regularly perform in simple negligence cases. Perhaps the most attractive argument of the proponents of strict liability is that "where insurer's and insured's interest necessarily conflict, the insurer, which may reap the benefit of its determination not to settle, should also suffer the detriments of its decision."[36] This argument apparently overlooks the fact that the parties to the contract expressly bargained for limited, not absolute, liability. Furthermore, the insurer is granted the right to control settlements.[37] Strict liability would make the insurer absolutely liable for the excess though the company was exercising an express contractual right;[38] where-

with respect to offers of settlement." Kaudern v. Allstate Ins. Co., 277 F. Supp. 83, 89 n.5 (D.N.J. 1967).

[32] 66 Cal. 2d at 431, 426 P.2d at 177, 58 Cal. Rptr. at 17.

[33] *Id.*

[34] Wynnewood Lumber Co. v. Travelers' Ins. Co., 173 N.C. 269, 271, 91 S.E. 946, 947 (1917).

[35] See 66 Cal. 2d at 431, 426 P.2d at 177, 58 Cal. Rptr. at 17 (dictum).

[36] *Id.*

[37] It must be remembered that the insured's cause of action is normally based on the alleged breach of an implied covenant found in this settlement control clause. See Annot., *supra* note 9; Keeton.

[38] While it is true that the insurance contract is not truly an arms length transaction, the insured is normally protected by his state legislature, which condones this clause. *E.g.*, N.C. GEN. STAT. § 20-279.21(f)(3) (1953). As pointed out by one writer, the full impact of the *Crisci* dicta is that it "holds out to liability insureds the prospect that they will have the best of both worlds: absolute contractual liability of the insurer, without necessity of proof other than rejection of an offer within policy limits, plus liability for financial damage, mental suffering, and perhaps other items of damage." Levitt, *The Crisci Case—Something Old, Something New*, 580 INS. L.J. 12, 18 (1968).

as, the insured would be completely protected if the settlement offer had been within policy limits.

An ancillary problem presented by the excess judgment cases is whether the injured party, either as a third party beneficiary or as an assignee of the insured's rights, may sue the insurer. The great weight of authority holds that the injured party is not a third party beneficiary and may not sue for bad faith in a direct action,[39] although an exception has been found in the case of compulsory insurance laws.[40] The concept of allowing the insured to assign his cause of action has received some approval,[41] for it allows the insured to effectuate a settlement of the excess that the company allegedly caused.[42] A strong countervailing argument is that such assignments would breed collusion between the injured person and the insured.[43] It is not difficult to foresee settlement offers being made within the policy limits solely to give rise to a bad faith action, and this danger would be increased by a strict liability rule. Some states effectively preclude such assignments by holding that the insured must make payment on the excess judgment before he has a cause of action against the insurer.[44]

Under present law the liability of the parties to the insurance contract is often uncertain in the settlement situation.[45] Perhaps the best solution, suggested by at least one writer,[46] is to include a provision in the insurance policy to the effect that the liability of the insurer will be double the original limits, should the insurer reject an offer that is within those policy limits. Such a provision would not eliminate all excess judgment actions. It would, however, tend to (1) minimize the risk that

---

[39] *See, e.g.,* Browdy v. State-Wide Ins. Co., 56 Misc. 2d 610, 289 N.Y.S.2d 711 (Sup. Ct. 1968).

[40] *Id.* While North Carolina has not passed upon this point, it should be noted that the state does have compulsory liability insurance.

[41] *E.g.,* Terrell v. Western Cas. & Sur. Co., 427 S.W.2d 825 (Ky. 1968). *Contra,* Dillingham v. Tri-State Ins. Co., 214 Tenn. 592, 381 S.W.2d 914 (1964). *See* Annot., 12 A.L.R.3d 1158 (1967).

[42] Annot., 12 A.L.R.3d 1158 (1967).

[43] *Id.*

[44] Universal Auto. Ins. Co. v. Culberson, 126 Tex. 282, 86 S.W.2d 727 (1935). *Contra,* United States Fid. & Guar. Co. v. Evans, 116 Ga. App. 93, 156 S.E.2d 809 (1967). Any effect of this rule on the insured's cause of action has been avoided by means of a declaratory judgment, but the holding still precludes an assignment since the insured must still make some payment before he can sue the insurer. Smith v. Transit Cas. Co., 281 F. Supp. 661 (E.D. Tex. 1968).

[45] For an article making recommendations to insurers on how to avoid this situation, see Snyder, *Defense in Excess of Policy Limit Litigation,* 18 FED. OF INS. COUNSELORS 9 (1968); *see also* O'Brien, *Liability Beyond the Policy Limit,* 391 INS. L.J. 525 (1955).

[46] Keeton 1183-85; see Georgia L. Ins. Co. v. Mississippi C.R. Co., 116 Miss. 114, 76 So. 646 (1917) (policy provided double coverage).

the insurer will gamble with the insured's money, since rejection of an offer within policy limits will expose the carrier to double liability, and (2) would determine the outer limits of the insurer's liability, absent actual bad faith. Such a provision would be more reasonable than court imposition of strict liability, which would frequently impose liability for exercising a contractual right, often one approved by the state legislature.[47] Before such drastic action is taken, the legislature should give its express sanction.

JAMES R. CARPENTER, JR.

Labor Law—Innocent Purchaser's Duty to Reinstate Employees

The NLRB, under Section 10(c) of the National Labor Relations Act, has authority to issue a remedial order against an employer who "has engaged in or is engaging in . . . unfair labor practice[s]."[1] The exercise of this authority is unquestioned when the order is directed against the guilty employer. If the guilty employer sells his business before the unfair practice has been remedied, however, the Board must decide whether the order may be directed against the purchaser. If the purchaser is but a "disguised continuance" of the seller[2] or one who has concerted with the guilty employer to evade the order,[3] the Board may properly direct an order against the purchaser. When the purchase is made in good faith, the problems are more acute. An examination of the decisions reveals the Board's difficulties.

Initially, the Board recognized no limitation as to the parties who could be bound by an order under Section 10(c) once an unfair labor practice was discovered. In the 1948 decision of *Alexander Milburn Co.*,[4] a purchaser, who was neither a "disguised continuance" nor an "evader,"

[47] *E.g.*, N.C. GEN. STAT. § 20-279.21(f)(3) (1953).

[1] National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1964).

> If . . . the Board shall be of the opinion that any person . . . has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair practice, and to take such affirmative action including reinstatement of employees with or without back pay as will effectuate the policies of this Act.

Id.

[2] Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945); Southport Petro. Co. v. NLRB, 315 U.S. 100 (1942).

[3] Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945); NLRB v. Ozark Hardwood Co., 282 F.2d 1 (8th Cir. 1960).

[4] 78 N.L.R.B. 747 (1948).

was ordered to reinstate employees wrongfully discharged by his predecessor. The Board, however, did recognize the policy favoring free alienation as it limited the class of "innocent purchasers" upon whom the order would be binding to those who were found to be "successors" of the previous employers. A "successor" was defined as one who continued the seller's business operations in substantially unchanged form. In *Milburn*, this was evidenced by the retention of the predecessor's employees and plant and by the manufacture of the same products.[5]

Upon subsequent judicial examination, Section 10(c) was held not to encompass an innocent purchaser. Two courts of appeals[6] reasoned that the enforceability of a Board order was limited by Rule 65(d) of the Federal Rules of Civil Procedure,[7] concluding that an innocent purchaser was not a "party to the action" under a statute applicable only to those "engaged in or engaging in" unfair labor practices. The Board, following this judicial mandate, overruled *Milburn* in *Symns Grocer Co.*[8]

In *Perma Vinyl Corp.*,[9] the Board reversed its position again by ordering a purchaser to reinstate employees discharged by the previous owner in violation of Section 8(a)(1) and (3) of the Act,[10] despite a finding that the successor was a "bona fide purchaser."[11] United States Pipe & Foundry Co. had purchased the assets of Perma Vinyl Corporation with knowledge of a pending unfair labor charge against Perma Vinyl, and had continued the manufacture of plastic pipe in the same manner with substantially the same work force. After the acquisition, the Board issued an order requiring Perma Vinyl and "its successors and assigns" to reinstate the employees. U.S. Pipe was served notice to appear and show cause why it should not be charged as Perma Vinyl's

[5] *Id.* at 748.

[6] NLRB v. Lunder Shoe Corp., 211 F.2d 284 (1st Cir. 1954); NLRB v. Birdsall-Stockdale Mfg. Co., 208 F.2d 234 (10th Cir. 1953).

[7] FED. R. CIV. P. 65(d) provides that

> [e]very order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, . . . and upon those persons in active concert or participation with them. . . .

[8] 109 N.L.R.B. 346 (1954).

[9] 164 N.L.R.B. No. 119 (May 24, 1967).

[10] National Labor Relations Act § 8(a)(1), (3), 29 U.S.C. § 158(a)(1), (3) (1964). The Board found that Perma Vinyl had discharged three employees because of their affiliation with a labor union.

[11] 164 N.L.R.B. No. 119 (May 24, 1967). As employed in this context, "bona fide purchaser" may be a misleading phrase. U.S. Pipe did have notice of the NLRB proceeding and, therefore, is to be distinguished from a bona fide purchaser in the law of real property who must take without notice. *E.g.*, Companaro v. Gondolfo, 60 F.2d 451, 452 (3rd Cir. 1932).

successor with remedying the unfair practices. Following an adverse ruling, U.S. Pipe petitioned the court to have the order set aside.

The Fifth Circuit Court of Appeals in *United States Pipe and Foundry v. NLRB*[12] affirmed the Board's decision. Finding support in the Supreme Court decision of *John Wiley and Sons, Inc. v. Livingston*,[13] which had bound a purchaser to his predecessor's collective bargaining agreement, the court directed that the order be enforced on the successorship theory of *Alexander Milburn Co.* Seizing upon the language in *Wiley* that "[t]he objectives of the national labor policy . . . require that the rightful prerogative of owners independently to rearrange their business . . . be balanced by some protection to the employees from a sudden change in the employment relationship,"[14] the court concluded that "purchasing with notice of the unfair labor proceedings and continuing the same operation even to the jobs in question . . . is . . . sufficient basis for requiring it to offer reinstatement to the employees on the successorship theory"[15] of *Alexander Millburn.*

Although the *Milburn* reasoning was revived, the decision did not fully resolve the difficulty with innocent purchaser liability, for the court based its decision on policy considerations and never explicitly faced the legal bar presented by the earlier courts of appeals decisions.[16] *U.S. Pipe* would constitute stronger precedent for future board rulings had these contrary holdings been dealt with adequately.

There are two possible approaches that the court could have taken to support its policy. As to the limitation posed by Federal Rule 65(d), the court may be justified in considering U.S. Pipe a "party to the action." In *Symns Grocer Co.*,[17] which initially overruled *Milburn*, the Board reasoned that the scope of their order was limited by Rule 65(d) of the Federal Rules of Civil Procedure and concluded that a successor employer, who had not acted with his predecessor to evade the charge and who was not a disguised continuance, could not be reached by an order under Section 10(c). The purpose of the limitations in Rule 65(d) apparently is to prevent unwitting contempt,[18] and U.S. Pipe, in the instant case, had notice of the NLRB proceedings against Perma

[12] 398 F.2d 544 (5th Cir. 1968).
[13] 376 U.S. 543 (1964).
[14] *Id.* at 549.
[15] United States Pipe & Foundry Co. v. NLRB, 398 F.2d 544, 548 (5th Cir. 1968).
[16] See note 6 *supra.*
[17] 109 N.L.R.B. 346 (1954).
[18] *See* Regal Knitwear Co. v. NLRB, 324 U.S. 9, 15 (1945).

Vinyl and was given an opportunity to be heard. This circumstance, added to the fact that the Board's orders are remedial rather than punitive in nature,[19] appear to justify an order against such a "bona fide purchaser."

An alternative approach would be for the Board to proceed directly against U.S. Pipe as the guilty employer, which would preclude any problem raised by Federal Rule 65(d). The Board has previously imposed only derivative responsibility in such cases,[20] seemingly on the ground that it was not the purchaser who committed the violation. This approach, however, is inconsistent with the "evader" cases[21] and seems to belie the plain import of the language in Section 10(c), which provides that the Board may issue an order against an employer who "has engaged in or is engaging in . . . unfair labor practices."[22] An evader, unlike a disguised continuance, is not the party that discharged the employees, but one who, by his acts, has *engaged* in unfair labor practices. Therefore, "engaging in unfair labor practices" may be construed to include not only those persons *committing* the violation, but also employers who, by their failure to afford a remedy, allow the harmful effects of a violation to continue.

Assuming that a "bona fide purchaser" can be validly bound by a Board order, there still remain policy restrictions on the exercise of this authority. These restrictions, which are embodied in the successorship theory, are seldom adequately articulated.

It is obvious that the purchaser must have the present capacity to comply with the order. If reinstatement is to be required, the jobs must still exist; the Board cannot order an employer to hire more men than he needs or to employ a person for whom there is no work.[23] This limitation upon the Board's power is qualified to the extent that an employer may be required to discharge employees hired subsequent to the violation to create openings for those ordered to be reinstated.[24] Also, the Board may require the employer to put the injured employees on a preferential hiring list.[25]

[19] Republic Steel Corp. v. NLRB, 311 U.S. 7, 11 (1940); Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617 (5th Cir. 1961).
[20] NLRB v. Harris, 198 F. Supp. 947 (S.D.N.Y. 1961).
[21] See note 3 *supra*.
[22] National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1964).
[23] NLRB v. Lightener Pub. Corp., 128 F.2d 237 (7th Cir. 1942); NLRB v. Somerset Shoe Co., 111 F.2d 681 (1st Cir. 1940).
[24] NLRB v. Shenandoah-Dives Mining Co., 145 F.2d 542 (10th Cir. 1944); NLRB v. Grower-Shipper Vegetable Ass'n, 122 F.2d 368 (9th Cir. 1941).
[25] NLRB v. J.G. Boswell Co., 136 F.2d 585 (9th Cir. 1943).

Notice before the purchase that there is an unfair labor practice charge against the seller is a second element of the successorship theory. *U.S. Pipe* and *Alexander Milburn* emphasized actual knowledge, and the ruling in *M. Yoseph Bag Co.*[26] suggests that the Board will require such notice. In *M. Yoseph*, the Board refused to order a remedy, although the predecessor was an officer, director, and large stockholder in the purchasing corporation. Since information of the charge is readily available, either by an inquiry to the union or to the NLRB itself, it would not appear to be inequitable to bind a purchaser to constructive notice, and future rulings may so hold.

The successorship theory may also require an affirmative showing that the labor policy of the purchaser will be the same as that of the predecessor-employer. The purpose of the National Labor Relations Act is to lessen industrial strife,[27] and to this end the Act protects the right of employees to engage in union activities.[28] The most serious consequence of a dismissal in violation of Section 8(a)(1) and (3) is the deterrence of these activities.[29] This deterrence was not alleviated by the change in ownership in either *U.S. Pipe* or *Alexander Milburn*. In the former, although there was a new owner, the president of Perma Vinyl became U.S. Pipe's general manager; the old employer was still influencing the labor policy and the deterrence to unionization remained. In *Alexander Milburn* the court was careful to note that the purchaser retained his predecessor's plant manager and supervisory personnel. "Under these circumstances, the employees had no reason to believe that the labor policies of the successor were other than those of the predecessor."[30] Therefore, the policy favoring the issuance of a remedial order is not weakened by the change in ownership. A different situation unfolds if there is a complete change in the employing enterprise before a remedy has been effected. Although the new employer continues the same operation in the latter situation, an employee is not justified in believing that there will still be discriminations in violation of the Act, for all ties binding the new labor policy with the old are broken. Under these circumstances, there is no deterrence of union activities and the policy favoring the issuance of an order against the new owner is considerably weakened. This suggests that the phrase often identified with the successorship theory, "similarity and continuity of operations across the change of

[26] 139 N.L.R.B. 310 (1962).
[27] National Labor Relations Act § 1(b), 29 U.S.C. § 141(b) (1964).
[28] National Labor Relations Act § 7, 29 U.S.C. § 157 (1964).
[29] Ford Motor Co., 31 N.L.R.B. 994, 1009 (1941).
[30] Alexander Milburn Co., 78 N.L.R.B. 747, 750-51 (1948).

ownership"[31] refers not so much to the making of the same products in the same plant, but to an appearance to the employee of a continuation of the old labor policy, which, in turn, frustrates the policies of the National Labor Relations Act.

An innocent purchaser can now be required by the NLRB to remedy the unfair labor practices of his predecessor under the successorship theory. Although an unrestricted exercise of this authority may place an unjust burden upon the purchaser, an examination of the contractual options available to the purchaser indicates that innocent purchaser liability, as limited by the successorship theory, is not manifestly unfair. If the prospective buyer has notice of the unfair labor charge, as required by *U.S. Pipe,* he can insulate himself from the hardships imposed by the subsequent order either by negotiating for a reduced purchase price or for an indemnity clause in the contract of sale. Admittedly, the innocent purchaser cannot be relieved of all the burdens through contractual agreement;[32] however, any remaining burden is negligible when contrasted to the deleterious effects of an unremedied violation. In light of this consideration, the court in *U.S. Pipe* properly balanced the equities.

JERRY W. LEONARD

Real Property—Mortgagee's Rights in Security

The California Supreme Court, in the recent decision of *American Savings & Loan Association v. Leeds,*[1] imposed significant limitations on a purchase money mortgagee's rights to his security. Contrary to the situations in other states, the California mortgagee finds himself in an increasingly precarious position. The *Leeds* decision not only increases the mortgagee's risk, but also injects a degree of uncertainty into the law.

The plaintiff in *Leeds* was the beneficiary of a deed of trust given to secure a debt defendant Leeds had incurred to purchase real estate from defendants Sheridan. The Sheridans had falsely represented that the house had been built on unfilled land and had also concealed defects caused by subsidence due to improper filling. After the sale, when further

[31] United States Pipe & Foundry Co. v. NLRB, 398 F.2d 544, 548 (5th Cir. 1968).

[32] For example, a stigma possibly attaches to an employer involved in an unfair labor proceeding.

[1] —— Cal. 2d —, 440 P.2d 933, 68 Cal. Rptr. 453 (1968).

subsidence rendered the property "worthless or of little or no value,"[2] Leeds sued the Sheridans for the purchase price and settled the action for an unknown amount. In its action, the mortgagee sought to recover general and punitive damages from the Sheridans, to hold Leeds liable for its loss on the theory that his failure to keep the property in repair destroyed its security, and to impose a trust on the amount Leeds had recovered from the Sheridans. Leeds demurred, and the court dismissed the complaint against him.

On appeal, plaintiff argued that covenants by Leeds in the deed of trust to "keep said property in good condition and repair . . . [and] to complete or restore promptly and in good condition and workmanlike manner any building which may be constructed, damaged, or destroyed thereon,"[3] and to assign to the plaintiff "[a]ny award of damages in connection with any condemnation for public use or injury to said property . . ."[4] entitled him to recover.

In ruling on the second quoted covenant, the court held that the settlement that Leeds had received in the prior suit was not for injury to the property, but for the "fraudulent or negligent wrong in inducing defendant to purchase the property."[5] For that reason, the money could not be regarded as a substitute for the injured property. By differentiating between recoveries for injury *to* land and for fraudulent representations *about* land, the court apparently intended to distinguish the situation in *Leeds* from that in *Los Angeles Trust & Savings Bank v. Bortenstein.*[6] There defendant's mortgaged land was flooded due to negligence on the part of the city, and defendant had recovered damages from the city. Plaintiff-mortgagee was allowed to share in the recovery to the extent of the mortgage as if the city had taken the land for public use. The money, according to the court, had taken the place of the land, and defendant had taken possession of the money subject to the plaintiff's security.

In *Leeds* the court, while denying that the money collected by Leeds "takes the place of the land," stated that if the Sheridans had paid Leeds the *full* purchase price in the settlement, the plaintiff could impose a constructive trust to the extent of its security in the premises. Since the plaintiff was unable to plead the amount that Leeds had received in the settlement, it was held to have failed to state a cause of action.

---

[2] *Id.* at —, 440 P.2d at 935, 68 Cal. Rptr. at 455.
[3] *Id.*
[4] *Id.*
[5] *Id.* at ——, 440 P.2d at 937, 68 Cal. Rptr. at 457.
[6] 47 Cal. App. 421, 190 P. 850 (1920).

The result that the court would have reached had the full purchase price been paid would apparently be grounded on general constructive trust principles,[7] and not because the court regarded the money as a substitute for the land merely because the entire purchase price had been refunded. The court reasoned that in that situation the Sheridans would have intended a complete settlement for all liability and that Leeds thus is presumed to have mistakenly taken money which belongs to the plaintiff. But it is unclear why a constructive trust should be imposed if Leeds collected the whole amount to which he and the plaintiff were entitled, but not if he collected less than that amount, but more than that to which he himself was entitled. Furthermore, damages for fraud would be measured by subtracting the actual value of the property at the time of conveyance from the price paid.[8] Given this measure, it may be accurate to say that the recovery did not "take the place of the land" for remedial purposes, but still the settlement may have been for more than Leeds' damages, especially since the damages he prayed for in the prior suit equalled exactly the purchase price paid to the Sheridans. With this possibility, why must the plaintiff plead the exact amount Leeds received, rather than being allowed to take advantage of discovery mechanisms to ascertain the amount of that recovery?[9] The court says little to solve these problems.[10]

As to the first covenant to restore damaged property, the court found that even if it could be interpreted to obligate Leeds to correct the fill, the state's anti-deficiency judgment statute, section 580b of the CALIFORNIA CODE OF CIVIL PROCEDURE,[11] would prohibit such an effect. By

[7] The court cited RESTATEMENT OF RESTITUTION § 160 (1936), which outlines the general nature of the constructive trust remedy.

[8] CAL. CIV. CODE § 3343 (West 1954).

[9] The plaintiff might have escaped this dilemma by pleading on information and belief that the defendant had received the entire purchase price, thereafter using discovery procedures and amending its complaint accordingly. The complaint was dismissed without leave to amend, however.

[10] Justice Mosk, dissenting, criticized the majority for its inattention to these problems, and for "hinting" that a future action may lie, while not allowing a determination in the case before them.

[11] CAL. CODE CIV. PROC. § 580b (West Supp. 1967). This section provides:

> No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given *to the vendor* to secure payment of the balance of the purchase price of real property, *or under a deed of trust, or mortgage, on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all of or part of the purchase price of such dwelling occupied, entirely or in part by the purchaser.*

Italicized portions were adopted by amendment [1963] Cal. Stat., ch. 2158, § 1.

so ruling, the court applied the statute to a situation markedly different from that in which such statutes are normally applied.

A "deficiency judgment" has been traditionally defined by the courts as "that part of a debt which a mortgage was given to secure and [which is] not realized from the sale of mortgaged property."[12] California's anti-deficiency statute has been interpreted to give broad protection to purchasers of real estate. It was originally enacted in 1933,[13] and was later modified to prohibit a deficiency judgment "after any sale of real property for failure of the purchaser to complete his contract of sale . . . ."[14] The California courts (before the amendment that specifically so provided) construed the statute, contrary to other court's interpretations,[15] to cover money advanced to the purchaser by persons other than the vendor.[16] It has been held that when a grantee of a purchase money mortgagor assumes the debt he is entitled to the protection of section 580b.[17] The court has also found that a purchase money mortgagor is protected by the statute from the claims of a holder of a second purchase money deed of trust, even though the security was exhausted in a sale by the holder of the first trust deed.[18]

The court has stated that the purpose of the statute is to insure that "for a purchase money mortgage or deed of trust, the security alone can be looked to for recovery of the debt,"[19] and thus to put on the lender the risk that the security may be inadequate at the time of default. An attempt was subsequently made to ascertain the purposes that the statute was designed to achieve.[20] The court discussed and rejected the possibility that the statute was intended to prevent a creditor from purchasing the mortgaged premises for less than their true value at a forced sale and thereafter obtaining a large deficiency judgment. Other sections

[12] Harrow v. Metropolitan Life Ins. Co., 285 Mich. 349, 353, 280 N.W. 785, 787 (1938).

[13] [1933] Cal. Stat., ch. 642, § 5.

[14] [1935] Cal. Stat., ch. 680, § 1.

[15] *See* Currie & Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict of Laws Method*, 1960 DUKE L.J. 1, 17-18.

[16] Bargioni v. Hill, 59 Cal. 2d 121, 378 P.2d 593, 28 Cal. Rptr. 321 (1963).

[17] Stockton Sav. & Loan Bank v. Massanet, 18 Cal. 2d 200, 114 P.2d 592 (1941).

[18] Brown v. Jenson, 41 Cal. 2d 193, 259 P.2d 425 (1953). *Contra*, Sivade v. Smith, 104 N.J. Eq. 528, 146 A. 364 (1929). In Gates v. Schuster, 227 Cal. App. 409, 38 Cal. Rptr. 644 (1964), a plaintiff who had sold both real and personal property and accepted cash and a promissory note secured by a trust deed on the real property only was held to have contracted to forego further security, and was therefore unable to obtain a deficiency judgment on the personalty.

[19] Brown v. Jenson, 41 Cal. 2d 193, 198, 259 P.2d 425, 427 (1953).

[20] Roseleaf Corp. v. Chierighino, 59 Cal. 2d 35, 378 P.2d 97, 27 Cal. Rptr. 873 (1963).

of the California Code[21] limit a deficiency judgment under *any* mortgage to the difference between the amount of the obligation and the *fair market value* of the property sold. Hence, a mortgagor is protected from a deficiency judgment following a low auction bid if the fair market value is equal to or greater than the mortgage debt. The court felt, therefore, that if section 580b is not merely redundant, it must have been intended to protect *purchase money* mortgagors, whether the mortgagee be the vendor or a third party, from deficiency judgments even when the fair market value of the land is not as great as the mortgage debt. Also rejected as the basis for the statute was the assertion that the lender knows more about the property being sold than the buyer.

Three considerations have been accepted as underlying the statute's stated goal:[22] (1) to discourage the vendor's overvaluing the land; (2) to discourage speculative land promotions; and (3) to prevent the aggravation of an economic depression that might result from the purchaser's losing both the land and the amount of the judgment. The *Leeds* decision may be evaluated in light of its tendency to further these three ends. The first goal is not relevant in *Leeds* because the plaintiff there was not the vendor. The *Leeds* decision might tend to further the second goal of braking speculative land sales by forcing potential third party lenders to investigate the value of the premises offered as security before extending loans. The third goal, offsetting deflationary tendencies in the economy, is acknowledged to be the primary objective. The *Leeds* case did not involve the most obvious way depressions could be accelerated by deficiency judgments because, unlike the normal deficiency judgment action, there was no possibility of the defendant's losing both the land and part of his other assets.

In ascertaining whether the *Leeds* decision could operate to lessen the severity of a depression in some other way, there are two approaches that might be read into the opinion. It could be contended that the court held (1) that the plaintiff must bear the risk that the security was damaged at the time of sale only, or (2) that if the security becomes inadequate at any time, for any reason, plaintiff must bear the burden. The relevant language is:

> Even if defendant's agreement to "keep said property in good condition and repair" and to "restore . . . any building which may be . . . damaged or destroyed thereon" could reasonably be interpreted to

[21] CAL. CODE CIV. PROC. §§ 580a, 726 (West 1955).

[22] Roseleaf Corp. v. Chierighino, 59 Cal. 2d 35, 378 P.2d 97, 27 Cal. Rptr. 873 (1963).

include an obligation to correct the improper fill condition and repair all physical damage caused thereby, section 580b of the Code of Civil Procedure would preclude giving effect to that interpretation . . . . To require defendant to correct the condition of the property existing at the time of sale . . . would shift to him one of the risks that section 580b requires plaintiff to bear.[23]

The second interpretation might open the possibility of exhaustion of the security by a dishonest or negligent mortgagor, with no recourse for the lender. Both the court's choice of language ("condition . . . existing at the time of sale") and the background of the decision make it unlikely that this was the intended meaning.[24]

If the court's interpretation passed the risk of inadequate security at the time of sale only to the vendor, the decision has no affect on the severity of depressions. If offsetting deflationary tendencies is the only legitimate purpose of section 580b,[25] the statute would apply only when the fair market value of the premises had fallen below the amount of the mortgage debt because of declining land values. The plaintiff urged that fighting such a snowball effect of declining land prices is the sole aim of the statute, and that the risk placed on the lender was of an economic nature caused by price fluctuation.[26] But the court, by its ruling, extended the disabling effect of the statute to those lenders who find the value of the premises to be below the amount of the debt because they took inadequate security originally, and implicitly held that the statute had purposes other than "cycle-leveling." The *Leeds* decision may rest on the goal of discouraging speculation or on purposes not previously enumerated by the court.

By apparently refusing to limit section 580b's purpose to "cycle-leveling," and by speaking of "the risks that section 580b requires plaintiff to bear"[27] without explicitly stating what those risks are, the court has left the mortgagee's rights and contract options open to question. It is certain that the mortgagee cannot protect himself from the risk that the security is inadequate at the time the mortgage is made, regardless of the cause of the inadequacy. Probably, the validity of a promise by a

---

[23] — Cal. 2d at —, 440 P.2d at 937, 68 Cal. Rptr. at 457 (citation omitted).

[24] Easton v. Ash, 18 Cal. 2d 530, 116 P.2d 433 (1941), held that the mortgagor's right to sue for waste remains intact. There is dicta to that effect in Weaver v. Bay, 216 Cal. App. 732, 31 Cal. Rptr. 211 (1963).

[25] Hetland, *Deficiency Judgment Limitations in California—A New Judicial Approach*, 51 CALIF. L. REV. 1 (1963), suggests that "cycle-leveling" should be the sole purpose.

[26] Appellant's Opening Brief at 12, Petition for Hearing by Supreme Court at 8, —— Cal. 2d ——, 440 P.2d 933, 68 Cal. Rptr. 453 (1968).

[27] —— Cal. 2d at ——, 440 P.2d at 937, 68 Cal. Rptr. at 457.

mortgagor not to impair the security is not affected by the *Leeds* decision. In *Mills v. Brown*,[28] a provision in a chattel mortgage on sheep whereby the mortgagor promised not to sell the sheep, their increase, or their wool was held to authorize a suit against the mortgagor for conversion, notwithstanding a statutory provision[29] limiting a mortgagee to one action to recover the debt or to enforce a right secured by the mortgage. The court found that the action was not one covered by the statute, but one to prevent impairment of the security given. This would seem analagous to an action for impairment of security by a mortgagor-occupier that is challenged by section 580b.[30] Moreover, the court has not in the past forbidden the mortgagee's contracting for further security on the same debt.[31] The validity of a promise by a mortgagor to repair damages due to the actions of third parties or natural catastrophies, which might be regarded as "further security," is, nevertheless, put into question by the *Leeds* decision.[32] The court did point out that *Leeds* involved an unusual situation where the damage had occurred before the transfer of the land. Also, in suggesting remedies that the mortgagee may still retain, the court included waste, suits against third parties for tortiously damaging the security, and rights in eminent domain proceedings, but made no mention of covenants to repair damage not caused by the mortgagor. There is nothing in the opinion to indicate whether such damage is included in the risks that section 580b puts on the lender, and the validity of such covenants by the mortgagor should be at least suspect.

Summarizing briefly, it was held by the court that the covenant by Leeds to assign "[a]ny award of damages" did not entitle plaintiff to a constructive trust in the proceeds of the settlement, the recovery not being for injury to land. The court further held that to interpret the covenant to "keep such property in good condition and repair" as imposing upon Leeds the duty to correct the fill would pass to him one of the risks section 580b requires the lender to bear. This decision has been evaluated in light of the three previously accepted reasons for the statute's policy. In assessing the effects of the decision on the primary goal, preventing depression, it is unlikely the court intended to require the mortgagee to

---

[28] 205 Cal. 38, 269 P. 636 (1928).

[29] CAL. CODE CIV. PROC. § 726 (West 1955).

[30] The dissenter found *Mills* applicable, —— Cal. 2d at ——, 440 P.2d at 938, 68 Cal. Rptr. at 458, and presumably felt that the analogy between realty and personalty was valid.

[31] Mortgage Guar. Co. v. Sampsell, 51 Cal. App. 2d 180, 124 P.2d 353 (1942).

[32] The court, in a footnote, —— Cal. 2d at ——, 440 P.2d at 936 n.2, 68 Cal. Rptr. at 456 n.2, did distinguish this case from those in which the damage was inflicted *after* the mortgage.

bear the burden of the security's becoming inadequate at any time for any reason. Since placing the risk of inadequate security at the time of sale on the mortgagee would not further the anti-depression goal, the court may have found purposes for section 580b not articulated in prior decisions. While it is possible to draw some conclusions about the effects of the decision on the mortgagee's position, it is not possible to say whether a provision making mortgagors responsible for damage to the security from third parties or natural calamity would be valid.

An authority on the law of mortgages has observed that "[i]n all legal systems there seems to be in the law of mortgages an evolution from a forfeit-idea in which the res is given as conditional satisfaction of some act for which there is no personal duty (at least not one for which there is a direct action) to a security idea."[33] This evolution has been due mainly to the skill of drafters of mortgages and other security agreements who, typically, are the lenders or their representatives. The California court's treatment of the anti-deficiency judgment statute has reversed the trend. The mortgaged real estate is no longer simply a convenient method for the lender to collect what is owed him, but a device for limiting the borrower's liability in loan transactions involving the sale of real estate. The facts that in the typical mortgage the lender is a professional and the borrowed an amateur, that the lender often is in the better bargaining position, and that the market is sometimes lacking in competitiveness may have influenced the reasoning that brought the court to this position. It is the court's view that these considerations influenced the legislature in enacting the statute. But the presence or absence of these facts in the individual case is now irrelevant, the determination having been made in advance for the whole class of such cases in favor of the borrower.

Thus, California has again given special encouragement to buyers of land, and in doing so has apparently revived an earlier view of the mortgage relation.

STEPHEN MASON THOMAS

Torts—A Clarification of the Actual Malice Test

In a recent libel case, *St. Amant v. Thompson*,[1] a majority of the Supreme Court reaffirmed and clarified, but declined to expand, the "reck-

[33] G. OSBORNE, MORTGAGES, § 13, at 31 (1951).

[1] 390 U.S. 727 (1968), *rev'g* 250 La. 405, 196 So. 2d 255 (1967).

less disregard" standard of *New York Times Co. v. Sullivan.*[2] In *New York Times* the Court, stating that the first and fourteenth amendments afford a qualified privilege to the maker of certain libelous misstatements of fact,[3] held that a false statement of fact relating to the official conduct of public officials is not actionable unless it is made with "actual malice—that is knowledge that it was false or with reckless disregard of whether it was false or not."[4] The Court in *St. Amant* refined this vague actual malice doctrine and formulated distinct guidelines to help determine the evidentiary criteria constitutionally necessary to support a finding that a publication was made with actual malice.[5]

New York Times established two methods by which the evidentiary requirements of the actual malice test could be satisfied.[6] The first, actual knowledge, is easily applied.[7] But the application of the second method—showing reckless disregard of the truth or falsity of a statement—is more difficult. The first effort to clarify the *New York Times* "actual malice" standard occurred in *Garrison v. Louisiana*,[8] where the Court expressly rejected the common law test of "ill will."[9] Requiring a "high degree of awareness"[10] of the probable falsity of a statement, the Court defined actual malice basically in terms of scienter[11] and stated that mere negligence or unreasonableness in making a false statement will

---

[2] 376 U.S. 254 (1964).

[3] The Court expressly adopted the view of the minority of state courts. 376 U.S. at 280-81. See Phoenix Newspapers, Inc. v. Choisser, 82 Ariz. 271, 312 P.2d 150 (1957); Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908); Annot., 150 A.L.R. 358 (1944).

[4] 376 U.S. at 279-80. An interesting part of the *New York Times* decision, the "public official" doctrine, is beyond the scope of this note. For examples, see Rosenblatt v. Baer, 383 U.S. 75 (1966); Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965); Fignole v. Curtis Publ. Co., 247 F. Supp. 595 (S.D.N.Y. 1965); Comment, *Constitutional Law—Defamation—Privilege to Comment on Official Conduct Extended*, 46 BOST. U.L. REV. 568 (1966); Comment, *Defamation of a Public Official*, 1 U. SAN FRAN. L. REV. 356 (1967). For a discussion of the extension of the public official concept to the "public figure," see Time, Inc. v. Hill, 385 U.S. 374 (1967); Afro-American Publ. Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966); Pauling v. National Review, Inc., 49 Misc. 2d 975, 269 N.Y.S.2d 11 (Sup. Ct. 1966); Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1966); Note, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 YALE L.J. 642 (1966).

[5] 390 U.S. at 728.

[6] 376 U.S. at 279-80.

[7] See Fox v. Kahn, 421 Pa. 563, 221 A.2d 181, *cert. denied*, 385 U.S. 935 (1966).

[8] 379 U.S. 64 (1964).

[9] *Id.* at 72.

[10] *Id.* at 74.

[11] See Hanson, *Developments in the Law of Libel: Impact of the New York Times Rule*, 7 WM. & MARY L. REV. 215 (1966).

not support a slander action by a public official. Nor will evidence of personal malice, or evidence that the misstatements affected the official's private reputation support it.[12] The holding in *Garrison* suggests that the defendant had a "general intent to make a false comment."[13]

Following *New York Times* and *Garrison*, numerous state and federal courts attempted to interpret the constitutional standard of reckless disregard. Lower court holdings generally used either the amount of the defendant's investigation of the source of his information or the inherently improbable nature of the information itself[14] as determinative. A conflict arose as to whether evidence of the defendant's investigation of his source was decisive. For example, the Third Circuit held that "investigatory failures are insufficient to show recklessness on the part of a newspaper."[15] However, the Seventh Circuit held there was sufficient evidence to go to the jury on the question of reckless disregard where defendant magazine published an article, based on the Civil Rights Commission Report, stating that the plaintiff was brutal to Negroes, when in fact the report only indicated it had been alleged.[16] The inherently improbable character of the libelous information was a determinative factor in other attempted definitions of reckless disregard. Motive to injure alone, that is, that the remark was incited by a prior grudge[17] or a desire to defeat a candidate,[18] was held not to constitute reckless disregard.

In *St. Amant*, the defendant in a televised political campaign address had charged the plaintiff with criminal conduct. Although the defendant failed to investigate the reliability of his charges, which were false, the Court held that the plaintiff had not satisfied his burden of proving that the statements were made with a "reckless disregard" for the truth.[19] The decision specifies that the fact finder must determine whether the publication was "indeed made in good faith."[20] To satisfy constitutional requirements, the evidence must be sufficient "to permit the

[12] 379 U.S. at 73, 76-77.

[13] Note, *Constitutional Law—Freedom of Speech—Defamation*, 39 TUL. L. REV. 355, 360 n.38 (1965).

[14] See Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579 (5th Cir. 1967).

[15] Baldine v. Sharon Herald Co., 391 F.2d 703, 706 (3d Cir. 1968).

[16] Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1966). For other examples in which investigation was important, see Ross v. News-Journal Co., —— Del. ——, 228 A.2d 531 (1967); Silbowitz v. Lepper, 55 Misc. 2d 443, 285 N.Y.S.2d 456 (Sup. Ct. 1967).

[17] Manbeck v. Ostrowiski, 384 F.2d 970 (D.C. Cir. 1967).

[18] Phoenix Newspapers v. Choisser, 82 Ariz. 271, 312 P.2d 150 (1957). The court applied a standard similar to that in *New York Times* before that decision was announced.

[19] 390 U.S. at 728.

[20] *Id.* at 732.

conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."[21] The Court further pointed out that not every uncontradicted assertion of good faith will guarantee a verdict for the defendant.[22]

> Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.[23]

The first two illustrations in the quoted passage indicate that if the defamatory publication has no source—neither an informant nor a fact situation of which the defendant has personal knowledge—a jury will be permitted to find reckless disregard. The Court implies that allegations by the plaintiff must be countered with positive evidence by the defendant that the statement was not a product of his imagination nor from a totally unknown and unverified source. If the source of the alleged defamation lies in some factual occurrence, the plaintiff then appears to have the burden of showing that only a reckless man would draw and publish such deductions from the situation, or that the defendant possessed knowledge sufficient to make his inference either recklessly or knowingly false. In other words, the deductions must be so improbable that the jury will be permitted to find by implication the scienter required by *Garrison.* If the defendant shows that the information came from an informant, the burden again shifts to the plaintiff. He must show either that there are obvious reasons for doubting the veracity of the informant, for example, by the reporter's past record of reliability,[24] or that the statements themselves are so "inherently improbable"[25] that only a reckless man would publish them. *St. Amant* implies that this inherent improbability may be established in either of two ways: the plaintiff must establish that knowledge contrary to the alleged defamation is so widely held that only a reckless man could publish it or that the defendant himself possessed facts from which the jury could find scienter.

[21] *Id.* at 731 (emphasis added).
[22] *Id.* at 732.
[23] *Id.*
[24] See Washington Post Co. v. Koegh, 365 F.2d 965 (D.C. Cir. 1966).
[25] 390 U.S. at 732.

The Court's treatment of the evidence in *St. Amant* suggests that the emphasis by lower courts on the importance of investigation was misplaced, for evidence of investigation and of the nature of the defendant's statements are no longer the primary determinants of the standard of reckless disregard. These factors now seem to be of significance only as evidence tending to show the defendant's doubt as a matter of fact. It further seems that by allowing a factual determination of doubt to be inferred from the evidence, the Court is possibly retreating from the *New York Times* requirement of proof of reckless disregard with "convincing clarity."[26]

St. Amant establishes some needed guidelines by its examples in which the Court recognizes that reckless disregard may be inferred from the facts. But the catch-all of "inherent improbability" that follows the examples leaves the test of reckless disregard a still uncertain concept. The Court in effect replaces the illusive reckless disregard standard with a new label—inherent improbability. It admits that the standard of reckless disregard "cannot be fully encompassed in one infallible definition."[27]

Despite these lingering uncertainties, the Court rejects the absolutist standard of Justices Black and Douglas,[28] proving many of the early commentators and speculators wrong.[29] The actual malice standard was initially established in *New York Times* by balancing opposing societal interests. The Court continues to recognize that although there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[30] there still remains a "pervasive and strong interest in preventing and redressing attacks upon reputation."[31] The Court has apparently decided that in relation to public issues the actual malice prerequisite retains a constitutionally adequate measure of protection for reputation and good name. There is little reason to expect sweeping changes in this field in the near future.

GEORGE HACKNEY EATMAN

---

[26] 376 U.S. at 286.

[27] 390 U.S. at 730.

[28] See New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Garrison v. Louisiana, 379 U.S. 64, 79-80 (1964) (concurring opinions).

[29] See Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1966); Note, *Criminal Law—Criminal Libel—Constitutional Limitations on State Action*, 14 AM. U.L. REV. 220 (1965); Note, *The New York Times Rule and Society's Interest in Providing a Redress for Defamatory Statements*, 36 GEO. WASH. L. REV. 424 (1967); Note, *Constitutional Law—Freedom of Speech—Defamation*, 39 TUL. L. REV. 355 (1965); Note, *New York Times Co. v. Sullivan —(84 S. Ct. 710)—The Scope of a Privilege*, 51 VA. L. REV. 106 (1965).

[30] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[31] Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).