Volume 15 | Issue 1 Article 11

1969

Civil and Criminal Procedure - Voir Dire Examinations - New Jersey Supreme Court Places Primary Reponsibility for Conducting Voir Dire Examinations on Trial Court Judges

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Recommended Citation

Gordon B. Aydelott, *Civil and Criminal Procedure - Voir Dire Examinations - New Jersey Supreme Court Places Primary Reponsibility for Conducting Voir Dire Examinations on Trial Court Judges*, 15 Vill. L. Rev. 214 (1969).
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RECENT DEVELOPMENTS

CIVIL AND CRIMINAL PROCEDURE — VOIR DIRE EXAMINATIONS — NEW JERSEY SUPREME COURT PLACES PRIMARY RESPONSIBILITY FOR CONDUCTING VOIR DIRE EXAMINATIONS ON TRIAL COURT JUDGES.

State v. Manley (N.J. 1969)

During the voir dire examination at the beginning of a trial resulting in defendant's murder conviction, his attorney questioned prospective jurors concerning their ability to confine evidence of defendant's prior criminal convictions to the issue of credibility.[1] After two potential jurors were interrogated in this manner, the trial judge refused to allow further questions on that issue unless counsel would indicate an intention to place defendant on the witness stand, reasoning that if defendant refused to testify, the fact that he had been previously convicted would not become evidential[2] and therefore, such a question could only serve to prejudice the jury against the defendant. On appeal, the Supreme Court of New Jersey affirmed, *holding, inter alia,* that the trial judge did not abuse the discretion vested in him by the existing practice rule[3] and statute,[4] and that henceforth, the courts would assume primary re-

1. The following question is typical:
If during the course of this trial there appears in evidence or it becomes evident to you that this defendant has once before been convicted of a crime, in fact, atrocious assault and battery, and that this element is admitted under the Judge's instructions for the purpose — for a limited purpose, would you be able to follow the Judge's instructions and use it only for that limited purpose?
State v. Manley, ___ N.J. ___, ___, 255 A.2d 193, 196 (1969).

2. State v. Manley, ___ N.J. ___, ___, 255 A.2d 193, 197 (1969), *citing* People v. Sanchez, 35 Cal. 2d 522, 529, 219 P.2d 9, 13 (1950). *Cf.* State v. Buffa, 31 N.J. 378, 157 A.2d 694, *cert. denied,* 364 U.S. 916 (1960).

3. N.J. REV. RULE 4:48–1 (1968), provides:
The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper.

4. N.J. REV. STAT. § 2A:78–4 (1951), provides:
Upon the trial of any cause, civil or criminal, all parties may, within the discretion of the court, question any person summoned as a juror, after his name is drawn from the box and before he is sworn as a juror, and without the interposition of any challenge, to elicit information for the purpose of determining whether or not to interpose a peremptory challenge and of disclosing whether or not there is a cause for challenge. In all cases in which a death penalty may be imposed, the examination as to competency shall be under oath, but in all other cases it shall be made without putting the juror under oath. Such questions shall be permitted for the purpose of disclosing whether or not the juror is qualified, impartial and without interest in the result of the action. The questioning shall be conducted under the supervision and control of the trial judge and in open court.

sponsibility for the interrogation of prospective jurors.[5] *State v. Manley*, ---- N.J. ----, 255 A. 2d 193 (1969).

The original purpose of the voir dire examination was to elicit from the prospective jurors responses which would either show sufficient freedom from bias for impartial consideration of the case or to indicate such actual bias as would permit a challenge for cause.[6] In England, voir dire examinations are perfunctory and conducted only to substantiate previously interposed challenges.[7] The traditional reason for this procedure was that the potential jurors were generally known in the precinct where the court was sitting and therefore a counsel could easily discover whether or not a cause for challenge existed through inquiries outside the courtroom.[8] In certain cases, where counsel has doubts as to the venireman's desirability as a juror but no statutory basis for challenge exists, he is also permitted to challenge the potential juror peremptorily.[9] Under the English law, however, examination as a means of determining the propriety of such a challenge is virtually unknown.[10]

The English procedure was initially followed in America, where the voir dire examination was regarded as incident[11] to the constitutional right to trial by an impartial jury.[12] However, due to territorial ex-

5. The court utilized the opportunity provided by this case to announce the adoption of a new New Jersey Court Rule, N.J. REV. RULE 1:8-3(a) (1969), effective September 8, 1969, and applicable in both civil and criminal cases. It provides:

> For the purpose of determining whether a challenge should be interposed, the court shall interrogate the prospective jurors in the box after the required number are drawn without placing them under oath. The parties or their attorneys may supplement the court's interrogation in its discretion. At trials of crimes punishable by death where the death penalty has not been waived pursuant to R. 3:1-3, however, the examination shall be made of each juror individually, as his name is drawn, and under oath.

6. Comment, *Voir Dire Examination — Court or Counsel,* 11 ST. LOUIS L.J. 234 (1967).

7. 31 YALE L.J. 514, 515 (1922).

8. *See* Moore, *Voir Dire Examination of Jurors: I. The English Practice,* 16 GEO. L.J. 438 (1928).

9. These challenges are limited by statute according to the nature of the case and the gravity of the offense. *See, e.g.,* N.J. REV. STAT. § 2A: 78-7 (1951).

10. Moore, *supra* note 8, at 445.

11. Annot., 99 A.L.R.2d 7, 16 (1965). *See* State v. Zellers, 7 N.J.L. 220, 222-23 (Sup. Ct. 1824); Clifford v. State, 61 N.J.L. 217, 39 A. 721 (E. & A. 1897).

12. *See* JUDICIAL CONFERENCE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, 26 F.R.D. 411, 465 (1961). The right to trial by jury in federal courts is guaranteed by U.S. CONST. amend. VI (criminal cases) and by U.S. CONST. amend. VII (civil cases). The latter amendment does not expressly provide that trial be by an *impartial* jury. However, this requirement is implied by the due process clause of the fifth amendment. *See* JUDICIAL CONFERENCE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, *supra* at 465. It is also implied as a result of the common law. Theil v. Southern Pac. Co., 328 U.S. 217, 220 (1946). *See* Vance, *Voir Dire Examination of Jurors in Federal Civil Cases,* 8 VILL. L. REV. 76, 77 n.3 (1963); Comment, *Voir Dire — Prevention of Prejudicial Questioning,* 50 MINN. L. REV. 1088, 1089 n.7 (1966). The sixth amendment guaranty of the right to trial by an impartial jury is imposed on state courts in certain criminal cases. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Supreme Court held that the fourteenth amendment guarantees a right to trial by jury in all criminal cases where the right would exist in a federal court. The seventh amendment guaranty has not been extended to civil cases brought in state courts. Oleson v. The Trust Company of Chicago, 245

pansion, urbanization and other factors,[13] it frequently became impossible to face the veniremen with prior knowledge of their respective interests and prejudices. Consequently, American courts adopted a system of identifying prejudiced jurors by means of an examination by counsel prior to challenge, under the supervision of the court.[14] This practice was judicially recognized as a matter of right in Illinois in 1891[15] and was adopted by legislative enactment in New Jersey in 1911.[16] The permissible scope of the typical American voir dire examination was likewise extended to include questions that would enable counsel to intelligently utilize peremptory challenges.[17]

This opportunity to directly and extensively interrogate jurors is presently employed to attain numerous objectives unrelated to the seating of an unbiased jury.[18] It has become common practice for counsel to

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F.2d 522 (7th Cir.), *cert. denied,* 355 U.S. 896 (1957). Most state constitutions, however, guarantee this right in both criminal and civil cases. *See, e.g.,* N.J. CONST. art. I, § 9.

13. *See* Moore, *Voir Dire Examination of Jurors II: The Federal Practice,* 17 GEO. L.J. 13, 36 (1928).

14. Comment, *supra* note 6, at 235; *supra* note 7, at 515. Under this system, the amount of latitude afforded counsel by courts in questioning jurors varies somewhat from jurisdiction to jurisdiction. In the Eastern District of Pennsylvania voir dire examinations are conducted in the jury room, out of the presence of the judge. He is afforded the opportunity to limit questioning only when a specific question is objected to by counsel. JUDICIAL CONFERENCE COMMITTEE, *supra* note 12, at 467. In some jurisdictions courts are supposed to limit questions to those that are "reasonable and pertinent." 58 YALE L.J. 638, 640 n.10 (1949). In most jurisdictions, however, a wide latitude is afforded counsel in conducting the voir dire examination. *Id.* For cases admonishing trial court judges to afford considerable leeway to counsel during the voir dire examination, *see e.g.,* Fredrick v. United States, 163 F.2d 536 (9th Cir. 1947); Henwood v. People, 57 Colo. 544, 143 P. 373 (1914).

15. Donovan v. People, 139 Ill. 412, 28 N.E. 964 (1891). The court held that examinations by counsel prior to challenge was an indispensable incident of the right of peremptory challenge. This decision was influenced by Stephens v. People, 38 Mich. 739 (1878), where it was held that counsel for the defendant in a criminal case had a right to personally re-examine jurors after the judge had finished his examination.

16. Law of 1911, ch. 151, [1911] N.J. Laws 220 (repealed 1951). This act provided in pertinent part:

> 1. From and after the passage of this act all challenges to jurors for any cause, whatever, in any action or suit, civil or criminal in any court of this state, may be made at any time before the juror is actually sworn.
>
> 2. Upon the trial of any issue in any civil suit or action in any court of this state each party shall be able to challenge peremptorily six of the general panel of jurors summoned and returned by the sheriff of [*sic*] other officer.
>
> 3. Either party or his attorney may question any juror after his name is drawn from the box and before such juror is sworn, for the purpose of eliciting information upon which he may determine whether or not to interpose such peremptory challenge. Within the discretion and under the control of the court, such questions shall be permitted for the purpose of disclosing whether or not the juror is impartial as between the parties to the suit and without interest therein or in result thereof.

Section 3 of this statute was held to apply to civil cases alone. Lamble v. State, 96 N.J.L. 231, 234, 114 A. 346, 347 (E. & A. 1921). This limitation of voir dire examination of jurors in noncapital criminal cases was discontinued by N.J. REV. RULE 3:7-2(b) (1949), which permitted both the defense and prosecution to examine prospective jurors for the purpose of determining whether to interpose a peremptory challenge or whether there was cause for challenge. The legislature later modified the 1911 Act to conform with this rule. N.J. REV. STAT. § 2A:78-4 (1951).

17. *See, e.g.,* N.J. REV. STAT. § 2A:78-4 (1951).

18. Holdaway, *Voir Dire — A Neglected Tool of Advocacy,* 40 MIL. L. REV. 1 (1968); Comment, *The Jury Voir Dire: Useless Delay or Valuable Technique,* 11 S. DAK. L. REV. 307, 319 (1966). A study made in a midwestern federal district

seek a favorable rapport with the veniremen through this opportunity to converse with them.[19] An advocate may also utilize voir dire to "steal his opponent's thunder" by previewing some of the evidence he expects his opponent to introduce.[20] Similarly, he may indoctrinate prospective jurors as to his view of the facts of the case or the law that is applicable.[21] He may also attempt to elicit responses from the prospective jurors that require a commitment to vote in a particular manner.[22] These secondary objectives are most frequently accomplished under the guise of soliciting the jurors' ability or willingness to follow a judicial charge involving the evidence, facts, or legal theories of the case.[23]

Several authorities seem to elevate these ends to a status coequal with the primary purpose of the voir dire examination.[24] However, the *Manley* court recognized that these practices were a drain on valuable court time and a subversion of the original purpose of the voir dire examination.[25] The court's conclusion that such practices frequently contribute to an inordinately lengthy trial seems valid since the voir dire examination during Manley's trial extended over eight days and, as the court pointed out, this was not unusual.[26] Consequently, it would appear that this procedure contributes substantially to the judicial backlog common in American courts, and tends to encourage citizens to shirk jury duty.[27]

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court indicates that only 20% of the questions asked in the course of voir dire are genuinely intended to discover bias. Broeder, *Voir Dire Examinations: An Empirical Study,* 38 S. CAL. L. REV. 503, 522 (1965). The *Manley* court intimated that the judiciary unwittingly fostered these practices by failing effectively to control the scope of voir dire. ____ N.J. at ____, 255 A.2d at 202.

19. Comment, *supra* note 6, at 245; Comment, *supra* note 18, at 335. *See also* R. KEETON, TRIAL TACTICS AND METHODS 244 (1954); Amandes, *From Voir Dire to Verdict Through a Juror's Eyes,* 9 PRAC. LAW. 21, 23 (1963).

20. Holdaway, *supra* note 18, at 22.

21. J. APPLEMAN, PREPARATION AND TRIAL 167 (1967).

> And I freely confess that I, as well as other professional advocates, do my damndest to indoctrinate jurors at this and every other stage of the trial. This is our job.

See I M. BELLI, MODERN TRIALS 796–99 (1954); Wormwood, *Selection of a Jury in a Civil Case,* 33 DICTA 179, 183 (1956).

22. Brill, *Voir Dire I — Examination of Jurors,* 29 Mo. L. REV. 259, 263 (1964); Comment, *supra* note 12, at 1092, 1095.

23. Examples of such questions include:

> Can you follow an instruction that requires you to disregard evidence of defendant's prior convictions in determining his guilt or innocence?
>
> Do you agree with the rule of law that requires acquittal in the event there is reasonable doubt?
>
> Could defendant rely upon you to vote for acquittal if the evidence were evenly balanced?
>
> Would you convict defendant if the prosecution showed certain facts and if the court charged that these facts violate the law?

For an exhaustive study of the propriety and effects of asking jurors hypothetical questions, *see* 99 A.L.R.2d 7 (1965).

24. *See* Holdaway, *supra* note 18, at 2; Comment, *supra* note 18, at 318–19.

25. ____ N.J. at ____, 255 A.2d at 205.

26. *Id.* at ____, 255 A.2d at 195.

27. SECTION OF JUDICIAL ADMINISTRATION OF THE AMERICAN BAR ASSOCIATION, THE JUDGE–JURY RELATIONSHIP IN THE STATE COURTS, 23 ORE. L. REV. 3, 6 (1943); Amandes, *supra* note 19, at 23; Dodd, *Note on Judicial Organization and Procedure,* 24 AM. POL. SCI. REV. 117, 127 (1930); Comment, *supra* note 6, at 242.

A more serious consequence of these ostensible efforts to "discover bias" is the tendency of the questions to implant in the mind of the prospective juror either a prejudice favoring the questioner or disfavoring his adversary. The attempts of opposing counsel to achieve rapport with the jurors while interrogating them can have but two results. If both are equally successful, the efforts of both are frustrated; on the other hand, if one attorney better succeeds in achieving this rapport, the other is put at a disadvantage simply because he is not as engaging.[28] This latter result is obviously in direct contravention of the intended purpose of voir dire.

Deleterious repercussions also inhere in the practice of previewing evidence. By so doing counsel may intentionally or unwittingly reveal evidence that would be inadmissible in the ensuing trial. The situation, as presented by the trial court, in the instant case provides a good illustration of the harm that could result from this practice.[29] Although the fact of Manley's prior conviction was revealed in good faith, it could not be admitted if Manley failed to testify and its disclosure during the course of voir dire could only prejudice him.

Voir dire examinations also afford an opportunity to bring other inadmissible and prejudicial facts and legal interpretations to the attention of the jury. For example, in jurisdictions where allusion to liability insurance coverage is otherwise inadmissible,[30] the voir dire examination may provide a vehicle for injecting this fact to the defendant's detriment.[31] In addition, counsel may take this opportunity to distort operative facts of the case, narrating them in a manner that will benefit his client and prejudice the opposition. A similar abuse may also inhere in the practice of educating the jurors in the applicable rule of law. Since attorneys frequently slant legal principles in the manner most favorable to their cause, this practice is not only prejudicial, but can also result in confusing the potential jurors and requiring the court to rule prematurely on questions of law.[32]

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28. Comment, *supra* note 6, at 245.

29. ..... N.J. at ....., 255 A.2d at 196.

30. This is the general rule in the United States. Annot., 4 A.L.R.2d 764, 767 (1949); 28 MISS. L.J. 65 (1956).

31. Comment, *supra* note 18, at 332-33; Comment, *supra* note 12, at 1093. Such questions commonly take this form: "Have you any interest as a director, shareholder, or employee of a company insuring for damages resulting from the operation of a motor vehicle?" For a detailed discussion of voir dire problems relating to insurance, *see* Vetter, *Voir Dire II — Liability Insurance*, 29 MO. L. REV. 305 (1964).

32. The dangers inherent in the practice of educating potential jurors in the rules of supposedly pertinent law are succinctly enumerated in the instant case:

> That the supposed instructions as orally expounded by the advocate are slanted, argumentative, and so often clearly erroneous as to cause certain reversal if given by the court, surprisingly appears to be a matter of little concern. . . . When an attorney is allowed to give his version of the law to the jury, the other lawyer is certain to retaliate by giving his version of it. The inevitable result is that the court is required in settling the dispute to instruct the jury orally and in advance on questions of law that may not eventually be relevant to the inquiry.

..... N.J. ....., ..., 255 A.2d 193, 204 (1969), *citing*, [ILL.] COMMITTEE ON LIMITATION OF VOIR DIRE EXAMINATIONS, REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON LIMITATION OF VOIR DIRE EXAMINATIONS (1958).

The avowed purpose of the rule promulgated in *Manley* is to bring about ". . . an expedient selection of a fair and impartial jury"[33] and to eliminate the opportunity to undermine this purpose by the practices previously noted. This objective is to be attained by transferring the primary responsibility for conducting the voir dire examination from counsel to the trial judge, and by stringently limiting its permissible scope. The technique adopted by the *Manley* court for curtailing abuses of the voir dire examination is by no means unique. Acting upon the recommendation of the judicial conference of Senior Circuit Judges,[34] Congress in 1938 incorporated within the Federal Rules of Civil Procedure[35] and the Federal Rules of Criminal Procedure[36] provisions which grant trial court judges the option of either permitting counsel to conduct the examination or conducting it themselves. In the latter event counsel is permitted to supplement the questioning either directly or through the court. A 1961 survey indicates that 51 federal district courts have adopted procedures whereby the judge takes the predominant role in conducting examinations.[37] Similarly, a number of states have either enacted legislation or promulgated court rules granting judges similar powers.[38]

It has been the experience of the federal court system that voir dire examinations conducted by judges and supplemented by counsel result in a great saving of time and improvement in the character of the examinations.[39] Such a system provides the advantages of eliminating unnecessary or repetitious questioning and premature rulings on questions of law. Preliminary questioning by the court is also more likely to produce a truly impartial jury since questions advanced by the judge

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33. ____ N.J. at ____, 255 A.2d at 205.

34. Examination of the prospective jurors shall be by the judge alone. If counsel on either side desire that additional matter be inquired into, he shall state the matter to the judge, and the judge, if the matter is proper, shall conduct the examination.

Recommendations of the Judicial Conference of Senior Circuit Judges, 10 A.B.A.J. 875 (1924).

35. FED. R. CIV. P. 47(a), states:

The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

36. FED. R. CRIM. P. 24(a), states:

The court may permit the defendant or his attorney or the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

37. JUDICIAL CONFERENCE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, *supra* note 12, at 466.

38. *See* Vanderbilt, *Judges and Jurors: Their Functions, Qualifications, and Selection,* 36 B.U.L. REV. 1, 73 (1956). For a detailed survey of state practices, *see* Comment, *supra* note 6, at 237 n.25.

39. JUDICIAL CONFERENCE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, *supra* note 12, at 467. A study made in Illinois, where a similar system is in effect, indicates that judge-conducted examinations reduce the time necessary for impaneling a jury from at least a half day to two hours. Crebs, *Voir Dire Examinations of Jurors; An Appraisal by a Judge,* 1963 U. ILL. L.F. 644, 646 (1963).

appear to be more objective and less inclined to distort the relevant law or facts in a manner beneficial to either party.

Some commentators have expressed the fear that court-conducted examinations will undermine the basic purpose of the voir dire examination because trial judges cannot have sufficient knowledge of the facts and issues involved in a given case to conduct an examination of adequate specificity.[40] However, the regulations providing for court-conducted examination, including the rule promulgated in the instant case, seem to answer this objection by permitting counsel to submit supplemental questions to the jurors.[41] Such questions could fill the gap in those situations where the court has an insufficient grasp of the factual or legal situation.

The position has also been advanced that court-conducted voir dire examinations would render the right of peremptory challenge meaningless,[42] since such challenges are frequently contingent on a juror's immediate reaction to a question — *i.e.*, a facial expression, halting answer, or a sense of resistance.[43] It is widely recognized, however, that the peremptory challenge constitutes a *matter of right* only when its purpose is the *elimination* of veniremen who are suspected of possessing a bias, prejudice, or other ground for disqualification that has not been articulated in a manner that would sustain a challenge for cause. It was not intended as a vehicle for providing counsel with the opportunity to select as *favorable* a jury as possible.[44] Therefore, it would seem that criticism of court-

40. *See* Carr, *Voir Dire Examination of Jurors; An Appraisal by an Attorney*, 1963 U. ILL. L.F. 653, 659 (1963); Heyl, *Selection of the Jury*, 40 ILL. B.J. 328, 331 (1952); Comment, *supra* note 18, at 317.

41. Such questions, of course, could not exceed the limitations announced by these rules and would be asked under the supervision of the trial judge. In some instances a court's refusal to permit proper questions, not otherwise covered, can constitute reversible error. *See, e.g.*, Aldridge v. United States, 283 U.S. 308 (1936) (Negro about to be tried for murder entitled to ask jurors whether they were racially prejudiced); Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959) (refusal to permit inquiry whether testimony of police officer would be given undue weight deemed reversible error). For a discussion of the propriety of judicial refusal to permit certain questions, *see* 17 MINN. L. REV. 299 (1952).

42. *See* OREGON BAR ASSOCIATION, REPORT OF JUDICIAL COUNCIL (1925), *cited in* 4 ORE. L. REV. 263, 270 (1925).

43. L. NIZER, MY LIFE IN COURT 35-36 (1961). Investigation anterior to the trial is also employed as a basis for the exercise of peremptory challenges. In less populous areas an investigation may be made by counsel, himself. J. APPLEMAN, *supra* note 21, at 160. In some jurisdictions "jury services" are available to supply counsel with data concerning the venire. M. BELLI, *supra* note 21, at 785-88. For a detailed discussion of juror investigation techniques and the propriety of such practices, *see* Okun, *Investigation of Jurors By Counsel: Its Impact on the Decisional Process*, 56 GEO. L.J. 839 (1968). It is arguable that in situations where one litigant is in a superior economic position or has ready access to personal data, *e.g.*, a governmental agency, a rule limiting the scope of voir dire will put the other party at a serious disadvantage as it would be unable to compensate for its disparate position by an extensive in-trial interrogation.

44. *See* Commonwealth v. Lopinson, 477 Pa. 284, 234 A.2d 552 (1967), *vacated on other grounds*, 392 U.S. 647 (1968); Commonwealth v. McGrew, 375 Pa. 518, 100 A.2d 467 (1953); Commonwealth v. Brown, 23 Pa. Super. 470, 499 (1903); *supra* note 14, at 638. The position is advanced, however, that a recognized and legitimate function of the peremptory challenge is to afford counsel the opportunity to eliminate "juror types" who, because of their religious, occupational, social or ethnic backgrounds, are not generally as well disposed toward the type of client he represents or the case

conducted examinations, on the ground that they may impede the selection of *favorable* jurors are illegitimate, as such an objective exceeds the scope of the right granted. However, assuming that visceral reactions are reliable indicators of unarticulated partiality,[45] it seems that they could be evoked with equal effectiveness through appropriate questions asked by the court or through supplemental questions advanced by counsel.

It has also been argued that the potential jurors are so awed by a judge-conducted interrogation that they hesitate to respond frankly.[46] This problem is particularly significant in jurisdictions where it is customary for the court to question the venire as a group. Not only are the questions perfunctory,[47] but this system provides the potential juror with a sense of immunity from the attention of the court. The average venireman is reluctant to leave the anonymity afforded by the venire, admit a bias or prejudice, and thereby necessarily focus upon himself the judge's undivided attention.[48] As a result, questions, which if asked individually might elicit frank admissions of prejudice, frequently draw absolutely no response. However, the judge-conducted examination does protect the juror from a potentially humiliating partisan examination and such an assurance should encourage him to respond to questions frankly and honestly, without fear of a supplemental "grilling" by counsel. But even if court-conducted examinations were found to inhibit frank disclosure, the advantages inherent in this system would appear to offset the inhibitive effects. It has been observed that:

> There is another merit in judicial examination — it brings the judge into a position of greater prominence in the conduct of jury trials. The part of the court is emphasized at the very commencement of the trial and the consciousness of the judge's importance in the minds of the jury and the public may be expected to continue throughout the case. Moreover, it will have a stimulating effect upon trial courts, for they will be taking more active part in the attempt to secure justice in jury cases.[49]

The criticism of group questioning, on the other hand, seems valid, especially when the ultimate purpose of voir dire is considered. The perfunctory nature of the questions submitted as well as the reluctance of individual veniremen to respond to them leave counsel with little if any basis for

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he advocates as other "juror types" would be. To this end, it is argued, counsel should be permitted the opportunity, during the course of voir dire, to question the veniremen as to their general backgrounds. Commonwealth v. Lopinson, 427 Pa. 284, 297, 234 A.2d 552, 560 (1967) (raising and rejecting this contention). For discussions on favorable and unfavorable "juror types" see J. APPLEMAN, *supra* note 21, at 162-65; M. BELLI, *supra* note 21, at 814-31; Comment, *supra* note 18, at 341-62.

45. *But see* Broeder, *supra* note 18, at 505-06.

46. *1959 Institute for California Judges — Panel Discussion, Part II: Selecting the Jury,* 47 CAL. L. REV. 872, 873 (1959) (remarks by Joseph Ball); Comment, *supra* note 6, at 240-41.

47. *E.g.,* Has any juror any bias or prejudice as to the type of case or to any party? Carr, *supra* note 40, at 659.

48. Comment, *supra* note 18, at 318.

49. Comment, *supra* note 6, at 244-45, *citing* Atkinson, *The Voir Dire Examination of Jurors in Kansas,* 1 J.B.A. KAN. 125, 138 (1932).

elimination of biased or prejudiced veniremen. This emasculation of the challenging procedure can be prevented by simply forbidding the practice of group questioning. The *Manley* rule utilizes this approach in capital cases where the death penalty has not been waived.[50] It is submitted, however, that the purpose of this rule would better be served if the court had extended the prohibition of group questioning to all cases, both criminal and civil. Insistence on individual questioning would assure counsel of a basis for intelligent utilization of his challenges. It would also preclude the necessity of continual submission of supplemental questions to attain this end, a practice which could reinstate many of the abuses this rule was designed to eliminate.

While it would appear that the rule espoused in *Manley* returns voir dire to its proper perspective, it should be noted that there is some skepticism as to whether court-conducted examinations will achieve the hoped for results.[51] This pessimism is supported by a study conducted in Illinois where trial judges are primarily responsible for conducting voir dire.[52] The study indicates that many of the judges adhered to the letter but not the spirit of the rule, asking a few perfunctory questions at the outset of the examination and then surrendering the floor to counsel.[53] The *Manley* court, envisioning such possibilities, accompanied its mandate with unequivocal instructions concerning its implementation. It indicated that voir dire examinations should be conducted substantially, if not exclusively, by the trial judges, and that counsel should submit any additional questions to the court prior to commencement of the trial. It admonished trial judges that such questions when asked by counsel should be closely regulated, and that henceforth, the scope of judicial discretion in permitting questions would be greatly limited. The purpose of the new rule, the court felt, should amply define the permissible boundaries of such questioning.[54] However, in order to reduce the possibility of equivocation and to compensate for the lack of precedent, the court appended a lengthy catalog of questions which have been declared improper in other jurisdictions.[55] It indicated that such questions were illustrative of those the new regulation would prohibit.

In the final analysis, the trial judges of New Jersey will determine the success or failure of this new procedure in curtailing the abuses which

50. *See* N.J. REV. RULE 1:8-3(a) (1969).
51. *See* Carr, *supra* note 40.
52. ILL. REV. STAT. ch. 110, § 101.24-1 (1967).
53. Carr, *supra* note 40, at 654.
54. ..... N.J. at ....., 255 A.2d at 206.
55. *Id.* The questions enumerated therein were all asked in conjunction with criminal cases. They fall into the following categories: those requiring a juror to commit himself to vote a certain way in a given situation; those asking whether a juror would be unduly swayed by the opinions of his peers; those requiring a juror to speculate what he, himself, would do in the event of a certain contingency; those which asked whether a juror would follow a certain rule of law after counsel had stated the substance thereof; those which preview facts or evidence; those which require a juror to judge his own mental attitudes; and those which ask whether a juror would give more credence to one witness than to another. For additional examples of improper questions, *see* Note, *supra* note 41.

have blighted voir dire examinations. If their conduct is guided by the purpose of the rule and the instructions which accompanied it, the voir dire examination should, once again, constitute a means of detecting prejudice rather than an instrument for inculcating it.

John F. DePue

CONSTITUTIONAL LAW — CONGRESSIONAL REAPPORTIONMENT — EQUAL REPRESENTATION REQUIREMENT REQUIRES A GOOD FAITH EFFORT TO ACHIEVE ABSOLUTE EQUALITY.

Kirkpatrick v. Preisler (U.S. 1969)

Wells v. Rockefeller (U.S. 1969)

In 1965, voters and citizens of the state of Missouri initiated suit in the District Court for the Western District of Missouri seeking to have Missouri's 1961 Congressional Apportionment Statute declared unconstitutional.[1] In 1967, a similar suit was instituted in the District Court for the Southern District of New York, by voters and citizens thereof, to have New York's 1961 congressional districting statute also declared unconstitutional.[2] Both suits were successful in obtaining the declaration of unconstitutionality, and further legislation and court action ensued.[3]

In the proceedings immediately below, the District Court for the Western District of Missouri held that Missouri's latest congressional districting statute[4] did not meet the constitutional requirement of equal representation because of obviously avoidable variances of population

1. Preisler v. Secretary of State of Missouri, 238 F. Supp. 187 (W.D. Mo. 1965).
2. Wells v. Rockefeller, 273 F. Supp. 984 (S.D.N.Y. 1967).
3. After the decision in 1965 in which the Missouri statute was declared unconstitutional, the General Assembly enacted new reapportionment legislation which was likewise declared unconstitutional. In this declaration, the District Court retained jurisdiction to review any further redistricting plan. Preisler v. Secretary of State of Missouri, 257 F. Supp. 953 (W.D. Mo. 1966), *aff'd sub nom.* Kirkpatrick v. Preisler, 385 U.S. 450 (1967). In 1967, the present statute, Mo. REV. STAT. ch. 128 (Cum. Supp. 1967), was enacted, and the Attorney General of Missouri moved for a declaration sustaining the Act, and dismissing suit in the District Court.

In 1967, the District Court in *Wells* advised "changes which can be superimposed on the present districts to cure the most flagrant inequalities" in time for the 1968 elections and retained jurisdiction pending reapportionment. 273 F. Supp. at 992. Within a month and a half after the legislature reconvened, the present districting statute was enacted, and the District Court again reviewed the legislation.

4. The 1967 Missouri redistricting statute, Mo. REV. STAT. ch. 128 (Cum. Supp. 1967), divides the state into ten congressional districts. Based on the 1960 census of Missouri total population of 4,319,813, the ideal population per district is 431,981. The 1967 statute created districts of population ranging from 3.13% (13,542) above the ideal, to 2.84% (12,260) below it. The average variation from the ideal was 1.6%, and the population difference between the largest and smallest districts is 25,802.

between districts without acceptable justification therefor.[5] The validity of New York's statute[6] however was sustained by the District Court for the Southern District of New York, which held that the plan afforded New York voters "an opportunity to vote in the 1968 and 1970 elections on a basis of population equality within reasonably comparable districts."[7]

The Supreme Court affirmed the judgment of the District Court of Missouri, and reversed that of New York's *holding* that "the command of Art. I, Sec. 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Kirkpatrick v. Preisler,* 394 U.S. 526, 531 (1969), *Wells v. Rockefeller,* 394 U.S. 542, 546 (1969).

In the landmark decision of *Baker v. Carr,*[8] the Supreme Court held that the voters' challenge to an apportionment statute presented a justiciable constitutional cause of action, within reach of judicial protection, and was not a non-justiciable political question.[9] Though the Supreme Court did not indicate any standard to determine whether relief or remedy was to be accorded on remand,[10] *Baker* made clear

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5. Preisler v. Secretary of State of Missouri, 279 F. Supp. 952 (W.D. Mo. 1967).

6. New York's 1968 congressional districting statute, N.Y. STATE LAW §§ 110–12 (McKinney 1968), divides the state into 41 congressional districts. The ideal population per district is 409,324. The 1968 statute creates a variance in district population of from 6.488% (25,556) above the ideal to 6.608% (27,052) below. The difference between the largest and smallest district is 53,653 persons.

New York's population statistics clearly demonstrate that 31 of New York's districts were divided into seven regions. These regions were then subdivided into districts of virtually identical population to other districts within the region. The districts of different substates were markedly unequal however. New York's remaining 10 districts were composed of whole county groupings.

7. Wells v. Rockefeller, 281 F. Supp. 821, 826 (S.D.N.Y. 1968).

8. 369 U.S. 186 (1962).

9. The District Court had held that the case presented a non-justiciable political question. Baker v. Carr, 179 F. Supp. 824 (M.D. Tenn. 1959). The court relied on Colegrove v. Green, 328 U.S. 549, 555 (1946), an Illinois congressional districting case, wherein Mr. Justice Frankfurter, writing for the majority, but joined only by Justices Reed and Burton, cautioned that "[c]ourts ought not enter this political thicket . . . [and that] . . . [v]iolation of the great guaranty of a republican form of government cannot be challenged in the Courts [citing authority]."

For a detailed analysis of Frankfurter's opinion see Beiser, *The Misread Milestone: Colegrove v. Green,* 39 N.Y.S.B.J. 336 (1967). *See also* Rankin, *The High Price Extracted For Not Entering The Political Thicket,* 15 AM. U.L. REV. 1 (1965); Tollet, *Political Questions And The Law,* 42 U. DET. L.J. 439 (1965).

After full consideration of *Colegrove,* the U.S. Supreme Court held in *Baker* that: (1) the District Court had jurisdiction of the subject matter; (2) the Tennessee voters had standing to sue; and (3) the plaintiffs had stated a justiciable cause of action on which relief could be granted.

The Court stated that the District Court had misinterpreted *Colegrove.* Mr. Justice Clark's concurring opinion, in *Baker,* refers to *Colegrove* as ". . . one [case] not only in which the Court was bobtailed but in which there was no majority opinion. Indeed even the 'political question' point in Mr. Justice Frankfurter's opinion was no more than alternative ground." 369 U.S. at 251.

See Note, *Challenges to Congressional Districting: After Baker v. Carr Does Colegrove v. Green Endure?,* 63 COLUM. L. REV. 98 (1963). *See generally A Symposium on Baker v. Carr,* 72 YALE L.J. 7 (1962).

10. The question of a judicial standard on which to decide the merits and grant appropriate relief was not discussed by the majority. Mr. Justice Douglas, in a

that an important new role of the federal courts would be as overseers of all congressional districting statutes.[11]

In *Wesberry v. Sanders*,[12] two voters sought a judgment declaring Georgia's districting statute invalid. The District Court, while paying lip service to *Baker*, dismissed the case for "want of equity," which was simply a post-*Baker* term for non-justiciability of a political question.[13] The Supreme Court reversed, finding justiciability through *Baker v. Carr*, and holding that Georgia's unequal apportionment of congressional districts grossly discriminated against voters of certain districts in violation of Art. I, Sec. 2 of the United States Constitution.[14] For the first time the Supreme Court, with extensive historical examination of the Constitutional Convention of 1787, held that the constitutional mandate of Article I, Section 2 — that United States Representatives be chosen "by the people of the several states" — meant that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[15] The Court concluded "[w]hile it may not be

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concurring opinion, stated only that, "any relief accorded can be fashioned in the light of well-known principles of equity." 369 U.S. at 250. Mr. Justice Clark, in his concurring opinion, complained that the Court had failed ". . . to give the District Court any guidance whatever." 369 U.S. at 252. Mr. Justice Frankfurter, joined in dissent by Mr. Justice Harlan, laments that "[e]ven assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments." 369 U.S. at 268. This issue of standards, which is central to the *Preisler* decision, received much comment after *Baker*. *See generally* Dean, *One Man–One Vote — Problems of Judicial Enforcement of Standards of Political Conduct*, 36 OKLA. B.A.J. 1436 (1965); Hanson, *Courts in the Thicket: The Problem of Judicial Standard in Apportionment Cases*, 12 AM. U.L. REV. 51 (1963); Israel, *On Charting A Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107 (1962). *See also* 16 S.C.L. REV. 634 (1964); 13 U.C.L.A. L. REV. 1345 (1966); 114 U. PA. L. REV. 504 (1966); 72 YALE L.J. 968 (1963).

11. Litigation challenging the constitutionality of state legislative apportionment schemes had been instituted in at least 34 states prior to the end of 1962 — within nine months of the Court's decision in Baker v. Carr. *See* McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 706–10 (1963), which contains an appendix summarizing reapportionment litigation through the end of 1962. *See also* Goldberg, *The Statistics of Malapportionment*, 72 YALE L.J. 90 (1962).

12. 376 U.S. 1 (1964).

13. Wesberry v. Vandiver, 206 F. Supp. 276 (N.D. Ga. 1962). While the district court said their dismissal was based on "want of equity," they cited, as their basis, Justice Frankfurter's "political question" opinion in *Colegrove*. The *Wesberry* court found that the following factors, present in *Colegrove*, required dismissal for "want of equity":

> [A] political question involving a coordinate branch of the federal government; a political question posing a delicate problem difficult of solution without depriving others of the right to vote by district, unless we are to redistrict the state; relief may be forthcoming from a properly apportioned state legislature; and relief may be afforded by the Congress.

Id. at 285.

14. In doing so the Court said, "[w]e do not reach the arguments that the Georgia statute violates the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment." Wesberry v. Sanders, 376 U.S. 1, 8 n.10 (1964).

15. 376 U.S. at 7–8. This interpretation of the mandate of article I, section 2, was not agreed to by Justices Harlan, Stewart and Clark. Mr. Justice Harlan, in his dissenting opinion, criticizes the "artificial construction" of article I:

> [s]tripped of rhetoric and a "historical context" . . . which bears little resemblance to the evidence found in the pages of history, . . . the Court's opinion supports its holding only with the bland assertion that "the principles of a House

possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives."[16]

The impact of *Wesberry* was widespread. Since the decision in 1964, thirty-seven states have undergone congressional redistricting. Of the remaining thirteen, five have a single representative each, and two elect representatives at large.[17]

In the state legislative apportionment case of *Reynolds v. Sims,*[18] the Supreme Court declared Alabama's state legislative districting statute invalid and in violation of the Equal Protection Clause due to population inequality without rational justification therefor. While *Reynolds,* being concerned with state legislative districting,[19] is factually distinguishable from *Wesberry* and the instant case, its importance in both areas of state and congressional districting is in its discussion of justifications for population variance. While the Court concedes that rational state policy may provide justification for some deviation from equality of state legislative districts, it dismisses many more considerations than it accepts.[20] *Reynolds'* effect was to confine the limits of the "as nearly as is practicable" standard of *Wesberry,* putting state legislatures on notice that thereafter many traditional districting considerations, such as history, geography, and group interests were no longer sufficient to justify unequal districts as being "as nearly [equal] as is practicable."[21]

> of Representatives elected, by the People" would be "cast aside" if "a vote is worth more in one district than in another" . . . The fact is, however, that Georgia's 10 Representatives *are* elected "by the People" of Georgia, just as Representatives from other states are elected "by the People of the several States." This is all that the Constitution requires.

Id. at 24. Justices Stewart and Clark, expressly agreed with Mr. Justice Harlan on this issue. *See also* Carpenter, *Wesberry v. Sanders: A Case of Oversimplification,* 9 VILL. L. REV. 415 (1964); Weiss, *An Analysis of Wesberry v. Sanders,* 38 So. CAL. L. REV. 67 (1965); 32 GEO. WASH. L. REV. 1076 (1965).

16. Wesberry v. Sanders, 376 U.S. 1, 18 (1964).

17. McKay, *Reapportionment: Success Story of the Warren Court,* 67 MICH. L. REV. 223, 229 (1968).

18. 377 U.S. 533, *rehearing denied* 379 U.S. 870 (1964). *See* King, *The Reynold's Standard And Local Reapportionment,* 15 BUFFALO L. REV. 120 (1965); 3 AM. BUS. L.J. 91 (1965); 31 BROOKLYN L. REV. 149 (1964); 43 TEXAS L. REV. 236 (1964); 39 TUL. L. REV. 349 (1965).

19. The Court distinguished between state and congressional apportionment when it observed that "[s]omewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting." 377 U.S. at 578. With this distinction it seems clear that whatever is impermissible in state legislative districting, would have to be impermissble in the less flexible congressional districting. In Justice White's dissenting opinion in *Preisler,* however, he criticizes the Court for making no attempt to distinguish state apportionment from congressional districting questions.

20. The Court stated:

> [b]ut neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities . . . . Considerations of area alone provide an insufficient justification . . . . Arguments . . . to insure effective representation for sparsely settled areas and to prevent . . . access of citizens to their representatives [from being] impaired are . . . unconvincing.

Reynolds v. Sims, 377 U.S. at 579–80.

21. Justice Harlan, in his dissenting opinion, compiled the following list of considerations which he contended the Court had ruled constitutionally impermissible

The only apparent consideration in *Reynolds* which would justify deviation was the maintenance of political subdivisions for the express purpose of deterring political gerrymandering.[22]

Still, the question remained, in state legislatures and federal courts, as to what constituted the standard of "as nearly as is practicable?" In *Preisler,* the Court addresses itself to elucidating the "as nearly as practicable" standard.[23]

Mr. Justice Brennan writing for the majority in *Preisler* begins by rejecting Missouri's initial argument in support of its congressional districting statute. Missouri first argued that the population variances were so slight as to be *de minimis*[24] and therefore satisfy without question the "as nearly as is practicable" requirement. The Court rejected a *de minimis* approach because of difficulty in non-arbitrarily determining a cutoff point below which variations are *de minimis,*[25] and because such a point would encourage legislatures to strive for a range, rather than for absolute equality.

The Court pronounced that the

> "as nearly as practicable" standard requires that the State make a good faith effort to achieve precise mathematical equality. . . . Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.[26]

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in one or another of its decisions: history; economic or other sorts of groups interests; area; geographical considerations; a desire to insure effective representation for sparsely settled areas; availability of access of citizens to their representatives; theories of bicameralism (except those approved by the Court); occupation; an attempt to balance urban and rural power; the preference of a majority of voters in the State. Reynolds v. Sims, 377 U.S. at 622–23.

22. This is the analysis of Dean Robert McKay, counsel for the appellant in *Wells*: "[a]pparently, the only acceptable justification for population variances is the use of political subdivision lines . . . [to] . . . prevent an otherwise destructive gerrymander. . . ." McKay, *supra* note 17, at 233.

23. 394 U.S. at 528.

24. The phrase *de minimis* is found in BLACK'S LAW DICTIONARY 482 (4th ed. 1951), as part of the phrase *de minimis non curat lex* which is defined as "[t]he law does not care for, or take notice of, very small or trifling matters." The phrase was first used in a reapportionment case by Mr. Justice Harlan in his dissent in Baker v. Carr, 396 U.S. 186, 335 (1962), where he uses the term to imply an "insignificant discrepancy" in the original plan of 1901 where each county was only under-represented — or over-represented by one representative at most. In a lower federal court decision, Calkins v. Hare, 228 F. Supp. 824, 829 (E.D. Mich. 1964), the phrase was used to illustrate *Wesberry's* "mathematical precision caveat." *See* p. 225 *supra.* That court noted that the *de minimis* phrase could not be used as an escape hatch for the reluctant. In Swann v. Adams, 385 U.S. 440, 444 (1967), Mr. Justice White similarly uses the phrase to describe mathematically unavoidable deviations in his statement that "mathematical exactness or precision is not required . . . de minimis deviations are unavoidable."

25. The Court emphasized that practicable equality may differ from state to state, and district to district, thus militating against an absolute cutoff point. Also in Reynolds v. Sims, 377 U.S. 533, 578 (1964), and Swann v. Adams, 385 U.S. 440, 445 (1967), the Court stated "[w]hat is marginally permissible in one State may be unsatisfactory in another depending on the particular circumstances of the case."

26. 394 U.S. at 530–31. In Swann v. Adams, 385 U.S. 440, 447 (1967), Mr. Justice Harlan, dissenting, criticized the rule placing the burden of justification of variation on the state, as "standing on its head" the usual rule that state legislative

Having required justification for any variance unless a good faith effort toward absolute equality is shown, the Court must first determine whether there was such a good faith effort. In making this determination the Supreme Court reviewed the following findings of the district court:

(1) the Missouri General Assembly had relied on population data less accurate than the available census figures; and

(2) the General Assembly had rejected a proposed plan with smaller population variances; and

(3) the simple transfer of entire counties into a contiguous district would have markedly reduced the variances.[27]

The inevitable conclusion which was drawn was that Missouri had not made a good faith effort to achieve absolute equality. The Court further stated that it was simply inconceivable that such variances were unavoidable.

Missouri had also argued, in the alternative, that the population variances between districts had legally valid justifications. Emphasizing that practical politics does not determine practicable equality, the Court examined, and rejected, each of the following five justifications proposed by Missouri: (1) the representation of distinct interest groups;[28] (2) the political realities of legislative interplay;[29] (3) the integrity of county lines and maintenance of political subdivisions;[30] (4) considerations of population trends;[31] and (5) the high proportions of non-voters in certain districts.[32]

In essence the Court rejected the first three of these considerations as simply invalid justifications for population variances. In so doing

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enactments come to the Supreme Court with a strong presumption of regularity and constitutionality. *But see* Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969).

27. 394 U.S. at 529.

28. The Court relied on *Reynolds* in rejecting this consideration. 394 U.S. at 533. *See* note 20 *supra*.

29. The Court reasoned that "[p]roblems created by partisan politics cannot justify an apportionment which does not otherwise pass the constitutional muster." *Id.*

30. While *Reynolds* accepted the justification of some variance due to the drawing of district lines along political boundaries in order to deter gerrymandering, the Court now rejects this justification as a variant of the previously disposed of argument that practical politics justify some deviation. *Id.*

31. The Court said that "[w]here these shifts [population trends] can be predicted with a high degree of accuracy, States that are redistricting may properly consider them." *Id.* at 535. However, the Court found that Missouri did not, in fact, consider this factor prior to apportionment. The Court relied on the district court which found "no evidence . . . that the . . . General Assembly adopted any policy of population projection in devising Districts 4 and 6, or any other district, in enacting the 1967 Act." 279 F. Supp. 952, 983 (W.D. Mo. 1967).

32. Missouri contended that overpopulation in the Eighth District was due to a large number of non-voters in a university and military base therein. As in the consideration of population trends, the Court found that Missouri had not actually considered this factor before enacting the apportionment statute. The Court assumed, arguendo, that valid apportionment might be based on voter population, rather than total population, but found that:

> [T]he Missouri plan is still unacceptable. Missouri made no attempt to ascertain the number of eligible voters in each district and to apportion accordingly. . . . [O]verpopulation in the Eighth District was explained away by the presence in that district of a military base and a university; no attempt was made to account for the presence of universities in other districts . . .

394 U.S. at 534–35.

the Court was emphasizing its insistence on the priority of equal popular representation over political considerations. The Court's handling of the final two considerations indicates that it has not rejected every possible justification as suggested by Mr. Justice Fortas in his concurring opinion,[33] but that the Court intends ". . . to open no avenue to subterfuge"[34] in allowing some justifications.

It is submitted that the crux of this case lies in that determination of the Court to close the loopholes in its requirement of equal representation. The Court's ruling in *Preisler* is dictated not so much from concern over mathematical variation, as it is from concern over Missouri's conspicuous bad faith in its reapportionment effort. Missouri came to the Court with inaccurate data, avoidable variances, simple solutions, and feigned justifications. Under these circumstances the Court's rejection of its districting plan was inevitable.

Similarly in *Wells,* a cursory review by the Supreme Court established that the constitutionally required good faith effort to achieve absolute equality among all of its 41 districts was simply not made. While other considerations are mentioned in the decision,[35] it is absolutely clear, as the Supreme Court found, that the basis of the plan was to divide the state into seven homogeneous regions, creating equal congressional districts within each region. However, there was no equality between congressional districts of different regions.[36] This was evident in the language of the district court where it sustained New York's statute "on a basis of population equality *within reasonably comparable districts.*"[37] This ruling cannot be upheld by the Court after its pronouncements in *Reynolds* and *Preisler* that population equality may not be subordinated to the consideration of preserving distinct interest groups.[38]

Again the real basis for this decision is not found in a violation of mathematical precision, or in the excess of a few percentage points, but rather in the fact that New York did not attempt to accomplish that which the Court said it must. The very essence of New York's plan was not in the achievement of state-wide district population equality, but in the maintenance of regions with distinct interest groups. Where Missouri did not put forth a good faith effort in its plan, New York used an im-

33. 394 U.S. at 537.

34. *Id.* at 535.

35. No testimony as to justification for variances was taken by the District Court but reference was made to the Joint Legislative Committee's Report which recites that considerations other than population totals were "geographical conformation of the area . . . , the maintenance of county integrity, the facility by which the various Boards of Elections can 'tool up' for the forthcoming [1968] primary election, equality of population within the region, and equality of population throughout the state." 394 U.S. at 545.

36. *See* note 6 *supra.*

37. 281 F. Supp. 821, 826 (S.D.N.Y. 1968) (emphasis added).

38. 394 U.S. 546. In reversing the judgment of the New York district court, the Supreme Court recognized that considerations of time may have validated the use of the plan in the 1968 elections, but that a plan meeting constitutional requirements had to be enacted for the 1970 election. *Id.* at 547.

permissible plan. In both cases it is this misdirection of purpose which the Court has tried to correct, not the simple failure to divide evenly.

Nevertheless, the criticism that the Court is drawing too strict a requirement by insisting on mathematical perfection and rejecting rational explanations for variation is strongly voiced in the concurring and dissenting opinions of the Court. The main objections of these Justices are twofold. It is felt that the Court's stringent standard takes the properly legislative function of districting out of the state legislatures and into the courts, and that the effect of these decisions, rather than perfecting representation, encourages gerrymandering.

In objecting to the rigorous standard of equality, Mr. Justice White views the Court's decision as an "unduly rigid and unwarranted application of the Equal Protection Clause,"[39] even though the Court made absolutely clear that its decision was based on the constitutional requirement of Article I, Section 2.[40] Mr. Justice Harlan, joined in dissent by Mr. Justice Stewart, more accurately voices his criticism by restating his objection in *Wesberry* — that the command of Article I, Section 2, is non-existent.[41] Thus, he logically contends that the Court is compounding its error here by insistence on mathematical perfection in following that "command." In a similar complaint, Mr. Justice Fortas, in a concurring opinion, erroneously complains that the majority's standard requires not only a good faith effort to achieve precise mathematical equality, but also justification of any remaining disparities.[42] He then finds that the Court has rejected possibly every type of justification that could be advanced.[43]

In envisioning the result of such a stringent standard, both Mr. Justice White and Mr. Justice Fortas foresee the courts laboriously drawing district lines through apartment houses, and private dwellings.[44] As a solution, Mr. Justice White advocates a *de minimis* approach wherein a variation of 10 to 15% between the largest and smallest district would be constitutionally permissible. Mr. Justice Fortas, however, would not set a fixed standard for permissible variation, agreeing with the majority that such an approach demeans the constitutional objective by suggesting that equality need never be the aim.

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39. 394 U.S. at 553.

40. This confusion may also explain Mr. Justice White's criticism that the Court failed to distinguish congressional from state legislative districting.

41. 394 U.S. at 549. *See* note 14 *supra.*

42. *Id.* at 537. This is an inaccurate reading of the majority's opinion which required justification "[*u*]*nless* population variances among congressional districts are shown to have resulted despite . . . [a good faith] . . . effort. . . ." 394 U.S. at 531 (emphasis added). *See* p. 224 *supra.*

43. 394 U.S. at 537. While the Court rejects the justifications on these facts, it does state, in dicta, that the considerations of population trends, and perhaps non-voter population are still viable justifications for some variance. *See* notes 31 and 32 *supra.*

44. *Id.* at 538, 556. Mr. Justice Fortas, however, qualifies this statement by commenting that "[t]he majority opinion does not suggest so extreme a practical application of its teaching, and I mention it only because the example may dramatize the fallacy of inflexible insistence upon mathematical exactness, with no tolerance for reality." *Id.* at 538.

Mr. Justice White and Mr. Justice Harlan, in separate dissenting opinions, further contend that the effect of the majority's decision, while requiring unnecessarily stringent adherence to mathematics, actually facilitates the task of gerrymandering. In support of this proposition, both Justices invoke language from *Reynolds* that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."[45] However, neither include *Reynolds'* subsequent statement that

> . . . if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration . . . then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.[46]

Mr. Justice Harlan in the instant decision, states furthermore that ". . . the Court's exclusive concentration upon arithmetic blinds it to the realities of the political process . . . [and] . . . is perfectly compatible with 'gerrymandering' of the worst sort."[47] He concludes that "[t]he legislature must do more than satisfy one man–one vote; it must create a structure which will in fact as well as theory be responsive to the sentiments of the community."[48] Thus, Justices White, Harlan, and Stewart dissent, while Mr. Justice Fortas, though criticizing the standard enunciated by the majority, concurs in the result.[49]

As previously suggested, it is submitted that the Justices' common criticism — that the Court has laid down a requirement of mathematical perfection — is unfounded. The majority made its decision not because of a violation of mathematics, but because of the states' obvious ability to approach nearer to equality, and their lack of good faith effort in that regard.

The criticism which the dissent levels at the majority that its "concentration upon arithmetic blinds it to the realities of the political process"[50] seems most fitting to be turned around against its authors. The majority has looked past the arithmetic and into the political realities of Missouri and New York, and has found considerations therein which violate a constitutional requirement. The dissenting Justices refuse to search beyond the arithmetic and urge non-interference with the state's legislative districting without examining either the states' motivations or possible alternatives.

The criticism of judicial district-making is also unwarranted. The majority makes clear that it is not establishing any fixed standard. Rather

45. Reynolds v. Sims, 377 U.S. 533, 578–79 (1964).
46. *Id.* at 581.
47. 394 U.S. at 551.
48. *Id.* at 551.
49. Mr. Justice Fortas agrees with the district court's rejection of Missouri's statute on the basis of Missouri's reapportionment history, and failure in their latest effort to use accurate data. *Id.* at 540–41. He concurred in *Wells,* stating that New York ". . . may not substantially or grossly disregard population or residence figures in order to recognize regional groupings within the state." 394 U.S. 542, 549 (1969). *See* Mr. Justice Fortas' dissent in Avery v. Midland County, 390 U.S. 474, 495 (1968).
50. 394 U.S. at 551.

than requiring judicial intrusion into the legislative business of districting to resolve minor squabbles of a few percentage points,[51] *Priesler* only requires the courts' intervention where, as in Missouri and New York, equal representation was clearly subordinated to other unacceptable considerations.

The second common basis for complaint is that *Preisler's* allegedly stringent standard does nothing to combat the gerrymander, and may even encourage it by eliminating the "political subdivision consideration." The latter point is questionable in that there has been no previous requirement on legislatures to strictly conform to political subdivisions, and gerrymandering in disregard of those subdivisions was always possible. The gerrymanderer at least faces some obstacle when equal numbers of people must be placed in each district.[52] It is true, however, that the Court's newly elucidated requirement of population equality is no guarantee against gerrymandering or unfair representation. This point would probably not be challenged by any of the Justices, but it lends no support to the dissent.

Though the Court has not dealt with the question to any great extent, it is indisputable that gerrymandering is an important problem effecting equal representation.[53] In *Wells,* the second basis of constitutional attack was that the statute represented "a systematic and intentional partisan gerrymander violating Article I, Section 2, of the Constitution and the Fourteenth Amendment."[54] The issue was here again not reached because of the disposition of *Wells* on the basis of population inequality.[55]

But the importance and difficulty of judicial resolution of the gerrymandering problem should have no effect on the Court's present task of

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51. *Id.* at 556. This is part of Justice White's dissent.

52. The majority has adequately answered this criticism:

> It is dubious in any event that the temptation to gerrymander would be much inhibited, since the legislature would still be free to choose which of several subdivisions, all with their own political complexion, to include in a particular congressional district. Besides, opportunities for gerrymandering are greatest when there is freedom to construct unequally populated districts. "[T]he artistry of the political cartographer is put to its highest test when he must work with constituencies of equal population. At such times, his skills can be compared to those of a surgeon, for both work under fixed and arduous rules. However, if the mapmaker is free to allocate varying populations to different districts, then the butcher's cleaver replaces the scalpel; and the results reflect sharply the difference in the method of operation." Hacker, Congressional Districting (1964 rev. ed.).

Id. at 534 n.4.

53. Only in Gomillion v. Lightfoot, 364 U.S. 339 (1960), did the Court reach the merits of a gerrymandering case, holding that the altering of Alabama municipal lines to exclude Negro voters violated the fifteenth amendment. *See* 6 VILL. L. REV. 411 (1961).

The issue of racial gerrymandering was before the Supreme Court in three other cases, but no decision on the merits was forthcoming from any of these cases. Connor v. Johnson, 386 U.S. 483 (1967); Wright v. Rockefeller, 376 U.S. 52 (1964); and Honeywood v. Rockefeller, 376 U.S. 222 (1964). *See generally* Comment, *Political Gerrymandering: The Law And Politics Of Partisan Districting,* 36 GEO. WASH. L. REV. 144 (1967); Comment, *Wright v. Rockefeller and Legislative Gerrymanders: The Desegregation Decisions Plus a Problem of Proof,* 72 YALE L.J. 1041 (1963).

54. 394 U.S. at 544.

55. Dean McKay, counsel for the appellant in *Wells,* inaccurately prognosticated in 1968 that the, "[d]ecision of these cases [*Preisler* and *Wells*] should provide guidance on the remaining question . . . of gerrymandering." 67 MICH. L. REV. 235 (1968).

assuring equal representation. Mr. Justice Harlan's insistence that "[t]he legislature must do more than satisfy one man–one vote . . ."[56] should not mean that the pursuit of this standard should be curtailed. Because the attainment of equal district population does not itself create perfect representation, that is no reason to abandon or compromise the effort to attain this constitutionally required goal.

Since *Baker* the Court has indicated its determination to achieve the one man–one vote goal. But also since *Baker* the criticism has arisen that the Court's standards were not definite enough to be followed by courts or legislatures.[57] The Court's elucidation of the requisite standard in *Preisler* reflects its realization that the factor most essential to the attainment of equal representation is genuine effort to that end by the state legislatures. Thus, the Court requires not mathematical perfection, but an *honest, good faith effort* to achieve absolute equality. A state plan which falls short of absolute equality may still meet this standard, but those which sacrifice that goal in deference to other objectives shall not. Clearly Missouri and New York made such an impermissible sacrifice. When the sacrificial act is as clear in other states, with resultant population variances, judicial correction can be expected in order to achieve, in *Wesberry's* terms, "the Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives."[58]

Michael R. Stiles

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — APPLICATION OF FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

Benton v. Maryland (U.S. 1969)

Petitioner, indicted on charges of burglary and larceny, was convicted of burglary, but found not guilty of larceny, and sentenced to ten years in prison. After his notice of appeal was filed, the Maryland court of appeals declared invalid a provision of the Maryland Constitution[1] which required grand and petit jurors to declare their belief in the existence of God.[2] As a result of this decision, the court of appeals

56. 394 U.S. at 551.
57. *See* note 10 *supra*. *See also* Irwin, *Representation and Election: The Reapportionment Cases In Retrospect*, 67 MICH. L. REV. 729 (1969).
58. Wesberry v. Sanders, 376 U.S. 1, 18 (1964).

1. MD. CONST. art. 36 (1867).
2. Schowgurow v. State, 240 Md. 121, 213 A.2d 475 (1965).

remanded petitioner's case to the trial court, where he chose not to accept the conviction and requested a new trial. He was reindicted and retried on charges of burglary and larceny. The trial judge denied petitioner's motion to dismiss the larceny charge, despite his objection that this was violative of the federal constitutional prohibition against subjecting persons to double jeopardy for the same offense.[3] Convicted of both charges, he was given concurrent sentences of fifteen years on the burglary charge[4] and five years on the larceny charge. On appeal, the Maryland court of special appeals rejected petitioner's double jeopardy claim on the merits[5] and the Maryland court of appeals denied discretionary review. On certiorari, the United States Supreme Court, in a six to two decision, reversed petitioner's conviction for larceny, *holding* that the double jeopardy clause of the fifth amendment is applicable to the states. *Benton v. Maryland,* 395 U.S. 784 (1969).

The United States Constitution provides that

> . . . [no] person [shall] be subject for the same offense to be twice put in jeopardy of life or limb. . . .[6]

The double jeopardy standard applied by the Court in federal prosecutions was first announced in 1896 in *United States v. Ball,*[7] where the Government alleged its own error in seeking to obtain a new trial. The Court refused to allow the Government to deprive the defendant of the benefit of acquittal by the jury, and ruled that an acquittal is final, ends the defendant's jeopardy, and bars subsequent prosecution for the same offense.[8]

The Court more specifically defined federal standards of double jeopardy to be applied by the federal courts in the case of *Green v. United States.*[9] The petitioner in *Green* had been convicted of second degree murder at his first trial, and on appeal, that conviction was reversed. On retrial, he was convicted of first degree murder. Relying heavily on *Ball,* the Court held that this second trial for first degree

3. Maryland is one of five states whose constitution does not prohibit placing an accused in jeopardy more than once for the same offense; the other states are Connecticut, Massachusetts, North Carolina, and Vermont. 17 AM. U.L. REV. 500 n.7 (1968). *See* LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, INDEX DIGEST TO STATE CONSTITUTIONS 576 (2d ed. 1959). However, the above states recognize the prohibition against double jeopardy as part of their common law in at least some instances. State v. Benham, 7 Conn. 414 (1829); Gilpin v. State, 142 Md. 464, 121 A. 354 (1923); Commonwealth v. McCan, 277 Mass. 199, 178 N.E. 633 (1931); State v. Clemmons, 207 N.C. 276, 176 S.E. 760 (1934); State v. O'Brien, 106 Vt. 97, 170 A. 98 (1934), *cited in* Brock v. North Carolina, 344 U.S. 424, 435 n.6 (1953) (Vinson, C.J., dissenting).

4. The State of Maryland is presently appealing to the United States Court of Appeals for the Fourth Circuit a federal district court order to resentence petitioner. This order was granted after a habeas corpus proceeding. Benton v. Copinger, 291 F. Supp. 141 (D. Md. 1968).

5. 1 Md. App. 647, 232 A.2d 541 (1967).

6. U.S. CONST. amend. V.

7. 163 U.S. 662 (1896).

8. *Id.* at 671.

9. 355 U.S. 184 (1957).

murder placed Green in jeopardy twice for the same offense, in violation of the Constitution.[10] Based on the rationale that the federal government with all its resources and power should not be allowed to make repeated attempts to convict an individual, the Court found that an acquittal is final, ending the defendant's jeopardy. Once the jury is discharged, a defendant may not be tried again, and the Government has no right to appeal for a new trial. A defendant can be tried a second time for the same offense only when his prior conviction for that offense has been set aside on appeal.[11]

Although the federal courts were always subject to these strict standards, the double jeopardy clause had never been made applicable to the states. The primary reason was that the Court had traditionally followed the doctrine of selective incorporation, enunciated in an earlier double jeopardy case, *Palko v. Connecticut*,[12] in deciding which constitutional guarantees were applicable to the states via the fourteenth amendment due process clause. According to this rule, only those specific guarantees which had "been found implicit in the concept of ordered liberty"[13] were included.

The recent trend of the Court has been to reject *Palko's* restrictiveness by incorporating all of the protections of the Bill of Rights directed at criminal proceedings. This trend started in 1961, when the Court applied the fourth amendment protection from unreasonable searches and seizures to the states through the due process clause of the fourteenth amendment.[14] The Court later applied the following protections of the Bill of Rights to the states: protection from cruel and unusual punishment;[15] right to counsel at trial;[16] right to counsel during interrogation;[17] freedom from compelled self-incrimination;[18] freedom from comment on defendant's failure to testify;[19] right to confront witnesses;[20] and the right to jury trial on a serious criminal offense.[21]

10. The Court rejected the Government's argument that Green's appeal of his second degree murder conviction waived his constitutional defense of former jeopardy. The Court referred to the standard required by Johnson v. Zerbst, 304 U.S. 458 (1938), that in order for a waiver of a constitutional right to be valid, such waiver must be a voluntary, knowing relinquishment of that right. Green v. United States, 355 U.S. 184. 191-92 (1957).

11. Green v. United States, 355 U.S. 184, 187-88 (1957).

12. 302 U.S. 319 (1937).

13. *Id.* at 325.

14. Mapp v. Ohio ,367 U.S. 643 (1961).

15. Robinson v. California, 370 U.S. 660 (1962).

16. Gideon v. Wainwright, 372 U.S. 355 (1963).

17. Escobedo v. Illinois, 378 U.S. 478 (1964).

18. Malloy v. Hogan, 378 U.S. 1 (1964).

19. Griffin v. California, 380 U.S. 609 (1965).

20. Pointer v. Texas, 380 U.S. 400 (1965).

21. Duncan v. Louisiana, 391 U.S. 145 (1968).

Although there have been several attempts[22] and some pressure to incorporate the double jeopardy provision of the fifth amendment,[23] it appears that the double jeopardy clause was the last significant protection of the Bill of Rights that had not yet been applied to the states through

22. The first attempt to apply the double jeopardy clause to the states was made in Dreyer v. Illinois, 187 U.S. 71, 85 (1902). The Court found it unnecessary to reach that question in disposing of the case. Petitioner in Palko v. Connecticut, 302 U.S. 319 (1937), urged the same application, but the Court held that the double jeopardy clause specifically did not apply to the states. Since *Palko,* the Court has had the issue of double jeopardy in a state proceeding before it seven times in the following cases: Cichos v. Indiana, 385 U.S. 76 (1966), *rehearing denied,* 385 U.S. 1020 (1967); Bartkus v. Illinois, 359 U.S. 121 (1959); Williams v. Oklahoma, 358 U.S. 576 (1959); Ciucci v. Illinois, 356 U.S. 571 (1958); Hoag v. New Jersey, 356 U.S. 464 (1958); Brock v. North Carolina, 344 U.S. 424 (1953); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

In *Cichos,* the Court was faced with a problem similar to the one in *Green.* Petitioner was tried on two counts (reckless homicide and involuntary manslaughter) and found guilty of reckless homicide. On appeal, the Indiana supreme court granted him a new trial where he was retried on the same two counts. The jury returned the same verdict as at the first trial, and petitioner received the same sentence. The Supreme Court upheld the Indiana court's affirmance of petitioner's conviction at the second trial notwithstanding the fact that the verdict at the first trial was silent as to the involuntary manslaughter charge. The Court refused to hold that the jury's silence on the involuntary manslaughter charge amounted to acquittal. Instead, the Court accepted the Indiana court's interpretation of state law, that a verdict of guilty of the reckless homicide charge at the first trial does not exclude a subsequent verdict of guilty of the overlapping offense of involuntary manslaughter.

The Court justified its refusal to reach the double jeopardy issue presented on the grounds that the Indiana statute and case law allowed treatment of the charges as one offense, allowing the jury the discretion to set the range of petitioner's sentence. Cichos v. Indiana, 385 U.S. 76 (1966). However, Mr. Justice Fortas, dissenting, was of the opinion that the case presented substantially the same question as did *Green.* The only significant difference to him was that in *Green,* the petitioner was convicted of the lesser offense at his first trial, and of the greater offense at his second trial; and that under *Green,* the state should not have been allowed to retry Cichos on the more serious charge of involuntary manslaughter since the jury had failed to return a finding of guilty on that count at the first trial. Cichos v. Indiana, 385 U.S. 76, 80–81 (1966) (Fortas, J., dissenting). For a study of the Court's denial of certiorari in thirty-five cases which have raised substantial issues of double jeopardy, *see* Hanus, *Denial of Certiorari and Supreme Court Policy-Making,* 17 AM. U.L. REV. 41, 48–52 (1967).

23. In United States v. Wilkins, 348 F.2d 844, 850 (2d Cir. 1965), *cert. denied,* 383 U.S. 913 (1966), the Second Circuit held:

> To hold as we do, that the Due Process Clause of the Fourteenth Amendment imposes some restrictions on a state's power to reprosecute, thereby spanning the gap between the Fifth Amendment's double jeopardy prohibition and a similar prohibition derived from state laws, is to preserve this societal understanding and to read the Fourteenth Amendment as entrusting the federal courts with a responsibility and power to decide which reprosecutions by a state violate our basic notions of justice.

Several commentators have also endorsed the idea of incorporating the double jeopardy provision. *See* Hanus, *Denial of Certiorari and Supreme Court Policy-Making,* 17 AM. U.L. REV. 41 (1967); Note, *Double Jeopardy and Collateral Estoppel,* 4 CRIM. L. BULL. 406 (1968); Comment, *Double Jeopardy: Its History, Rationale and Future,* 70 DICK. L. REV. 377 (1966); Note, *Double Jeopardy: A Vanishing Constitutional Right,* 14 HOW. L.J. 360 (1968); Comment, *Double Jeopardy and Due Process,* 59 J. CRIM. L.C. & P.S. 247 (1968); Note, *Constitutional Law — Double Jeopardy,* 13 N.Y.L.F. 133 (1967); Comment, *Double Jeopardy and the Doctrine of Manifest Necessity,* 20 N.Y.U. INTRA. L. REV. 189 (1965); Comment, *Double Jeopardy v. Double Punishment — Confusion in California,* 2 SAN DIEGO L. REV. 86 (1965); Comment, *Multiple Prosecution: Federalism v. Individual Rights,* 20 U. FLA. L. REV. 355 (1968). *But see* Note, *An Epilogue to Cichos: Double Jeopardy Examined,* 17 AM. U.L. REV. 500 (1968).

For an analysis of the development of the policies behind the double jeopardy protection, *see generally* J. SIGLER, DOUBLE JEOPARDY (1969).

the fourteenth amendment.[24] This omission has been corrected by the Court's decision in the instant case. In fact, there is now a total incorporation of the significant protections of the first eight amendments,[25] although in theory, the selective incorporation doctrine of *Palko* is still viable.[26]

In order to reach the double jeopardy issue, the Court had to overcome two procedural problems arising out of the petitioner's conviction on two separate counts of burglary and larceny. First, the Court found that there was a justiciable case or controversy. Even though the petitioner would not receive a reduction in his sentence if his appeal was successful, the Court recognized that there were adverse legal consequences involved in a criminal conviction.[27] Secondly, the Court held that the concurrent sentence doctrine[28] was a rule of judicial conveni-

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24. *See* Hanus, *supra* note 23, at 44.

25. *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968), where the Court summarized:

> [M]any of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State [*citing* Chicago, B.&Q.R. Co. v. Chicago, 166 U.S. 226 (1897)]; the rights of speech, press and religion covered by the First Amendent [*citing See, e.g.,* Fiske v. Kansas, 274 U.S. 380 (1927)]; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized [*citing See* Mapp v. Ohio, 367 U.S. 643 (1961)]; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination [*citing* Malloy v. Hogan, 378 U.S. 1 (1964)]; and the Sixth Amendment rights to counsel [*citing* Gideon v. Wainwright, 372 U.S. 335 (1963)], to a speedy [*citing* Klopfer v. North Carolina, 386 U.S. 213 (1967)], and public [*citing In re* Oliver, 333 U.S. 257 (1948)] trial, to confrontation of opposing witnesses [*citing* Pointer v. Texas, 380 U.S. 400 (1965)] and to compulsory process for obtaining witnesses [*citing* Washington v. Texas, 388 U.S. 14 (1967)].

Some protections of the Bill of Rights have not yet been incorporated through the fourteenth amendment — the fifth amendment protection against being held without a presentment or indictment by a grand jury, the seventh amendment right to jury trial in non-criminal proceedings where the amount in controversy exceeds $20.00, and the eighth amendment protection against excessive bail and fines.

26. 395 U.S. at 794.

27. This finding was based on the rationale noted in Sibron v. New York, 392 U.S. 40, 55 (1968), that "most criminal convictions do in fact entail adverse collateral legal consequences." The Court illustrated two of the potential adverse consequences of petitioner's criminal conviction by citing examples of the possible use of a recidivist statute by a state to enhance punishment for a later offense, or the possible impeachment of his character if his testimony were sought in a future trial. 395 U.S. at 790–91.

28. 395 U.S. at 791. The origins of the concurrent sentence doctrine were traced by the Court to Locke v. United States, 11 U.S. (7 Cranch) 339 (1813), where it was held that the existence of one sufficient count out of eleven rendered consideration of challenges to all eleven counts unnecessary. *Id.* at 344. The Court next quoted Claasen v. United States, 142 U.S. 140 (1891), where it was held that challenges to other counts need not be considered if there had been a valid conviction on any one count. *Id.* at 146. According to the Court, the case most frequently cited to bolster the invocation of the concurrent sentence doctrine in recent times is Hirabayashi v. United States, 320 U.S. 81 (1943), where the Court found it unnecessary to consider a challenge to one count in a conviction since the conviction on the second count was determined to be valid. *Id.* at 105.

The failure to apply consistently the concurrent sentence doctrine is noted in United States v. Hines, 256 F.2d 561, 563 (2d Cir. 1958). In that case, instances of the selective use of the doctrine to deny review, or the avoidance of the doctrine to allow review are reported. The conclusion reached in *Hines* and approved in *Benton,* is that the concurrent sentence doctrine is not a hard and fast rule, but rather, a matter of judicial discretion. In St. Pierre v. United States, 319 U.S. 41, 43 (1943),

ence rather than a jurisdictional bar to consideration of challenges to multiple convictions.[29]

The Court seized upon the opportunity to abandon the rationale of *Palko,* as it had abandoned the similar rationale of *Betts v. Brady*[30] in *Gideon v. Wainwright*[31] and that of *Twining v. New Jersey*[32] in *Malloy v. Hogan.*[33] Finding the *Palko* rule of inclusion too restrictive, the Court chose to adopt the approach set forth in *Duncan v. Louisiana* — "[o]nce it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal governments."[34] Deciding that the double jeopardy clause was fundamental, the Court merely superimposed upon the states the rules governing the federal courts as enunciated in *Ball* and *Green.*[35] This definition of federal double jeopardy standards is not exhaustive of those protections which have been applied by federal courts.[36] While some states may go further than the Court goes in *Benton* in providing an accused with double jeopardy protection,[37] the minimum standard imposed on the states

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the Court noted three exceptions which would justify ignoring the concurrent sentence doctrine: 1) where the petitioner would be subject to further penalties under state or federal law after the judgment against him was satisfied, 2) where the effect of an injunction would operate *in futuro,* and 3) where the effect of a judgment might impair petitioner's credibility as a witness in any future legal proceedings.

The Supreme Court in *Benton* detailed several instances of its own use or avoidance of the concurrent sentence doctrine. The Court summarized its recent decisions on the question of mootness in criminal cases which have recognized the existence of a justiciable case or controversy notwithstanding the existence of a valid concurrent sentence. The latest leading case in this area is Sibron v. New York, 392 U.S. 40 (1968), in which the Court held that a criminal case did not become moot upon the expiration of the sentence imposed, noting that most criminal convictions do, in fact, entail adverse collateral legal consequences. The possibility of such consequences makes the challenge of such a conviction a justiciable case or controversy. *Id.* at 55. That same rationale was used in *Benton* to justify the finding of a justiciable case or controversy notwithstanding a valid concurrent sentence.

In rejecting the *Hirabayashi* rule in favor of the *Sibron* rule, the Court held that "the concurrent sentence rule may have some continuing validity as a rule of judicial convenience . . . there is no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed." Benton v. Maryland, 395 U.S. 784, 791 (1969). *But see* 5 WHARTON, CRIMINAL LAW AND PROCEDURE § 2220, at 440 (12th ed. 1957); Note, *Court Treatment of General Recidivist Statutes,* 48 COLUM. L. REV. 238 (1948); 6 U. FLA. L. REV. 560 (1953) *cited in* Brief for United States as Amicus Curiae at 11–12, Benton v. Maryland, 395 U.S. 784 (1969).

29. 395 U.S. at 791.

30. 316 U.S. 455 (1942).

31. 372 U.S. 335 (1963).

32. 211 U.S. 78 (1908).

33. 378 U.S. 1 (1964).

34. Benton v. Maryland, 395 U.S. 784, 795 (1969), *citing* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

35. Green v. United States, 355 U.S. 184, 188 (1957), *citing* United States v. Ball, 163 U.S. 662, 671 (1896).

36. The Supreme Court and lower federal courts have dealt with several double jeopardy situations not considered in *Ball, Green,* nor *Benton.* For an extensive treatment of federal action in these other areas, *see* Orfield, *Double Jeopardy in Federal Criminal Cases,* 3 CAL. WEST. L. REV. 76 (1967). *See also* Note, *Constitutional Law — Double Jeopardy,* 13 N.Y.L.F. 133, 139–44 (1967).

37. *See* Note, *An Epilogue to Cichos: Double Jeopardy Examined,* 17 AM. U.L. REV. 500, 537 (1968).

by *Benton* will provide defendants with "substantial fairness"[38] in regard to double jeopardy in all criminal prosecutions, state or federal.

Critics of the *Benton* decision have several legitimate objections to the Court's rule in this case. One serious criticism raised by the dissent is that the Court could have reversed petitioner's larceny conviction on the grounds that his retrial on that count was a denial of due process, for which reversal would be required under *Palko*.[39] This course of action would have required a new interpretation of the *Palko* standard of due process to be binding on the states under the fourteenth amendment. A finding that double jeopardy is not one of those legitimate state interests protected under *Palko* would not have offended those who resist incorporation and would have been a far less sweeping step than wholesale incorporation of the double jeopardy clause. The Court could have avoided the fifth amendment issue by utilizing the technique suggested by Mr. Justice Harlen in his concurring opinion in *Griswold v. Connecticut*,[40] and concentrated solely on fourteenth amendment due process to determine if the state court procedure did indeed violate "basic values 'implicit in the concept of ordered liberty.' "

This alternative method of reversing petitioner's larceny conviction would have had another, and quite possibly beneficial effect, in that states would have been encouraged to develop their own standards of double jeopardy, instead of merely conforming to the minimum federal standard. One commentator is of the opinion that

> [O]ne must wonder whether it would be wise to place states that have been trailblazers in the double jeopardy area under the federal thumb, when, in many ways, federal double jeopardy has been rather backward . . . Although states are certainly free to apply stricter standards in the criminal area after incorporation, this is seldom the case. It is always easier, and safer on review to merely follow the minimum requirements. Moreover, much of the federal double jeopardy law is still greatly unsettled in areas wherein the states have well-settled and well-understood principles. It is quite possible that incorporation in this area, to correct what might seem to be one gross injustice in a particular case would do more harm than good when viewed from the broad spectrum of double jeopardy in the fifty states, rather than from the narrow fulcrum of an isolated complaint.[41]

Another valid criticism is that the Court decided a constitutional question in disposing of the case, when it could have refused to do so by applying the concurrent sentence doctrine.[42] Thus, Justice Harlan's view that the Court has "actually been at pains to 'reach out' to decide

38. *Id.*
39. Benton v. Maryland, 395 U.S. 784, 809-13 (1969) (Harlan & Stewart, JJ., dissenting).
40. 381 U.S. 479, 500 (1965) (Harlan, J., concurring). *See also* Spencer v. Texas, 385 U.S. 554 (1967); Rochin v. California, 342 U.S. 165 (1952).
41. *See* note 37 *supra*.
42. *See* note 28 *supra*.

that very important constitutional issue" cannot be disputed.[43] Similarly, the Court's justification for "reaching out" to consider the double jeopardy issue is questionable — that since the state court reached the double jeopardy issue, the Supreme Court could reach that issue as well.[44] The Court's invocation of the collateral estoppel doctrine for the purpose of remanding petitioner's burglary conviction is also weak.[45]

Whether the Court will periodically revise the standards of double jeopardy applied to the states and to the lower federal courts to keep pace with changing requirements of substantial fairness remains to be seen. The Court has been willing to revise standards imposed in the area of wire tapping and electronic surveillance to protect the fourth amendment freedom from unreasonable searches and seizures as evidenced by the *Berger–Katz–Alderman* line of cases.[46] However, in view of the fact that double jeopardy does not present such an offensive threat to personal liberty as does the clandestine invasion of one's private conversations in the bugging cases,[47] it is unlikely that the Court will move with the same deliberation and insistency in the double jeopardy area as it has in the electronic surveillance area.

The application of the double jeopardy clause to the states will not have any startling effect on most of those forty-five states which have their own state constitutional protections against double jeopardy.[48]

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43. Benton v. Maryland, 395 U.S. 784, 801, 806 (1969) (Harlan & Stewart, JJ., dissenting), *citing* Siler v. Louisville & N.R.R., 213 U.S. 175, 191–93 (1909); Ashwander v. TVA, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

44. 395 U.S. at 792–93, 806.

45. The Court remanded petitioner's burglary conviction for determination of the issue of collateral estoppel raised by petitioner below, as this was not considered by the Maryland court. Petitioner claimed that the burglary conviction was affected by the double jeopardy violation since evidence admissible on the larceny charge, but not admissible on a charge of burglary alone, was used to convict him. Petitioner argued that this evidence should have been excluded from the second trial under the collateral estoppel doctrine, since he was acquitted of larceny at the first trial. Mr. Justice Harlan in his dissent joined by Mr. Justice Stewart, objected to the remand of the burglary conviction. The fact that part of the evidence introduced at petitioner's second trial was relevant to both counts of burglary and larceny, presented no question of its admissibility at a trial on burglary alone to the dissenting Justices, even assuming that the doctrine of collateral estoppel applies in some form to the states. The dissent cited dictum in Hoag v. New Jersey, 356 U.S. 464, 470–77 (1958), that "[d]espite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this Court has never so held." Justices Harlan and Stewart further argued in *Benton* that:

> The principle of collateral estoppel makes conclusive, in collateral proceedings, only those matters which were "actually litigated and determined in the original action" . . . Hence petitioner's acquittal of larceny at his first trial may have rested solely upon that jury's unique view of the *law* concerning that offense, and cannot be taken as having necessarily "determined" any particular question of fact.

395 U.S. at 804.

The dissent concluded that contrary to the majority's position, there could be no collateral estoppel effect in a collateral proceeding and that petitioner's collateral estoppel argument on the burglary conviction must fail. 395 U.S. at 798–804 (Harlan & Stewart, JJ., dissenting). *See also* Note, *Double Jeopardy and Collateral Estoppel*, 4 CRIM. L. BULL. 406 (1968).

46. Alderman v. United States, 394 U.S. 165 (1969); Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).

47. *Cf.* 14 VILL. L. REV. 758 (1969).

48. *See* INDEX DIGEST TO STATE CONSTITUTIONS, *supra* note 3.

However, the constitutional provisions of six of these forty-five states, as they are written, limit double jeopardy protection to capital cases.[49] Only five of those six states have extended their double jeopardy protection, consistent with the extension of the federal protection, to cover non-capital cases as well.[50] The one state with a constitutional double jeopardy provision still limited to capital cases is Pennsylvania.[51] It is clear that *Benton* requires extension of this protection in Pennsylvania now to non-capital cases.

The impact *Benton* will have on the five states,[52] including Maryland, having only common law protection against double jeopardy will be more pronounced, especially if the standards announced in *Green* are stricter than the common law precedent in those states.

The Court in *Benton* gave no indication of whether its decision would apply to juvenile or administrative proceedings. The case for its application to juvenile proceedings is strong, in that there, as well as at criminal trial, an accused can be deprived of his liberty. Constitutional safeguards are applicable to any such proceeding.[53]

The Court's overruling that part of *Palko* that had formerly excluded the states from the double jeopardy clause will have little new effect beyond its present incorporation, imposing federal double jeopardy standards on the states. *Benton* is another step in the Court's attempt to incorporate significant federal constitutional protections through the fourteenth amendment. The idea of selective incorporation is still viable, but since most of the significant protections of the Bill of Rights have now been "selectively incorporated"[54] the Court has in fact, if not in word, accepted the substance of Justices Black and Douglas' appeal for total incorporation of the Bill of Rights.[55]

F. J. Nyhan

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49. *Id.*

50. The federal double jeopardy protection was extended to cover non-capital cases, both felonies and misdemeanors in *Ex Parte* Lange, 85 U.S. (18 Wall.) 163 (1874). The annotated constitutions of five of those six states each cite state court common law authority for extending the double jeopardy protection to non-capital cases. Those five states and the relevant constitutional provisions are Alabama, ALA. CONST. art. I, § 9; Deleware, DEL. CONST. art. I, § 8; Kentucky, KY. CONST. art. 13; Maine, ME. CONST. art. I, § 8; Tennessee, TENN. CONST. art. I, § 10.

51. Pennsylvania's refusal to extend this protection under its common law dates from 1857 where, in the case of McCreary v. Commonwealth, 29 Pa. 323, 325 (1857), the court cited dicta from earlier cases in restricting the double jeopardy protection to capital cases. This position has been directly affirmed as recently as 1965, in the case of Commonwealth *ex rel.* Papy v. Maroney, 417 Pa. 368, 207 A.2d 814 (1965) and again in 1967, in the cases of Commonwealth v. Warfield, 424 Pa. 555, 227 A.2d 177 (1967) and Commonwealth v. Vivian, 426 Pa. 192, 231 A.2d 301 (1967).

52. *See* note 3 *supra.*

53. *See* United States v. Dickerson, 168 F. Supp. 899 (D.D.C. 1958) (juvenile proceeding). *See also* Comment, *In re Harry Bridges,* 52 YALE L.J. 108 (1942) (deportation proceeding). For a more detailed treatment of this aspect of juvenile proceedings, *see* Rubin, *Constitutional Rights in Juvenile Court,* 16 CLEV.-MAR. L. REV. 477 (1967), and Note, *Double Jeopardy and Due Process in the Juvenile Courts,* 29 U. PITT. L. REV. 756 (1968).

54. *See* notes 14-21, 25 *supra.*

55. *See* Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black & Douglas, JJ., dissenting).

CONSTITUTIONAL LAW — SEARCH AND SEIZURE — LIMITING THE PERMISSIBLE SCOPE OF SEARCH INCIDENT TO AN ARREST.

Chimel v. California (U.S. 1969)

Three police officers arrived at petitioner's home with a warrant authorizing his arrest for burglary. Although no search warrant had been issued and petitioner objected, an extensive 45 minute search of his three-room home, garage and workshop was conducted prior to his removal to police headquarters. At the subsequent state trial, the evidence obtained by the search was admitted over petitioner's objections. His conviction was affirmed by both the California District Court of Appeals[1] and the California Supreme Court[2] on the basis that the warrantless search of petitioner's home was justified as being incident to a lawful arrest. On certiorari, the Supreme Court reversed, *holding* that the permissible scope of a search incidental to a lawful arrest must be limited to the arrestee's person and the area from within which he might gain possession of a weapon or destructible evidence; all other searches, in the absence of well-recognized exceptions,[3] may only be made after a search warrant has been obtained. *Chimel v. California,* 395 U.S. 752 (1969).

The history of warrantless searches incident to a lawful arrest has had a stormy existence marked by much misunderstanding and, in some instances, quick reversals.[4] The first decision to give any indication of the reasonable extent of an incidental search was *Weeks v. United States.*[5] However, in *Weeks* the Court made no mention of the right to search the area where the arrest occurred, but limited the scope of the search to the arrestee's person. Eleven years later, the case of *Agnello v. United States*[6] established, by way of dictum, the right to conduct a search incidental to a lawful arrest. Soon after, in *Marron v. United States,*[7] the Supreme Court expanded the *Agnello* dictum and for the first time allowed a search which extended beyond the room where the arrest

1. People v. Chimel, 61 Cal. Rptr. 714 (1967).
2. People v. Chimel, 68 Cal. 2d 436, 439 P.2d 333, 67 Cal. Rptr. 421 (1968).
3. *See* note 19 *infra.*
4. For a detailed survey of the background of incidental search, *see* R. DAVIS, FEDERAL SEARCHES AND SEIZURES 152 (1964); W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965); Way, *Increasing Scope of Search Incidental to Arrest,* 1959 WASH. U.L.Q. 261.
5. 232 U.S. 383 (1914). "What then is the present case? . . . It is not an assertion of the right on the part of government, always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime." *Id.* at 392.
6. 269 U.S. 20 (1925). The Court in *Agnello* stated:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not doubted. . . .

Id. at 30.
7. 275 U.S. 192 (1927).

was made to an area adjacent to that room. In *Marron,* as in *Agnello,* the search of the premises was dependent upon the fact that the crime was committed in the presence of the officer.[8] In fact, every Supreme Court decision prior to 1947 which had allowed an incidental search beyond the person involved cases in which an officer was present at the time of the offense.[9]

The evolving trend which tended to limit warrantless, incidental searches to those cases in which a crime was committed in the presence of an officer ceased with the decision of *Harris v. United States.*[10] There, the extensive search of a four-room apartment was held to be valid as incident to arrest, despite the fact that the federal agent did not witness the crime and that the search extended considerably beyond the defendant's person.

The final Supreme Court decision having a bearing on the scope of an incidental search, and the one on which the California supreme court[11] primarily relied in affirming Chimel's conviction was *United States v. Rabinowitz.*[12] There, the Supreme Court specifically overruled the then current *Trupiano*[13] decision, which had made warrantless, incidental searches unreasonable per se in any situation where it was practical for the officers to obtain a warrant. The test, the *Rabinowitz* Court stated,

8. The fact that the *Marron* opinion did not mean all that it seemed to say became evident a few years later in Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), and United States v. Lefkowitz, 285 U.S. 452 (1932), where an incidental search of the three rooms adjacent to the one in which the arrest was made was disallowed because it could not be said that the officers witnessed a crime being committed in their presence, and because there would have been ample time to obtain a search warrant. It is obvious that Mr. Justice Butler, who wrote the opinion in both *Go-Bart* and *Lefkowitz,* intended to limit the *Marron* case.

9. *See* Marron v. United States, 275 U.S. 192 (1927); Agnello v. United States, 269 U.S. 20 (1925); Carroll v. United States, 267 U.S. 132 (1925). Although the failure of the Supreme Court to make any affirmative statements concerning the right to conduct a search incidental to a lawful arrest where the crime was not committed in the officer's presence does not necessarily rule out the possibility; these cases are a strong indication that the Court did not intend the arrest to supercede the warrant requirements of the fourth amendment.

10. 331 U.S. 145 (1947).

11. 68 Cal. 2d 436, 439 P.2d 333, 67 Cal. Rptr. 421 (1968).

12. 339 U.S. 56 (1950). *Rabinowitz* established the proposition that a warrantless search incident to a lawful arrest may extend to the area within the defendant's "immediate control." However, no guidelines were presented to aid the courts in determining what that area might be. Law enforcement officers have used this language to justify an increase in the physical area of incidental search. As a result, *Rabinowitz* has come to stand for the proposition that "immediate control" includes the entire area that is considered to be in the possession or under the control of the person arrested. *See, e.g.,* Kernick v. United States, 242 F.2d 818 (8th Cir. 1957) (on probable cause for possession of heroin, officers searched the suspect's person and found a baggage check. They secured the baggage and found nine ounces of heroin. The court held that the suitcase was within the "constructive possession" of the prisoner); Bartlett v. United States, 232 F.2d 135 (5th Cir. 1956) (allowed a search of the motel rooms occupied by two escaped convicts, where the arrests were executed immediately outside, on the theory that the room was within the arrestee's control); Clifton v. United States, 224 F.2d 329 (4th Cir. 1955) (court upheld an incidental search of a home when the arrest took place in the yard).

13. Trupiano v. United States, 334 U.S. 699 (1948). In overruling *Trupiano,* the Court returned to its earlier decisions in *Marron* and *Harris,* which had held that the police have the right to search the area within the immediate control of the arrestee as an incident to the arrest and a search warrant is not a necessary prerequisite.

"is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."[14] Today, therefore, an incidental search may be made in any type arrest: (1) with a warrant[15]; (2) without a warrant where the offense is committed in the presence of the officer[16]; or (3) without a warrant where the officer has probable cause to believe that a crime is being committed or has been committed.[17]

Against this background, the Supreme Court in *Chimel* endeavored to define more precisely the permissible scope of a warrantless search incident to an arrest. An extensive historical analysis indicated to the Court that the "reasonableness" test established by *Rabinowitz* was too imprecise to be constitutionally viable, and therefore new guidelines for limiting the scope of incidental searches were established. These guidelines provide that when an arrest is made, it is reasonable for the arresting officer to search the suspect's person and the area within his immediate control for weapons or any readily accessible evidence. The phrase "within his immediate control" was construed by the Court to mean the area from within which the arrestee might gain possession of a weapon or destructible evidence.[18] The search cannot extend beyond the room in which the arrest was made or even to concealed areas within that room itself. All incidental searches, in the absence of well recognized exceptions,[19] can be made only with a warrant.

In establishing the above guidelines, the Court directly overruled *Rabinowitz* and *Harris* in so far as they would allow, in the absence of exceptional circumstances, warrantless searches outside of the arrestee's immediate control. In so doing, the Court rejected any possibility of distinguishing *Chimel* from *Rabinowitz* and *Harris* on a factual basis even though it could have applied the *Rabinowitz* test and found the search unreasonable because it ranged well beyond the room where the arrest was made,[20] or as petitioner argued, that the arrest was engineered as to time and place in order to facilitate an unreasonable, exploratory

14. 339 U.S. at 66 (1950).

15. Abel v. United States, 362 U.S. 217 (1960); Cutchlow v. United States, 301 F.2d 295 (9th Cir. 1962); Zammar v. United States, 217 F.2d 223 (8th Cir. 1959); United States v. Lord, 184 F. Supp. 923 (S.D.N.Y. 1960).

16. Peters v. New York, 392 U.S. 40 (1968); United States v. Gorman, 36 F.R.D. 416 (D. Conn. 1965); United States v. Rios, 192 F. Supp. 888 (S.D. Cal. 1961).

17. Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961); Washington v. United States, 263 F.2d 742 (D.C. Cir. 1959); Barnes v. Beto, 247 F. Supp. 435 (S.D. Tex. 1964). *See* R. DAVIS, FEDERAL SEARCHES AND SEIZURES (1964); Way, *Increasing Scope of Search Incidental to Arrest,* 1959 WASH. U.L.Q. 261.

18. 395 U.S. at 763.

19. Examples of categories of searches recognized as being exceptions to the warrant requirement are those of "hot pursuit," as shown in Warden v. Hayden, 387 U.S. 294 (1967); a peculiar need to act quickly, as in Schmerber v. California, 384 U.S. 757 (1966) (immediate blood test permissible where after delay it would not indicate presence of alcohol); search of a moving vehicle, as in Carroll v. United States, 267 U.S. 132 (1925); and the common law exception of consent.

20. *See* Whitely v. United States, 237 F.2d 787 (D.C. Cir. 1956); Drayton v. United States, 205 F.2d 35 (5th Cir. 1953); United States v. Fowler, 17 F.R.D. 499 (S.D. Cal. 1955).

search.[21] Instead, Mr. Justice Stewart described these factual distinctions as "artificial," and stated that the same rationale that allowed the less extensive searches in *Rabinowitz* and *Harris* would also have permitted the more extensive search in the instant case.[22] Therefore, the "reasonableness" rationale established by *Rabinowitz* to determine the scope of incidental searches was rejected in favor of an added emphasis on the warrant procedure[23] and also redefined limitations on the scope of warrantless searches.[24] The original objectives of incidental search — protection of the officer and prevention of concealment or destruction of evidence — are re-established as the basis for justifying the search and limiting its scope.[25] Or stated differently, *Chimel* now limits contemporaneous searches to those which can be justified by the need to seize weapons or destructible evidence and additionally to those situations where the arrest itself might be frustrated if the officer was required to obtain a warrant.

Rabinowitz, on the other hand, had expressly held that the exceptions for searches incident to an arrest were not limited to those situations mentioned above, but allowed any contemporaneous search that was found to be "reasonable" under all the circumstances, regardless of whether it would have been practical to obtain a warrant.

The Court recognized that the result of the *Rabinowitz* approach was to extend the scope of incidental search to such a point that fourth amendment protection in this area was virtually non-existent,[26] since the "reasonableness" standard failed to establish any criteria or basis for

21. The courts have uniformly condemned searches incident to an arrest where it is clear that the arrest was arranged solely as a pretext for conducting a search. For example, even though police may have ample opportunity to arrest a suspect on the street, they may wait to arrest him after he arrives home so that they might engage in a general, warrantless search of his premises. *See* Jones v. United States, 357 U.S. 493 (1958); Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961); McNight v. United States, 183 F.2d 977 (D.C. Cir. 1950); United States v. Johnson, 113 F. Supp. 359 (D.D.C. 1953).

22. 395 U.S. at 766.

23. The Court's holding that a search warrant be obtained whenever practical is a harkening back to the rationale of Trupiano v. United States, 334 U.S. 699 (1948), which held that the acquisition of a warrant where practical was a necessary condition for reasonableness.

24. Although the court doesn't specifically mention it, its increased attention to the limitations in the scope of incidental search appears to be attributable to the demise of the "mere evidence" rule established in Gouled v. United States, 255 U.S. 298 (1921), which limited the evidence which could be seized to the fruits and instrumentalities of the crime. Since the evidence had to be limited to these items, it placed some theoretical limitations on the scope of the search. Under Warden v. Hayden, 387 U.S. 294 (1967), evidence of guilt as well as fruits of the crime could be seized. Thus, a search could be termed a general exploration only if it was aimed at finding evidence of some other crime. *See The Supreme Court, 1966 Term,* 81 HARV. L. REV. 69, 117-22 (1967).

25. Agnello v. United States, 269 U.S. 20, 30 (1925).

26. The limiting factor established by the *Rabinowitz* Court — that the area to be searched as incident to the arrest extend no further than the area under the arrestee's immediate control — has not been maintained by lower courts. *See* United States v. Wise, 190 F. Supp. 615 (D. Md. 1961) (a search that extended to the other rooms of a dwelling house was upheld even though the arrest was made in the kitchen); People v. Braden, 34 Ill. 2d 516, 216 N.E.2d 808 (1966) (validating a search of an apartment plus a refrigerator and a closet outside of the apartment); State v. Miller, 47 N.J. 273, 220 A.2d 409 (1966) (extended the area under the "control" of the arrestee to another's residence which the suspect was visiting).

determining the limits of incidental search.[27] The inherent vagueness of the standard presented a serious threat to the right of privacy protected by the fourth amendment, because the scope of the search was not subject to judicial restraint prior to the action, but was determined by what seemed reasonable to the arresting officer at the time of arrest.[28] The inevitable result of such a determination was that the police concept of reasonableness tended to dominate and control since all searches were not judicially examined as they would have been had the police been required to obtain a warrant. In some instances police concepts of reasonableness also prevailed because once the police had made an arrest and obtained the evidence, their very success tended to have a retroactive effect on probable cause and thus influence the judicial finding of such cause.[29]

The dissent in the instant case attempts to justify the reasonableness approach by the application of two principles: first, since the police may justifiably search the area within the arrestee's control for weapons or evidence, a further invasion of his privacy by searching in a broader area is relatively minor,[30] and second, it would not be unreasonable to dispense with the need for a warrant, since the arrestee could immediately seek judicial determination of probable cause in an adversary proceeding.[31] In considering these arguments, the majority feels itself unable in light of fourth amendment principles to characterize the invasion of privacy which results from an extensive search of a man's home as being minor. The protection of prior judicial screening, it contends, is being sacrificed for no apparent reason, at least in so far as it would be practical to obtain a warrant. Secondly, the majority questions whether the states do in fact provide the speedy proceedings to determine probable cause which the dissent assumes. But even more fundamentally, the fourth amendment would not be served by merely preventing the introduction of evidence illegally seized.[32] Subsequent review is never an adequate substitute for

27. "To say that the search must be reasonable is to require some criteria of reason. It is no guide at all either for a jury or for district judges or the police to say that an 'unreasonable search' is forbidden — that the search must be reasonable." United States v. Rabinowitz, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting).

28. Given this leeway, it is not surprising to find police engaging in somewhat questionable practices such as waiting for a suspect to enter his home before arresting him so that they can conduct an extensive search of his home. Petitioner accused the police of this very thing in *Chimel*. Another practice is to arrest a suspect on a trumped-up charge such as vagrancy or speeding and then carry out an otherwise invalid search as an incident to that arrest. *See* Worthy v. United States, 409 F.2d 1105 (D.C. Cir. 1968).

29. *See* Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319; Way, *Increasing Scope of Search Incidental to Arrest,* 1959 WASH. U.L.Q. 261; *The Supreme Court, 1949 Term,* 64 HARV. L. REV. 114 (1950).

30. 395 U.S. at 774 (1969).

31. *Id.* at 780. This theory was first espoused by Mr. Justice Brennan in his dissenting opinion in Abel v. United States, 362 U.S. 217, 249-50 (1960).

32. Previously, the only protection afforded an individual from the unlawful invasion of police officers was the exclusion from evidence at the trial of any evidence which had been illegally obtained. Weeks v. United States, 232 U.S. 383 (1914), applies the exclusionary rule to federal courts. Mapp v. Ohio, 367 U.S. 643 (1961), applies this rule to the states through the due process clause of the fourteenth amendment.

prior screening. The right of the individual to be secure in his home would not be protected by a later finding that the evidence sought to be introduced was obtained by illegal means.

The Supreme Court's increased emphasis on the warrant system is in line with the underlying rationale of current fourth amendment cases dealing with the general area of search and seizure. In each decision the warrant procedure has been vigorously applied. In *Terry v. Ohio*,[33] a case on which the *Chimel* majority heavily relied, the Court emphasized that, whenever practical, the police must obtain advance judicial approval for conducting searches and seizures. In *Katz v. United States*,[34] evidence obtained by electronic surveillance was held inadmissible because it was not obtained through a warrant which the Court felt was a necessary precondition for eavesdropping. And *Camara v. Municipal Court*[35] ruled that in certain types of administrative searches, warrants would be required prior to the governmental inspection unless consent was obtained from the owner of the premises.

The effect of these cases and particularly the instant decision on the warrant system will undoubtedly involve substantial costs to society. Police and magistrates will be required to do a great deal of time-consuming paper work as a necessary incident to the operation of the warrant system. At the same time, studies of the warrant system[36] indicate that, if not issued under ideal conditions, the protection afforded by warrants is less than that insured by responsible and restrained law enforcement techniques. However, in spite of this increased burden on the warrant system and its possible weaknesses, the Supreme Court has now decided that prior judicial screening is so essential to fourth amendment principles that it regards these practical factors as less significant than the preservation of individual freedom from unreasonable intrusions by law enforcement officials.

The permissible scope of an incidental search under the new rule is based on the *Terry* case; the same rationale[37] which governs the scope of "stop and frisk" underlies the basis of a "search incident to a lawful arrest" and marks its proper extent. But it is important to remember that the limited search permitted by *Terry* may only be used when its sole justification applies — protection of the police officer in this brief face to face encounter.[38] Thus, the "frisk" must be limited to a "patting-

33. 392 U.S. 1 (1968).
34. 389 U.S. 347 (1967).
35. 387 U.S. 523 (1967). Other cases emphasizing the importance of the warrant procedure are Schmerber v. California, 384 U.S. 757 (1966); Aguilar v. Texas, 378 U.S. 108 (1964); Chapman v. United States, 365 U.S. 610 (1961).
36. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 194 (1966); L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 115, 201 (1967); W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 15–16, 502–04 (1965).
37. In *Terry*, the Court held that, "the scope of [a] search must be strictly 'tied to and justified by' the circumstances which rendered its initiation permissible." 392 U.S. at 20 (1968).
38. Sibron v. New York, 392 U.S. 40 (1968).

down"[39] of the outer clothing of the suspect for weapons which would be readily accessible and could be used without considerable delay.[40] In contrast, the on-the-scene search of an arrestee's person must be more extensive because the suspect is usually in the presence of the officers for a longer period and mav well have an opportunity to procure a carefully concealed weapon. Moreover, a search incident to the arrest of a suspect does not rely solely on protection of the officer as its justification, but is equally justified by the need to prevent the destruction or concealment of evidence. This, by itself, would require a more extensive search than a "frisk" prescribes.

If evidence of some other crime is discovered during the course of a valid search, the guidelines established by the instant decision do not appear to disturb the traditional rule which allows the admission of such evidence.[41] The Court in *Chimel* expressly states that "it is entirely reasonable for the arresting officer to search for and seize *any* evidence on the arrestee's person. . . ."[42] This approach seems to be sound. Since probable cause must exist for an arrest to be valid, there is usually a sufficient nexus between the individual and the offense to justify a belief that he may have on his person either a weapon or other evidence of the crime. Under these circumstances, an accompanying search which is limited in scope to the justifiable objectives of incidental search — protection of the officer and preventing the destruction of evidence — would be valid and any discovered evidence should be admissible.[43]

In the past, the Supreme Court has justified a search of the "place" where the arrest occurs by an application of the objectives outlined above.[44] As a practical matter, however, the lower courts have given little more than lip service to these objectives. They have generally upheld any search, regardless of extent, that was in any way "incident" to a lawful arrest.[45]

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39. The standard police instructions on how to search a person provide:

> [T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and the area about the testicles, and entire surface of the legs down to the feet.

L. Priar & T. Martin, *Searching and Disarming Criminals,* 45 J. CRIM. L.C. & P.S. 481 (1954).

40. 392 U.S. at 65. For discussions of the scope of "stop and frisk," *see* LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond,* 67 MICH. L. REV. 40 (1968); Comment, *Stop and Frisk,* 63 NW. U.L. REV. 837 (1969); 7 DUQ. L. REV. 144 (1968); 20 SYRACUSE L. REV. 85 (1968).

41. Harris v. United States, 331 U.S. 145 (1947) (seizure of contraband incident to an arrest unrelated to the presence of the contraband was admissible); Abel v. United States, 362 U.S. 217, 238 (1960) (fruits and instrumentalities of any crime are admissible if they come into the officer's possession during a lawful search).

42. 395 U.S. at 763 (1969).

43. This basis for justifying an incidental search had been disregarded in a recent pre-*Chimel* case, United States v. Worthy, 409 F.2d 1105 (D.C. Cir. 1968), which held that narcotics seized as the result of an extensive search of a man arrested for vagrancy were admissible as being incident to his arrest. This type of ruling would now clearly violate the permissible scope of a search established by the instant case.

44. *E.g.,* United States v. Rabinowitz, 339 U.S. 56, 72 (1950) (Frankfurter, J., dissenting); Agnello v. United States, 269 U.S. 20, 30 (1925); Carroll v. United States, 267 U.S. 132, 158 (1925).

45. *See* note 26 *supra.*

The Court has expressed its concern for the ever-increasing scope of contemporaneous searches by showing a tendency in recent cases to limit them. In *Preston v. United States*,[46] an incidental search was held to be invalid because it was not justified by the need to seize weapons or prevent the destruction of evidence and was too remote in time and place. And in *Peters v. New York*,[47] the search was sustained only because it was limited in scope to the objectives outlined in *Preston*. The instant case goes further and not only restricts the scope of search to the enumerated objectives, but confines the area which may be searched strictly to the room in which the arrest was made, and does not allow probing into any closed or concealed areas of that room itself; thus, seizures are strictly confined to visible and readily accessible items.

In conjunction with this, however, it might well be argued that limiting the scope of incidental search by a fixed formula might create more problems than it purports to solve. If the scope of reasonable search is to be limited to the room where the arrest occurred, how large may the circumference of the room be? What of hallways and corridors leading to larger rooms? How do you define the areas within a suspect's "reach"?[48] In trying to answer these questions it would be well to remember that, under the *Chimel* rule, the permissible scope of the search will not be judged by a geographical formula alone, but the search will be weighed in light of the legitimate objectives established by the sound application of fourth amendment principles.

Additionally, in those situations[49] where it would be impractical to obtain a search warrant because the purpose of the search would be frustrated by requiring one, *Chimel* would still allow a warrantless, incidental search extending beyond the room where the arrest occurred.[50] Here, too, the scope of the search should be no broader than could be justified by the application of the reason for dispensing with the warrant requirement. Just such an approach was used in *Schmerber v. California*[51] to justify the immediate taking of a blood sample from a man accused of drunken driving. Since the only reason for taking the blood before leaving the scene was that delay would make the evidence unobtainable, the scope of the search was limited to only those tests which had to be made immediately. Similarly, in *Warden v. Hayden*,[52] the Court assumed, without holding, that the scope of a search in "hot pursuit" should be limited to finding the suspect or weapons he might use to escape and not

46. 376 U.S. 364 (1964).
47. 392 U.S. 40 (1968).
48. Respondent's Brief at 64, Chimel v. California, 395 U.S. 752 (1969).
49. *See* note 19 *supra*.
50. Mr. Justice Stewart expressly points out that the holding in *Chimel* is entirely consistent with the existing principle that, assuming probable cause, moving vehicles may be searched without a warrant where it isn't practical to obtain one because the vehicle may be moved out of the area where the arrest occurs. *See* Preston v. United States, 376 U.S. 364 (1964); Brinegar v. United States, 338 U.S. 160 (1948); Carroll v. United States, 267 U.S. 132 (1925).
51. 384 U.S. 757 (1966).
52. 387 U.S. 294 (1967).

to find evidence of his guilt, even though seizable if found. This procedure of examining the reason behind allowing warrantless searches and limiting their scope to that reason is in line with the underlying rationale in *Chimel* and should provide the criteria for judging all incidental searches involving the exceptions to the warrant requirement.

Although it is generally agreed that law enforcement requires some degree of incidental search at the time of arrest,[53] there appears to be no constitutionally justifiable excuse for the broad scope of incidental search which has existed since *Harris* and *Rabinowitz*. Prior to the rule in the principal case, law enforcement officers have had to use their own judgment in determining what constitutes the reasonable scope of such searches. The very permissiveness of this procedure induced police to engage in warrantless searches with much frequency — often with no justification. Hopefully, the application of the rules and principles adopted in *Chimel* will eliminate the problem of determining by a retrospective examination the permissible scope of a search incident to a lawful arrest and substantially reduce the amount of unconstitutional invasions of privacy.

Timothy E. Foley

CRIMINAL PROCEDURE — CONSTITUTIONAL LAW — PRISONERS WHO ENTER GUILTY PLEAS ARE NOT FORECLOSED FROM HAVING A FEDERAL EVIDENTIARY HEARING ON THE VOLUNTARINESS OF THEIR PLEA.

Ross v. McMann (2d Cir. 1969)

Dash v. Follette (2d Cir. 1969)

In separate criminal proceedings, petitioners Ross and Dash were convicted after pleading guilty to charges of murder and robbery respectively. The state courts denied their petitions for writs of error *coram nobis*.[1] The petitioners subsequently applied to federal district courts for writs of habeas corpus claiming that their guilty pleas resulted from the threatened use by the prosecution of coerced confessions which

53. *See generally* R. DAVIS, FEDERAL SEARCHES AND SEIZURES (1964); J. LANDYNSKI, SEARCH AND SEIZURE IN THE SUPREME COURT (1966); L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME (1967). *See also* Way, *Increasing Scope of Search Incidental to Arrest*, 1959 WASH. U.L.Q. 261; Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 433 (1969).

1. People v. Ross, 26 App. Div. 2d 773, 272 N.Y.S.2d 969 (Sup. Ct. 1966); People v. Dash, 21 App. Div. 2d 978, 252 N.Y.S.2d 1016 (Sup. Ct. 1964), *cert. denied*, 380 U.S. 937 (1965). *Coram nobis* is a common law writ, the purpose of which is to correct a judgment in the same court in which it was rendered on the ground of error of fact. BLACK'S LAW DICTIONARY 1785-86 (4th ed. 1951).

would have led to their conviction.[2] The district courts dismissed the petitions without a hearing relying on the *Glenn v. McMann*[3] rationale that "[a] voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings . . .,"[4] thereby invalidating their coerced confession claim. The Court of Appeals for the Second Circuit, in a six to three decision, reversed and remanded[5] with instructions to hear and determine petitioners' applications, *holding* that the petitions raised sufficient question as to the voluntariness of the pleas of guilty to require hearings thereon.[6] *Ross v. McMann,* 409 F.2d 1016 (2d Cir. 1969); *Dash v. Follette,* 409 F.2d 1016 (2d Cir. 1969).

From a historical viewpoint, it is important to note that the availability of federal habeas corpus proceedings for state court prisoners has long been one of the most controversial areas in criminal law.[7] Although habeas corpus was incorporated by the Constitution as a federal common law remedy,[8] it was not until 1867 that Congress authorized a federal court to order the discharge of any person held by a state in violation of his Constitutional rights.[9] Since then the statutory language governing the scope of the writ has not been altered to any significant extent,[10] but the interpretation of the language has materially changed. For example, at first the use of the writ in federal courts to test the constitutional validity of a conviction was restricted to those cases where the judgment was void for lack of jurisdiction within the trial court.[11]

2. Ross applied for writ of habeas corpus in the District Court for the Eastern District of New York. Dash made his application for writ of habeas corpus in the District Court for the Southern District of New York. Specifically, petitioner Ross alleged that he pleaded guilty to murder in the second degree because his attorney had refused to attempt to suppress an illegally obtained confession, and had warned him that if he risked trial, confession and other evidence would surely lead to his conviction for first degree murder and sentence to the electric chair. Alleging similar grounds, petitioner Dash claimed that his plea of guilty to the charge of robbery in the second degree was the product of a coerced confession and that the trial court warned him that he would get the maximum penalty if found guilty after trial.

3. 349 F.2d 1018 (2d Cir. 1965).

4. *Id.* at 1019.

5. Ross v. McMann, 409 F.2d 1016 (2d Cir. 1969). It was noted that petitioner's habeas petitions may be premature in that state court remedies may still be available. If this is determined by the District Court to be the case, that court may defer hearing on this matter pending final determination of the action in the state courts.

6. Both convictions would stand, of course, if it were determined after a full and fair evidentiary hearing, either that the confession was voluntary and there was no threat by the judge or attorney, or that the plea was not substantially motivated by the confession or by the alleged threat of the judge or attorney. Ross v. McMann, 409 F.2d at 1023 n.4.

7. *See* Carter, *The Use of Federal Habeas Corpus by State Prisoners,* 23 WASH. & LEE L. REV. 23 (1966).

8. U.S. CONST. art. 1, § 9, cl. 2. This clause provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

9. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

10. *See* Longsdorf, *The Federal Habeas Corpus Acts Original and Amended,* 13 F.R.D. 407 (1953).

11. However, while still speaking in terms of lack of jurisdiction upon the part of the state court, the federal courts were continuously stretching federal habeas corpus to include review of state court proceedings which were jurisdictionally correct.

However, since 1942,[12] habeas corpus relief for state prisoners in federal courts has been steadily broadened by the expanded application of the concept of procedural due process under the fourteenth amendment. In 1963, in an effort to clarify certain federal standards for dealing with habeas corpus, the Supreme Court decided the famous trilogy of *Fay v. Noia*,[13] *Townsend v. Sain*[14] and *Sanders v. United States*.[15] Of these cases[16] it is the *Townsend* decision which is particularly applicable in determining whether the federal court should hold an evidentiary hearing on issues previously tried and decided in the state courts. In *Townsend*, the petitioner moved to suppress a confession he had made on the grounds that it had been induced by drugs. The state conceded that he had been given the injection, but after a hearing in which there was conflicting testimony as to the drug's effect, the trial judge denied the motion without explanation, and Townsend was convicted.[17] Due to the unresolved factual issues involved in the admissibility of the confession, the Supreme Court vacated this judgment and remanded.[18] In reaching its decision to order a hearing, the Court established liberal guidelines to be followed in deciding when a hearing is proper in a federal habeas corpus proceeding:

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas corpus applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding.[19]

The Court felt that these standards would help clarify certain controversial aspects of federal habeas corpus petitions.

The precise issue before the Court of Appeals in the instant cases was whether either petitioner had raised sufficient question as to the voluntariness of his guilty plea to require an evidentiary hearing thereon. Although the guilty pleas were entered on the advice of their respective counsel, the petitioners claimed that the threatened use of illegally obtained confessions coerced them into pleading guilty and therefore such pleas were not voluntary. However, in order to entertain this argument

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Mooney v. Holohan, 294 U.S. 103 (1935); Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 237 U.S. 309 (1915).

12. Waley v. Johnston, 316 U.S. 101 (1942).

13. 372 U.S. 391 (1963). The Court held that the prisoner need not exhaust state remedies that are not available to the prisoner at the time he files his petition.

14. 372 U.S. 293 (1963).

15. 373 U.S. 1 (1963). The Court removed the principle of res judicata as a consideration in federal habeas corpus proceedings.

16. These three cases when considered with the procedural aspects of the Judicial Code, 28 U.S.C. §§ 2241–55 (1964), constitute the guidelines for applying the present law of federal habeas corpus.

17. His conviction was affirmed by the state appellate court, People v. Townsend, 11 Ill. 2d 30, 141 N.E.2d 729 (1957), *cert. denied*, 355 U.S. 850 (1957), and collateral state relief was denied without an evidentiary hearing. The district court judge, considering only the pleadings filed in Townsend's federal habeas application and the opinion of the state appellate court on appeal, denied the writ.

18. 372 U.S. 293 (1963).

19. *Id.* at 312.

and remand the cases for evidentiary hearings, the appellate court had to overcome the rule enunciated in *Glenn v. McMann*,[20] where it was held that "[a] voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings . . ."[21] Realizing that the rule on its face would bar an evidentiary hearing by the federal court and thereby prejudice defendant's procedural rights,[22] the court attempts to circumvent this dilemma by distinguishing between two possible interpretations of the holding in *Glenn* and adhering to the narrowest reading.

A broad reading of *Glenn* would dictate the conclusion that an unconstitutionally coerced confession would be irrelevant in determining the voluntariness of the guilty plea.[23] While the majority agrees that prior violations of constitutional rights are waived by a voluntary guilty plea, it determines that the holding in *Glenn* was more limited. The court interprets *Glenn* to read that "the allegation of a coerced confession, *without more,* is not sufficient to raise the issue of the voluntariness of a guilty plea."[24]

In reaching this conclusion the Court of Appeals has established the rule that mere conclusory allegations by a petitioner that his confession was coerced are not sufficient to predicate an order for a hearing on the issue of voluntariness — it is mandatory that sufficient particulars be alleged.[25] In other words, through a narrow reading[26] of *Glenn*

20. 349 F.2d 1018 (2d Cir. 1965). In *Glenn,* petitioner was convicted of murder pursuant to his plea of guilty given in open court while he was represented by counsel. He applied for a writ of habeas corpus alleging that his plea of guilty was unconstitutionally coerced by the existence of a confession that had been obtained from him involuntarily.

21. *Id.* at 1019.

22. An anomoly is presented if the *Glenn* rule is followed in that a defendant who pleaded guilty for fear of being convicted for either a higher crime or a longer sentence due to the existence of a coerced confession or other illegally obtained evidence could not have his conviction reviewed either by appeal or in a habeas corpus proceeding whereas if a defendant pleaded not guilty and was later convicted through the use of a coerced confession or illegally obtained evidence, he could appeal his conviction and obtain a reversal upon proof of his allegations.

23. Ross v. McMann, 409 F.2d at 1020.

24. *Id.* at 1019–20.

25. In explaining what particulars must be alleged the court states:

> To enable the district court to decide whether or not a hearing should be ordered, additional supporting material such as the affidavit of the attorney who represented the petitioner when he entered the guilty plea, or exhibits or affidavits of persons having knowledge of the claimed facts, should be appended, with the petitioner's own affidavit, to the original petition filed with the district court.

Id. at 1022 n.3.

26. The court finds support for its narrow interpretation of *Glenn* in recent Second Circuit cases which have implied that a prior invasion of a defendant's constitutional rights is relevant to the issue of the voluntariness of the guilty plea. *See* United States *ex rel.* Boucher v. Reincke, 341 F.2d 977, 981 (2d Cir. 1965), where, in determining that petitioner's guilty plea had been voluntary, the court found that he had been adequately represented by counsel at his arraignment; United States *ex rel.* Swanson v. Reincke, 344 F.2d 260, 261 (2d Cir. 1965), *cert. denied,* 382 U.S. 869 (1965), where in affirming a conviction based on the constitutional validity of a statute, the court stated that there was no reliance on the suggestion that a plea of guilty should bar collateral attack on prior constitutional defects; United States *ex rel.* Martin v. Fay, 352 F.2d 418, 419 (2d Cir. 1965) (concurring opinion), *cert. denied,* 384 U.S. 957 (1966), where the court stated that it could "conceive of situations in

the court has determined that when sufficient doubt as to the voluntariness of the guilty plea has been raised, prior constitutional defects are relevant in resolving that issue.

This problem of whether a particular guilty plea is an effective waiver of all prior non-jurisdictional defects is of great concern to the courts.[27] In the instant case, the Court of Appeals finds that the guilty pleas were not voluntary and therefore could not be considered as waivers of prior invasions of constitutional rights. In applying the established standards of waiver,[28] the court finds that in light of the allegations set forth in the petitions neither of the guilty pleas were an "intentional relinquishment or abandonment of a known right or privilege,"[29] and therefore neither could serve as a voluntary waiver.[30]

Although in particular cases other circuit courts have affirmed the right of state prisoners to apply for federal habeas corpus to question the voluntariness of their guilty pleas,[31] the Second Circuit, through the holding in the instant case, is the first to establish a definite rule to be applied in determining whether to hold a hearing on the issue of volun-

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which a plea of guilty upon the advice of counsel would have been caused by circumstances entitling the defendant to challenge his own act on the ground it was a compelled act"; United States *ex rel.* Siebold v. Reincke, 362 F.2d 592, 593 (2d Cir. 1966), where it was noted that "[a] conviction will not be sustained if it rests upon a plea of guilty which is the result of coercion, nor, perhaps, if a plea of guilty resulted from other violations of constitutional rights."

27. Voluntariness is important because the guilty plea serves as a conviction. As noted in Machibroda v. United States, 368 U.S. 487 (1962), the gravity of a plea of guilty makes it mandatory that the surrounding circumstances be conscientiously examined in order to verify the propriety of the proceedings.

28. The Supreme Court in *Fay* clearly stated that no matter what the state procedural method might be, any forfeiture of constitutional rights must meet the federal standards of waiver. 372 U.S. at 420–22.

29. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). This is the classic definition of waiver used by the federal courts.

30. The court further substantiates its contention that petitioners did not voluntarily relinquish their right to contest the coerced confessions by pointing out that the state failed to afford a constitutionally acceptable means of presenting their claims. In Jackson v. Denno, 378 U.S. 368 (1964), the only state procedure for contesting the validity of confessions was declared retroactively unconstitutional.

In *Jackson* the trial court had submitted the issue of the voluntariness of petitioner's confession to the jury, instructing it to ignore the confession if it felt that it was involuntary; and then to determine guilt from the other evidence in the case. Alternatively, if the confession was found to be voluntary, the jury was instructed to determine its truth and reliability and to weigh it accordingly. On appeal from a denial of Jackson's writ in federal district court, the Supreme Court held that the New York procedure did not afford a reliable determination of the voluntariness of the confession and violated the petitioner's constitutional rights under the due process clause of the fourteenth amendment.

It should be noted that in the dissenting opinion of the instant case, Chief Judge Lumbard disagrees with the majority's application of *Jackson.* He asserts that since *Jackson* dealt with confessions which actually went before a jury for consideration, it is inconsequential whether petitioners were deterred from having the jury rule on their confessions. The inference being that it is pure speculation to consider whether they pleaded guilty because they did not want a jury to know of their "confession." At the time of their trials, before *Jackson,* defendants Ross and Dash did, according to the dissent, have an acceptable procedure by which they could present their claims. Ross v. McMann, 409 F.2d 1016, 1029 (1969).

31. *See* United States *ex rel.* Collins v. Maroney, 382 F.2d 547 (3d Cir. 1967); Broxon v. Wainwright, 372 F.2d 940 (5th Cir. 1967); Reed v. Henderson, 385 F.2d 995 (6th Cir. 1967); Doran v. Wilson, 369 F.2d 505 (9th Cir. 1966); Shelton v. United States, 292 F.2d 346 (7th Cir. 1961), *cert. denied,* 369 U.S. 877 (1962).

tariness. By formulating specific standards as to what must be alleged, the court indicates that it is striving for complete protection of individual rights when accepting a guilty plea.[32] However, there is disagreement between the state and federal courts as to the effective use of habeas corpus to achieve this preservation of constitutional rights. Of great concern is the relative ease with which cases settled on pleas of guilty can be attacked.[33] As stated in the dissent:

> If a defendant's decision to plead guilty can be attacked and placed in jeopardy many years later, the state will have been deprived of a substantial part of the benefit which it properly and fairly thought it should enjoy — namely, achieving a sure and certain result and saving considerable time and expense.[34]

Notwithstanding this justifiable state interest in finality, the federal courts are primarily concerned with whether the state procedures leading to the entry of the guilty plea were fundamentally fair in a constitutional sense.[35]

Aside from this controversy over the effect of a guilty plea, the decisions in *Ross* and *Dash* touch upon the more basic question of to what extent state court proceedings are reviewable by federal courts. There is strong feeling among many legal commentators[36] that the federal courts are encouraging a flood of petitions by adopting the liberal guidelines of *Townsend*. This claim is supported by the upward trend of recent years in the number of habeas corpus petitions filed by state prisoners.[37] This increase in volume gives rise to the state's objection concerning the cost of additional proceedings. The habeas corpus jurisdiction does require an enormous commitment of federal judicial resources, to say nothing of the heavy burdens it imposes on state prosecuting authorities, for what has been suggested to be a marginal profit in terms of furthering criminal justice.[38] However, if the continued restraint of a single defendant in violation of his constitutional rights is *intolerable* as the Court in *Fay* said it was,[39] then habeas corpus needs no cost justification.

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32. *See* note *27 supra.*
33. Ross v. McMann, 409 F.2d 1016, 1030 n.1 (1969).
34. *Id.* at 1030.
35. In Sanders v. United States, 373 U.S. 1, 8 (1963), the Court stated that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."
36. *See* Brennan, *Some Aspects of Federalism,* 39 N.Y.U.L. REV. 945 (1964); Carter, *The Use of Federal Habeas Corpus by State Prisoners,* 23 WASH. & LEE L. REV. 23 (1966); Goodman, *Use and Abuse of the Writ of Habeas Corpus,* 7 F.R.D. 313 (1947); Lay, *Problems of Federal Habeas Corpus Involving State Prisoners,* 45 F.R.D. 45 (1968); Comment, *The Burden of Federal Habeas Corpus Petitions From State Prisoners,* 52 VA. L. REV. 486 (1966).
37. From only 1,903 in 1963, the number of petitions has increased to 6,331 in 1968. DIRECTOR ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 130 (1968).
38. *See* Comment, *The Burden of Federal Habeas Corpus Petitions From State Prisoners,* 52 VA. L. REV. 486 (1966).
39. Fay v. Noia, 372 U.S. 391, 441 (1963).

A more impressive argument is that the petitioner who may have a valid constitutional claim has little chance for the federal court to evaluate it in sifting through the thousands of meritless petitions. As Mr. Justice Jackson noted in *Brown v. Allen*,[40] the federal courts' task is extremely difficult:

> [T]his Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own. Judged by our own disposition of habeas corpus matters, they have, as a class, become peculiarly undeserving. It must prejudice the occasional meritorious application to be buried in a flood of worthless one. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.[41]

This view is supported by the dissent in the instant cases, which feels it is not the function of federal courts to review state criminal proceedings in order to determine the voluntariness of a guilty plea entered years before. The traditional opposing argument to this line of reasoning was succinctly stated by Mr. Chief Justice Hughes:

> It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.[42]

As noted by the majority, when a petitioner alleges facts sufficient to support his claim that his guilty plea was substantially induced by the existence of a confession illegally obtained from him which he had no adequate means of challenging, it is the duty of the court to grant him a hearing.

Other Justices who agree with Mr. Chief Justice Hughes' proposition — that the protection of individual constitutional rights is of utmost importance in our judicial system — emphasize the significance of the growing protections that the interpretation of the Constitution affords to state prisoners.[43] In light of this, the federal courts have been indicating that if the state remedy is inadequate, or the possibility of state relief uncertain, the state prisoner may apply to federal court for a writ of habeas corpus.[44] Although the federal courts recognize that this growing trend to liberally grant review of state proceedings is

40. 344 U.S. 443, 532 (1953) (Jackson, J., concurring).

41. *Id.* at 536–37.

42. Bowen v. Johnston, 306 U.S. 19, 26 (1938).

43. The Supreme Court has been gradually expanding the scope of the due process clause of the fourteenth amendment, thereby increasing the number of grounds upon which violation of constitutional rights may be based. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 253 (1963).

44. *See, e.g.,* Bruce v. Beto, 396 F.2d 212 (5th Cir. 1968); Whippler v. Balkcom, 342 F.2d 388 (5th Cir. 1968); Brown v. Heyd, 277 F. Supp. 899 (E.D. La. 1967).

subject to great criticism,[45] this controversy over the balance of power between state and federal courts is far from settled. Only when the states have fully recognized the necessity of assuring a completely fair administration of criminal justice will intervention by the federal courts wither away.[46]

It is submitted that the court's analysis in *Ross* and *Dash* indicates that, despite the repeated warnings that our courts are becoming congested with meritless petitions and that there is too much emphasis on the procedural protection of constitutional rights, the federal courts will continue to safeguard individual freedom by protecting the right to petition for writ of habeas corpus. By ordering hearings to determine the voluntariness of guilty pleas, the court is recognizing that for the state prisoner with a meritorious claim the consequences — death or imprisonment — are too harsh to allow the courts to limit the power of habeas corpus.

Michael P. Kane

INSURANCE — INJURED THIRD PARTIES HAVE RIGHT OF DIRECT ACTION AGAINST THE INSURED AS A THIRD PARTY BENEFICIARY OF AN INSURANCE CONTRACT WHICH CANNOT BE DEFERRED BY A NO ACTION CLAUSE IN THE INSURANCE CONTRACT.

Shingleton v. Bussey (Fla. 1969)

Plaintiff Bussey brought an action against defendant Shingleton and her insurer, Nationwide Mutual Insurance Co., for damages sustained as a result of defendant's alleged negligence in operating an automobile. The Circuit Court for Leon County, Florida, dismissed the insurance company as a party, and plaintiff appealed. On appeal, the District Court of Appeals, First District, determined that the trial court erred in the dismissal, and the cause was reversed and remanded.[1] The insurance company appealed this judgment, and the Supreme Court of Florida affirmed the district court's decision, *holding, inter alia,* that the injured plaintiff was a third party beneficiary of the motor vehicle liability policy, and as such, he had a right to direct action against the insurer which

45. In Henry v. Mississippi, 379 U.S. 443 (1965), it was stated that "[t]he Court is not blind to the fact that the federal habeas corpus jurisdiction has been a source of irritation between the federal and state judiciaries." *Id.* at 453.
46. Griswold, *The Long View,* 51 A.B.A.J. 1017, 1022 (1965).

1. Bussey v. Shingleton, 211 So. 2d 593 (Fla. 1968).

could not be deferred by a no action clause[2] in the insurance contract. *Shingleton v. Bussey,* 223 So.2d 713 (Fla. 1969).

Traditionally, an injured third party has had no right of direct action against an insurer as a third party beneficiary to an insurance contract.[3] This rule has been in effect in Florida since the 1936 case of *Artille v. Davidson,*[4] which held that an insurer could not be joined as a party to an action between the injured party and the insured because the action sounded in contract and the plaintiff could not show privity between himself and either of the parties to the contract.[5] The *Artille* court further held that the insurance contract was not entered into for the benefit of plaintiff as a member of the public, and therefore, plaintiff could not join the insurer directly under a third party beneficiary theory.[6] While, absent a statute, this is still the law in a majority of jurisdictions, in recent years some states have accepted the third party beneficiary rationale.[7]

As a result of the rule that injured parties do not have a right of direct action against insurance companies, no action clauses obligating the insurer to indemnify the insured only for losses actually sustained and paid by the insured[8] have been consistently upheld as not against public policy.[9] Likewise, no action clauses conditioning the insurance

2. A no action clause provides that no action will lie against insurer until the amount of assured's obligation is ascertained by judgment or by settlement. *E.g.,* C.C.H. Auto. L. Rep. ¶ 2370, at 2035.

3. *See* 8 J.A. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE §§ 4851–61 (2d ed. 1962).

4. 126 Fla. 219, 170 So. 707 (1936).

5. *Id.* at 221–22, 170 So. at 708. *See also* Russell v. Burroughs, 183 Ga. 361, 188 S.E. 451 (1936); Ellis v. Bruce, 215 Iowa 308, 245 N.W. 320 (1932); Zeigler v. Ryan, 63 S.D. 607, 262 N.W. 200 (1935); Conwell v. Hays, 103 W. Va. 69, 136 S.E. 604 (1927); Appleman, *Joinder of Policyholder and Insurer as Parties Defendant,* 22 MARQ. L. REV. 75, 76 (1938).

6. 126 Fla. 219, 222, 170 So. 707, 708 (1936). Exceptions to this kind of holding have taken place where the insurance contract in controversy expressly stipulated that it was entered for the benefit of injured third parties. *See, e.g.,* McCaleb v. Continental Cas. Co., 132 Tex. 65, 116 S.W.2d 679 (1938). However, most of the cases before the courts have involved indemnity policies, *i.e.,* liability contracts made for the sole benefit of the assured. *See, e.g.,* Allen v. Aetna Life Ins. Co., 145 F. 881 (3d Cir. 1906); Shea v. United States Fidelity & Guar. Co., 98 Conn. 453, 120 A. 286 (1923); Connolly v. Bolster, 187 Mass. 266, 72 N.E. 981 (1905).

7. New Amsterdam Cas. Co. v. Jones, 135 F.2d 191 (6th Cir. 1943) (applying Michigan law); Slavens v. Standard Accident Ins. Co., 27 F.2d 859 (9th Cir. 1928) (applying Montana law); Gothberg v. Nemerovski, 58 Ill. App. 2d 372, 208 N.E.2d 12 (1965); American Auto Ins. Co. v. Struwe, 218 S.W. 534 (Tex. 1920).

8. Ohio Casualty Ins. Co. v. Beckworth, 74 F.2d 75 (5th Cir. 1934).

9. *See, e.g.,* Davison v. Maryland Cas. Co., 197 Mass. 167, 83 N.E. 407 (1908); Connolly v. Bolster, 187 Mass. 266, 72 N.E. 981 (1905). Under such policies, injured third parties who were awarded judgments against insolvent insureds could not recover from the insurer because the condition precedent to insurer's liability, loss paid by insured, had not been met. Thatcher v. Aetna Accident and Liab. Co., 287 F. 484 (8th Cir. 1923); Allen v. Aetna Life Ins. Co., 145 F. 881 (3d Cir. 1906); Bain v. Atkins, 181 Mass. 240, 63 N.E. 414 (1902); Comment, 13 LA. L. REV. 495, 496–97 (1953). In the face of these inequities many states, recognizing the social utility of direct suit against insurance companies as a means of distributing the burden of caring for injured parties, enacted remedial legislation making insurers liable in spite of assured's insolvency and allowing injured parties to sue insurer directly after obtaining judgment against insured. *See, e.g.,* ARK. STAT. ANN. §§ 66–526, 66–527 (1947); CAL. INS. CODE § 11580 (West 1955); LA. ACT. 253 of 1918; MASS.

company's liability on ascertainment of the insured's obligation[10] have been held valid and enforceable.[11] Some states have adopted direct action statutes, [12] thereby allowing injured third parties a right of direct suit against the insurer. The purpose of these statutes was to reduce the occurrence of piecemeal litigation by allowing disclosure of insurance company interests in suits by injured parties against insureds. However, no court has allowed direct suit absent such a statute.[13]

In the instant case the Florida supreme court has become the first court to rely on a third party beneficiary theory to permit direct action where there is a no action clause in the insurance contract. In reaching this conclusion the court first establishes that a direct right of action accrued to the injured third party absent such a clause. The court relies heavily on the nature of automobile liability insurance and on the Florida public policy evidenced by the state's Financial Responsibility Law,[14] to show that the plaintiff was a member of the endangered public and, as such, was the intended direct beneficiary of the insurance contract. The court argues that liability contracts are entered into for the direct benefit of the public at large and therefore its injured members are the intended beneficiaries of the contract and should be allowed direct suit against both contracting parties. Both the nature of insurance contracts themselves and the functions they serve appear to substantiate the court's reasoning. When one enters an automobile liability insurance contract, he does so contemplating the possibility of injury to third parties resulting from his negligence.[15] Although it can be argued that the primary parties to the agreement enter it for the sole purpose of protecting the

GEN. LAWS ANN. Ch. 175, §§ 112, 113 (1959); N.Y. INS. LAW §§ 167-I(a), (b) (McKinney 1966); R.I. GEN. LAWS ANN. §§ 27-7-1, 27-7-2 (1956); WIS. STAT. ANN. §§ 85.93, 260.11 (1957). There were many more such remedial statutes. *Cf.* Comment, 9 OREGON L. REV. 57 (1930); Note, 46 HARV. L. REV. 1325 (1933); Note, 15 IOWA L. REV. 73 (1930). Such statutes were held constitutional in Merchants Mut. Auto. Liab. Ins. Co. v. Smart, 267 U.S. 126 (1925).

10. *See* Faude, *The New Standard Automobile Policy,* 1955 INS. L.J. 647; C.C.H. Auto. L. Rep. ¶ 2370, at 2035.

11. *See, e.g.,* Michel v. Fire & Cas. Co., 82 F.2d 583 (5th Cir. 1936); Government Personnel Auto. Ass'n v. Haag, 131 S.W.2d 978 (Tex. Civ. App. 1939).

12. Under such statutes injured parties may sue insurers directly in spite of a no action clause in the contract. Arkansas permits original suit against insurers of charities which would not be otherwise liable. ARK. STAT. ANN. § 66-517 (Supp. 1959). Louisiana permits the direct action against all liability insurers. LA. REV. STAT. ANN. § 22:655 (1959). The Rhode Island statute permits direct suit on all liability policies written locally. R.I. GEN. LAWS ANN. § 27-7-2 (1956); Riding v. Travelers' Ins. Co., 48 R.I. 433, 138 A. 186 (1927). The Wisconsin statute is similar to that of Louisiana. WIS. STAT. §§ 204.30(1), 260.11(1) (1959).

13. Other states, having instituted compulsory insurance for common carriers, judicially sanction such direct action on the theory that insurance is for the benefit of the public and the compulsory insurance rules evidence a legislative design to confer the right on injured persons. *See, e.g.,* Jones v. Thunderbird Transp. Co., 178 F. Supp. 9 (D. Kan. 1959); James v. Young, 77 N.D. 451, 43 N.W.2d 692 (1950); Enders v. Longmire, 179 Okla. 633, 67 P.2d 12 (1937). However, this is as far as the judiciary has gone along this line.

14. 13 FLA. STAT. ANN. § 324 (1968).

15. Gothberg v. Nemerovski, 58 Ill. App. 2d 372, 208 N.E.2d 12 (1965); Simmon v. Iowa Mut. Cas. Co., 3 Ill. 2d 318, 121 N.E.2d 509 (1954); American Auto. Ins. Co. v. Struwe, 218 S.W. 534 (Tex. 1920).

insured against liability for his own wrongdoing,[16] the fact that the parties contemplate an accident indicates that injured third parties possess more than an incidental interest in the contract.[17] The high number of suits involving automobile liability insurance[18] is a further illustration of the importance to the public of liability insurance. Indeed, the courts have recognized that "[m]any persons injured and disabled from automobile accidents would become public charges . . ."[19] if not for liability insurance.[20] Thus, since it appears that such contracts are at least partially for the direct benefit of the public and can no longer be considered merely the private contract of two parties, there appears to be no valid reason to consider injured third parties as mere incidental beneficiaries to the insurance contract.

The public nature of automobile liability insurance has led Florida and other states to adopt various public policies for the purpose of providing security for persons injured in automobile accidents.[21] Ready evidence of this policy in Florida is available in the preamble to the state's Financial Responsibility Law:

> It is the intent of this chapter to . . . provide financial security by such owners and operators whose responsibility it is to recompense others for injury to person or property caused by the operation of a motor vehicle. . . .[22]

The statute implements this public policy by requiring proof of ability to pay future obligations, defining minimum required insurance, and supplying required provisions for automobile liability insurance contracts.[23] This enactment would seem to implicitly recognize the public nature of automobile liability insurance and indicate an intent that injured parties be able to recover through a direct suit against the insurer.

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16. Goodwillie v. London Guar. & Accident Co., 108 Wis. 207, 84 N.W. 164 (1900); Appleman, *supra* note 5.

17. Gothberg v. Nemerovski, 58 Ill. App. 2d 372, 208 N.E.2d 12 (1965); Simmon v. Iowa Mut. Cas. Co., 3 Ill. 2d 318, 121 N.E.2d 509 (1954).

18. Appleman, *supra* note 5, at 75; Sinha, *The Problem of Application of the Fault Principle to Automobile Accidents,* 14 VILL. L. REV. 386, 402–03 (1969). Eighty-five percent of American automobile owners carry liability insurance. CONARD, MORGAN, PRATT, VOLTZ & BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 90 (1964).

19. Simmon v. Iowa Mut. Cas. Co., 3 Ill. 2d 318, 121 N.E.2d 509, 511 (1954).

20. Studies have shown that a high percentage of victims relying on uninsured operators for recovery receive no compensation; whereas from 80 to 85 percent of those dependant on insured motorists for compensation receive some recovery. COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, REPORT TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES 204 (1932); James & Law, *Compensation for Auto Accident Victims: A Story of Too Little Too Late,* 26 CONN. B.J. 70, 75 (1952).

21. Almost all states have enacted compulsory insurance laws regarding commercial vehicles. *E.g.,* MICH. STAT. ANN. § 22.574 (1937); *See* Brownfield, *Compulsory Liability Insurance for Commercial Motor Vehicles,* 3 LAW & CONTEMP. PROB. 571 (1936). Most states have adopted financial responsibility legislation. *E.g.,* 13 FLA. STAT. ANN. § 324 (1968); *See* Braun, *The Financial Responsibility Law,* 3 LAW & CONTEMP. PROB. 505 (1936). Other states have statutes providing for compulsory uninsured motorist coverage. *E.g.,* N.H. REV. STAT. ANN. § 268:15 (1957); VA. CODE ANN. § 38.1–381 (Supp. 1968).

22. 13 FLA. STAT. ANN. § 324.011 (1968); Comment, *Substantive Due Process in Florida,* 21 U. MIAMI L. REV. 99, 124 (1966).

23. 13 FLA. STAT. ANN. §§ 324.011, 324.021, 324.051 (1968).

Furthermore, denial of direct action tends to produce results which appear repugnant to this statutory intent. The resultant delay in recovery may cause increased financial difficulties to the injured party because of discontinued income and unpaid medical expenses,[24] or it may force him to delay in obtaining proper medical attention.[25] Likewise, the victim may be forced to accept a quick, inadequate legal settlement with the insurer in order to avoid the financial pressure and the anxiety of further litigation.[26] Thus, the policy of securing recompense for injured parties would appear to be more adequately implemented by allowing them to sue the insurer directly.

The principle argument against giving effect to the legislative intent and for denying protection to the injured third party is that knowledge regarding the tortfeasors' insurance coverage will cause juries to grant more and larger judgments to injured parties.[27] It is contended that juries will unfairly evaluate testimony if they know that defendant is an affluent insurance company, rather than a person of meager means.[28] Although this argument has been accepted by a majority of jurisdictions,[29] close analysis indicates that it is not a valid reason for denying direct action. The prejudice allegedly engendered against an insurer as a result of the jury's knowledge of insurance coverage would appear to be minimal since modern jurors are familiar with automobile liability insurance[30] and probably assume that an insurance company is the ultimate defendant even though its role is anonymous.[31] Similarly, if such prejudice exists, it appears that it would not be increased by permitting direct suit, since coverage is often revealed at trial in order to

24. Sinha, *supra* note 18, at 408.

25. *See* CONARD, MORGAN, PRATT, VOLTZ & BOMBAUGH, *supra* note 18, at 221; Conard & Jacobs, *New Hope for Consensus in the Automobile Injury Impasse*, 52 A.B.A.J. 533, 537 (1966); Franklin, Chanin & Mark, *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 3 (1961); McNiece & Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U.L. REV. 585, 590 (1952); Sinha, *supra* note 18, at 408 n.162.

26. Ehrenzweig, *"Full-Aid" Insurance for the Traffic Victim — A Voluntary Compensation Plan*, 43 CALIF. L. REV. 1, 7–8 (1955); Franklin, Chanin & Mark, *supra* note 25, at 3; McNiece & Thornton, *supra* note 25, at 590; Sinha, *supra* note 18, at 408 n.162.

27. *See generally* 8 J.A. APPLEMAN & J. APPLEMAN, *supra* note 3, § 4861, at 294–95; Comment, *Direct Action Statutes: Their Operational and Conflict-of-Law Problems*, 74 HARV. L. REV. 357, 358 (1960).

28. Appleman, *supra* note 5, at 81; Note, *The Liability Insurer as a Real Party in Interest*, 41 MINN. L. REV. 784, 788 (1957). *See, e.g.*, Morton v. Maryland Cas. Co., 1 App. Div. 2d 116, 123–27, 148 N.Y.S.2d 524, 530–33 (1955); Simpson v. Foundation Co., 210 N.Y. 479, 95 N.E. 10 (1911).

29. *See, e.g.*, Miami Jockey Club v. Union Assur. Society, 12 F. Supp. 657 (S.D. Fla. 1935), *aff'd*, 82 F.2d 588 (5th Cir. 1936); Smith Stage v. Eckert, 21 Ariz. 28, 184 P. 1001 (1919); Rodzborski v. American Sugar Ref. Co., 210 N.Y. 262, 104 N.E. 616 (1914); Cosselman v. Dunfee, 59 App. Div. 467, 69 N.Y.S. 271 (1901), *aff'd*, 172 N.Y. 507, 65 N.E. 494 (1902); Conwell v. Hays, 103 W. Va. 69, 136 S.E. 604 (1927). Some states have an express legislative basis for excluding evidence of insurance. *E.g.*, MICH. STAT. ANN. § 24.13030 (1957); N.D. REV. CODE §§ 39–1611, 49–1833 (Supp. 1957).

30. Comment, *Insurance as Evidence*, 16 SYRACUSE L. REV. 92 (1964). *See* Pinkerton v. Oak Park Nat'l Bank, 16 Ill. App. 2d 91, 147 N.E.2d 390 (1958).

31. Note, 41 MINN. L. REV. 784, 790 (1957). *See* Lassiter, *Direct Actions . . . Against the Insurer*, 1949 INS. L.J. 411, 416.

establish issues other than liability.[32] Insurance companies seem to implicitly admit this lack of prejudice when they reveal their interests to potential jurors through extra-judicial campaigns designed to influence the populace to consider the impact that high damage awards have on premiums.[33] Moreover, studies have indicated that the effect of an unequivocal statement to the jury concerning insurance may tend to lessen unconscionably low damage awards with no prejudice to the insurer.[34] At least one state which statutorily allows direct action against insurance companies has found that judgments are not significantly higher than those entered prior to the statutes.[35] Thus, it appears that direct action against an insurer is not as prejudicial as contended and that the intent of the legislature, the intent of the parties, and possibly even the interests of the insurer are best effectuated by allowing the injured third party to sue the insurance company directly.

Having concluded that an injured plaintiff has a right of direct action against the insurer, the *Shingleton* court was then confronted with the question of whether this right could be deferred by a no action clause. It decides this issue in the negative, resting its conclusion on public policy, Florida procedural rules, and its construction of the "open courts" clause of the Florida constitution.[36]

The arguments on the public policy grounds are virtually identical to those used by the court in justifying the use of a third party beneficiary theory to permit direct suit.[37] Additionally, however, the court emphasizes that situations arise in which plaintiff's recovery would be delayed due to disputes between the insured and the insurer — *i.e.*, where the insurer seeks a declaratory judgment discharging his liability on the policy because of lack of proper notice[38] — and that these delays would tend to undercut the primary public policy of securing recompense for injured parties.[39] Similarly, it would also appear that by issuing an insurance contract for the direct benefit of the public, the insurer

32. Comment, *supra* note 27, at 366–67. *See, e.g.*, General Accident & Fire & Life Assur. Corp. v. Ramos, 34 Misc. 2d 450, 225 N.Y.S.2d 991 (Sup. Ct. 1962). Levatino v. Rochester Savings Bank, 38 N.Y.S.2d 182 (Sup. Ct. 1942); Rashall v. Morra, 250 App. Div. 474, 294 N.Y.S. 630 (1937); McGovern v. Oliver, 177 App. Div. 167, 163 N.Y.S. 275 (1917).

33. Comment, *supra* note 30, at 100. *See* Causey v. Cornelius, 164 Cal. App. 2d 269, 330 P.2d 468 (Ct. App. 1958); Hendrix v. Consolidated Van Lines, 176 Kan. 101, 269 P.2d 435 (1954).

34. Kalven, *The Jury, the Law, and the Personal Injury Award*, 19 OHIO ST. L.J. 158, 171–72 (1958).

35. Wisconsin has permitted direct action. *See* note 12 *supra*. Verdicts there compared favorably with those in surrounding states not permitting such action. *See* 8 APPLEMAN § 4861, *supra* note 3, at 294 n.18.

36. 25 FLA. STAT. ANN. CONST., DECLARATION OF RIGHTS § 4 (1968) provides:

> *Courts to be open;* remedies guaranteed. Section 4. *All courts in this state shall be open,* so that every person for any injury done him in his lands, goods, person, or reputation shall have remedy, by due course of law, and *right and justice shall be administered without . . . delay.*

(emphasis added.)

37. *See* pp. 260–61 *supra*.

38. *See, e.g.*, Bergh v. Canadian Universal Ins. Co., 216 So. 2d 436 (Fla. 1968).

39. Rhame v. National Grange Mut. Ins. Co., 238 S.C. 539, 121 S.E.2d 94 (1961).

has implicitly consented to suit by injured members thereof. Therefore, he should not be allowed to give such consent in one breath and deny it in the next.[40] Consequently, the court's public policy rationale for direct suit would seem to mandate a conclusion that the no action clause is unenforceable.

The court's further argument that allowing direct action by the injured party in spite of the contractual no action clause serves to implement Florida's procedural rules can be supported by reference to the applicable rules. The joinder rule permits plaintiff to join as a defendant anyone possessing adverse interests.[41] In the instant case there can be no doubt that the insurer's interests were adverse to plaintiff's, and therefore, on its face, the rule would appear to demand direct action. Moreover, since application of this rule must be in compliance with the mandate to construe the rules "to secure the just, speedy, and inexpensive determination of every action . . . ,"[42] it is obvious that allowing the no action clause to defer suit would be antagonistic to this mandate in light of the delay and costs involved in liability insurance suits.[43] Hence, the criteria of the civil rules would appear to be best met when direct suit is allowed.

Additional support for the above conclusion may be found in the fact that dual suits should be avoided if a single suit will assure a fair trial for all parties.[44] But where an insurance company is involved, it can be argued that a single suit will not grant the insurer a fair trial because he may be forced to take contradictory positions where questions as to his liability under the contract arise, *i.e.*, requiring him to assert policy defenses against the insured while fulfilling his duty to defend for him.[45] Although the court in the instant case sought to overcome this argument by providing for severance where such questions would cloud the issues regarding insured's liability to plaintiff,[46] situations may arise where the defense on the insurance contract is not apparent to the insurer at the outset of trial, *i.e.*, where the defense is based on insured's failure to fulfill his obligation to cooperate with the insurer during litigation.[47]

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40. This is the rationale used in the states with direct action statutes. *See, e.g.*, Allstate Ins. Co. v. Charneski, 286 F.2d 238 (7th Cir. 1960); Buxton v. Midwestern Ins. Co., 102 F. Supp. 500 (D.C. La. 1952); Riding v. Travelers' Ins. Co., 48 R.I. 433, 138 A. 186 (1927); Lang v. Baumann, 213 Wis. 258, 251 N.W. 461 (1934).

41. FLA. R. CIV. P. 1-210(a) (1968).

42. FLA. R. CIV. P. 1.010 (1968); *See* Arnow & Brown, *Florida's 1954 Rules of Civil Procedure*, 7 U. FLA. L. REV. 125 (1954); Wiggenton, *New Florida Common Law Rules*, 3 U. FLA. L. REV. 1 (1950).

43. *See, e.g.*, Sellers v. United States Fidelity & Guar. Co., 185 So. 2d 689 (Fla. 1966).

44. *See, e.g.*, United Tile Co. v. Marks Const. Co., 215 So. 2d 147 (La. 1968); Olivedell Planting Co., Inc. v. Town of Lake Providence, 209 La. 898, 25 So. 2d 735 (1946); Barton v. Farmer's State Bank, 276 S.W. 177 (Tex. 1925); American Automobile Ins. Co. v. Struwe, 218 S.W. 534 (Tex. 1920); National Bank of Jefferson v. Texas Investment Co., 74 Tex. 421, 12 S.W. 101 (1899).

45. *See, e.g.*, Bergstein v. Popkin, 202 Wis. 625, 233 N.W. 572, 574 (1930).

46. Shingleton v. Bussey, 223 So. 2d 713, 720 (Fla. 1969).

47. C.C.H. Auto. L. Rep. ¶ 2360, at 2035.

However, there appears to be nothing to stop severance once the insurer discovers that this defense may be available to him.[48] And even if this problem could not be resolved, the fairness of the trial would appear to be even more questionable if direct action were not allowed, since the deferment of the injured person's recovery because of provisions in a contract to which he was not a party would create a much greater injustice.[49]

Although Florida's public policy and procedural rules would seem to provide sufficient reason for not giving effect to no action clauses, the court finds further justification for its decision under the due process clause of the state constitution, which requires that right and justice be administered without delay.[50] Many situations arise where delay will occur if full effect is given to the no action clause. Requiring two suits forces plaintiff to wait until the conclusion of the second action for payment. Likewise, the insurer is required to await the conclusion of the suit between the injured party and the insured before asserting insurance contract defenses. His right to justice without delay would also appear to be violated for a similar period. Thus, allowing the no action clause to defer suit against the insurer and thereby requiring two suits would appear to be repugnant to this constitutional mandate.

Although the foregoing argument appears persuasive on its face, it is against the weight of authority. There are thirty-five states which have constitutional declarations similar to the one in question. Thirty-one of these permit no action clauses to defer direct suit against insurer,[51] and the other four have direct action statutes[52] on which they base their decision. Thus, the Florida court has propounded a rationale which even direct action states have been loath to expound, and it appears that *Shingleton* would probably have been a less controversial decision had the court relied exclusively on the valid public and procedural policy arguments.

Having taken the position that no action clauses violate the due process clause, the court has left itself open to constitutional arguments

48. This requires insurer to be alert for this defense so that it does not go undiscovered until after trial. But even if it should go undiscovered and, therefore, be subsequently unavailable, the apparent injustice to plaintiff resulting from delayed recovery seems to require that insurer take other measures to protect its interests. *See* p. 265 *infra.*

49. In construing the state's direct action statutes, Louisiana courts have held that clauses making notice to the insurer a condition precedent to his liability are inapplicable to injured third parties, and that third parties' rights should not be defeasible by insured's violation of the policy. West v. Monroe Bakery, 217 La. 189, 46 So. 2d 122 (1950); Bougon v. Volunteers of America, 151 So. 797 (La. App. 1934); Edwards v. Fidelity & Cas. Co., 11 La. App. 176, 123 So. 162 (1929). Also, it has been noted that an injured party could not be required to comply with a provision that assured render co-operation and assistance to the insurer in conducting legal proceedings. *Id.* at 801.

50. 25 FLA. STAT. ANN. CONST., DECLARATION OF RIGHTS § 4 (1968).

51. *See, e.g.,* Schachtrup v. Union Auto. Indem. Ass'n, 303 Ill. App. 445, 25 N.E.2d 534 (1940); Haines v. Harrison, 357 Mo. 956, 211 S.W.2d 489 (1948); Johnson v. McGilchrist, 174 Wash. 178, 24 P.2d 607 (1933).

52. Arkansas, Louisiana, Rhode Island, and Wisconsin. *See* note 12 *supra.*

regarding obligations of contracts. It can be argued that the allowance of direct action suits against the insurer in the face of a no action clause impairs the obligations of contract in violation of federal and state constitutional rights.[53] The contention would be that such clauses secure valuable rights for the insurance company[54] and that a balance struck in favor of direct action is unreasonable because it infringes upon those rights. However, when weighed against the state's interest in its established public policy of providing remedy and recompense for injured persons, such rights would not seem to dictate against direct action. It is on such a balance that direct action statutes have been held constitutional as not imposing a substantial impairment of contract.[55] Furthermore, the only apparent contract right or interest secured by such a clause is that of not having the fact of insurance introduced into the case, and as has already been noted, the preservation of such an interest is not substantial reason to deny an injured third party the ordinary rights of litigants.[56]

Thus, although it appears that the court's reliance on the state's due process clause is against the weight of authority, other justifications for direct suit would seem to support the instant decision. Moreover, it is difficult to see how allowing direct action places an unusual burden on the insurer, since he has the ability to predict the risks to be encountered and the freedom to raise the selling price of his product should his operating costs increase.[57] Consequently, should this case be followed by states having public policies similar to those enunciated in the instant case it should result in a more just and speedy determination of automobile accident cases insuring financial security for injured third parties without judicial or economic prejudice to insurance companies.

Thomas R. Hendershot

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53. *See, e.g.,* Bish v. Employers' Liab. Assur. Corp., 102 F. Supp. 343 (W.D. La. 1952), *aff'd per curiam,* 202 F.2d 954 (5th Cir. 1953), *rev'd on rehearing per curiam,* 217 F.2d 953 (5th Cir. 1955); Comment, *supra* note 9, at 507.

54. Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Bank of Minden v. Clement, 256 U.S. 126 (1921); Pawlowski v. Eskofski, 209 Wis. 189, 244 N.W. 611 (1932).

55. Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954); Michael v. St. Paul Mercury Indem. Co., 92 F. Supp. 140 (W.D. Ark. 1950); Talbot v. Allstate Ins. Co., 76 So. 2d 76 (La. App. 1954). Also, it has been held that giving such statutes retroactive effect would not impair any of insurer's substantial rights. Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co., 18 La. App. 725, 138 So. 183 (1931).

56. *See* p. 261 *supra.*

57. Bougon v. Volunteers of America, 151 So. 797, 802 (La. App. 1934) (dictum).

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NEGOTIABLE INSTRUMENTS — FINAL PAYMENT — PAYOR BANK'S ACCEPTANCE OF CHECK FROM PAYEE DEPOSITOR PARTLY FOR CASH AND BALANCE FOR CREDIT CONSTITUTES FINAL PAYMENT.

Kirby v. First & Merchants Nat'l Bank (Va. 1969)

Defendant payee[1] presented a check for $2,500 to plaintiff depositary[2]–payor bank[3] and received $200 of the check in cash with the $2,300 balance credited to her account. Upon subsequent dishonor of the check for insufficient funds, the bank charged back[4] to defendant's account and commenced suit for the overdraft[5] created by the charge. The trial court granted judgment for the bank, but the Supreme Court of Appeals of Virginia reversed, *holding* that the bank had cashed the check upon presentment, thus constituting final payment under the Uniform Commercial Code and preventing any right of charge back. *Kirby v. First & Merchants Nat'l Bank,* ___ Va. ___, 168 S.E.2d 273 (1969).

The concept of final payment under Article 4 of the Uniform Commercial Code is extremely important since it is the starting point for determining the rights and obligations of numerous parties in relation to an item[6] — including the determination of when a payor bank becomes liable for the amount of the item.[7] Prior to adoption of the Code, the traditional rule for "on us" items[8] was that final payment occurred either when the bank gave cash to the holder or credited his account.[9] As check volume increased, however, there became a need to balance the bank's desire for time to process the check with the payee's need

1. The "payee" of a check is the individual who is intended by the drawer of the check to be the recipient of the money. Schweitzer v. Bank of America Nat'l Trust & Savings Ass'n, 42 Cal. App. 2d 536, 542, 109 P.2d 441, 445 (1941).

2. UNIFORM COMMERCIAL CODE § 4–105(a) defines "depositary bank" as "the first bank to which an item is transferred for collection even though it is also the payor bank."

3. "Payor bank" is defined in UNIFORM COMMERCIAL CODE § 4–105(b) as "a bank by which an item is payable as drawn or accepted." In the instant case, the payor bank also happened to be the depositary bank.

4. "Charge-back," although not defined in the Code, is a debit to a depositor's account that offsets a previous credit that was not collected. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 377 (P. Gove ed. 1965).

5. Subsequent to the deposit and prior to suit, the defendant made withdrawals from his account, lowering the balance below $2,500.

6. UNIFORM COMMERCIAL CODE § 4–104(1)(g) defines "item" as "any instrument for the payment of money even though it is not negotiable but does not include money."

7. UNIFORM COMMERCIAL CODE § 4–213(1). Other examples of the importance of "final payment" are: the drawer of the instrument is relieved of liability to the holder upon final payment; the owner of an item will have a preferred claim against the payor bank for the amount of an item once final payment has occurred; and final payment is one of the occurrences which can prevent notice, stop-order, legal process, and set-off (the "four legals") from being effective to prevent actual payment of the item.

8. Items presented directly to the payor bank either for deposit or for cash.

9. 1 PATON'S DIGEST 1066–68 (1940).

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for speed in payment.[10] The draftsmen of the Code achieved this balance by adopting the principle of "settle now, investigate later."[11] This means that when a check is presented to a payor bank for deposit, provisional credit is given[12] and the bank is afforded additional time in which to process the check and charge back[13] its customer's account if the check is subsequently dishonored. However, the bank's right of charge back must be exercised prior to its "midnight deadline"[14] and before it has made final payment.[15] Most of the post–Code litigation

10. Leary, *Article 4: Bank Deposits and Collections Under The Uniform Commercial Code*, 15 U. PITT. L. REV. 565, 571 (1954). For a good analysis of the development and drafting of Article 4 of the Code see Malcolm, *Article 4 — A Battle With Complexity*, 1952 WIS. L. REV. 265.

11. Leary, *Check Handling Under Article Four of the Uniform Commercial Code*, 49 MARQ. L. REV. 331, 335 (1965). Mr. Leary was formerly the Reporter for Article 4 of the Code; however, he did not prepare the final draft.

12. UNIFORM COMMERCIAL CODE § 4–201(1) states:

> Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting bank for an item is or becomes final (subsection (3) of section 4–211 and sections 4–212 and 4–213) the bank is an agent or sub-agent of the owner of the item and any settlement given for the item is provisional.

To "settle," according to UNIFORM COMMERCIAL CODE § 4–104(j) is:

> [T]o pay in cash, by clearing house settlement, in a charge or credit or by remittance, or otherwise as instructed. A settlement may be either provisional or final.

13. UNIFORM COMMERCIAL CODE § 4–212(3) provides:

> A depositary bank which is also the payor bank may charge back the amount of an item to its customer's account or obtain refund in accordance with the section governing return of an item received by a payor bank for credit on its books (section 4–301).

14. UNIFORM COMMERCIAL CODE § 4–301 provides in pertinent part:

> (1) Where an authorized settlement for a demand item (other than a documentary draft) received by a payor bank otherwise than for immediate payment over the counter has been made before midnight of the banking day of receipt the payor bank may revoke the settlement and recover any payment if before it has made final payment (subsection (1) of section 4–213) and before its midnight deadline it
>
> (a) returns the item; or
>
> (b) sends written notice of dishonor or nonpayment if the item is held for protest or is otherwise unavailable for return.
>
> (2) If a demand item is received by a payor bank for credit on its books it may return such item or send notice of dishonor and may revoke any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified in the preceding subsection.

Comment 2 to § 4–301 indicates that "[t]he time limits for action imposed by subsection (1) are adopted by subsection (2) for cases where the payor bank is also the depositary bank, but in this case the requirement of a settlement on the day of receipt is omitted." Section 4–104(1)(h) of the Code defines "midnight deadline" with respect to a bank as "midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later."

15. UNIFORM COMMERCIAL CODE § 4–213(1), in defining the time of final payment, states:

> An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:
>
> (a) paid the item in cash; or
>
> (b) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing housing rule or agreement; or
>
> (c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or
>
> (d) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing house rule or agreement.
>
> Upon a final payment under subparagraphs (b), (c), or (d), the payor bank shall be accountable for the amount of the item.

with respect to final payment[16] has involved the process of posting,[17] which is only one of several determinants of final payment.[18] There has been little, if any, litigation as to when a bank has "paid the item in cash," another determinant of final payment under the Code.

The issue facing the Virginia court of appeals in *Kirby* was whether or not the bank had made final payment and was thus precluded from exercising its right of charge back. The bank contended that the credit given to the payee was provisional pending final settlement. In addition, it argued that the payee should be liable as an endorser under section 3–414(1),[19] and that even if the check was paid in cash, the settlement was provisional under the terms of the deposit contract.[20]

With respect to the bank's first argument, *i.e.*, that only provisional paper credit had been given, the court held that the bank had "paid the item in cash" within the meaning of section 4–213(1)(a).[21] It based this decision on the fact that the bank paid $200 of the check in cash; that the bank vice president testified that they "cashed the check"; that the "$2,300" was written opposite "currency" on the deposit slip; that the words "cash for Dep." were written on the back of the check; and that the bank's ledger indicated a credit of $2,300 to the payee's account rather than a credit of $2,500 and a debit of $200. The court further held that an endorser contracts to pay an instrument only if it is dishonored and since the bank had in fact "paid the item in cash" and had

16. Gibbs v. Gerberich, 1 Ohio App. 2d 93, 203 N.E.2d 851 (1964); West Side Bank v. Marine Nat'l Exch. Bank, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

17. UNIFORM COMMERCIAL CODE § 4–109 states:

The "process of posting" means the usual procedure followed by a payor bank in determining to pay an item and in recording the payment including one or more of the following or other steps as determined by the bank:

(a) verification of any signature;
(b) ascertaining that sufficient funds are available;
(c) affixing a "paid" or other stamp;
(d) entering a charge or entry to a customer's account;
(e) correcting or reversing an entry or erroneous action with respect to the item.

For a general discussion of the process of posting see 9 B.C. IND. & COM. L. REV. 957 (1968).

18. *See* note 15 *supra*.

19. UNIFORM COMMERCIAL CODE § 3–414(1) states:

Unless the endorsement otherwise specifies (as by such words as "without recourse") every endorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his endorsement to the holder or to any subsequent endorser who takes it up, even though the endorser who takes it up was not obligated to do so.

20. The depositor's contract provided in pertinent part:

Items received for deposit or collection are accepted on the following terms and conditions. This bank acts only as depositor's collecting agent and assumes no responsibility beyond its exercise of due care. All items are credited subject to final payment and to receipt of proceeds of final payment in cash or solvent credits by this bank at its own office. . . . This bank may charge back, at any time prior to midnight on its business day next following the day of receipt, any item drawn on this bank which is ascertained to be drawn against insufficient funds or otherwise not good or payable.

210 Va. 88, ..., 168 S.E.2d 273, 277 n.6 (1969).

21. *Id.* at ....., 168 S.E.2d at 276.

not dishonored it, the payee could not be liable as an endorser under section 3-414(1) of the Code.[22] With respect to the deposit contract issue, the court found that it in no way changed the requirements of the Code[23] since the contract clearly recognized that settlement for an item is provisional only until the item is finally paid. The court also stated that even if the bank's settlement had been provisional, it lost its right of charge back,[24] since it neither returned the item nor sent written notice prior to its midnight deadline, in accordance with section 4-301.[25]

The dissent, on the other hand, felt that the settlement in question was provisional[26] and that the bank should have had the right of charge back since it gave oral notice of dishonor to its customer and justifiably relied on the customer's promise to come in and cover the check.[27] Classifying this as a normal and customary banking transaction, the dissent explained that the same bank official that testified for the majority also testified that the bank "received it [the check] for deposit," and the fact that the deposit was made against a check was clearly evidenced on the face of the deposit slip. Thus, the dissent concluded that there was nothing in the record to support the proposition that the plaintiff had cashed the check.[28]

The Code does not define the meaning of the words "paid the item in cash," but comment 3 to section 4-213 indicates that the Code was designed to continue the traditional rule of payment in cash. As explanation for this concept, comment 3 cites the reader to Paton's Digest where the following rule is stated: "A check presented over the counter by the holder is paid *when money* or its equivalent *is given to the holder*."[29] "Or its equivalent" is later defined as a bank draft[30] or credit to a customer's passbook.[31] However, since it was the express purpose of the authors of the Code to alter only the rule regarding passbook credit as final payment,[32] comment 3 seems to indicate that the Code is designed to continue the rule that payment in cash or payment by bank draft is final payment. Under this view, the defendant in *Kirby* would have had to receive the full $2,500 in cash or a bank draft

22. *Id.* at ____, 168 S.E.2d at 276. The court went on to say that if the bank dishonored the check after it made final payment, it could only sue defendants for breach of warranty and since the customer's warranties as set forth in sections 3-417(1) and 4-207(1) do not include a warranty that the drawer of the check has sufficient funds, the bank would have no cause of action.

23. *Id.* at ____, 168 S.E.2d at 277.

24. *Id.* at ____, 168 S.E.2d at 277.

25. *See* note 14 *supra*.

26. Kirby v. First & Merchants Nat'l Bank, 218 Va. 88, ____, 168 S.E.2d 273, 278 (1969).

27. *Id.* at ____, 168 S.E.2d at 279.

28. *Id.* at ____, 168 S.E.2d at 278.

29. 1 PATON'S DIGEST 1066 (1940) (emphasis added).

30. *Id.* at 1068.

31. *Id.* at 1067.

32. Leary, *supra* note 11, at 334-35.

before the item could be said to have been "paid in cash."[33] The defendant, however, never alleged that she received the full amount in her hands, but the court held that certain documentary evidence coupled with partial payment was sufficient to establish that the bank cashed the check and made final payment. This appears to be a misreading of both the intent and purpose of the Code.

By finding that certain documentary evidence coupled with a partial payment in cash is sufficient to establish that a payor bank has "paid the item in cash," the *Kirby* court has held that a bank can pay a check in cash without ever delivering the full amount of currency to the payee. The ramifications of this decision for Virginia depositors and banks are significant. A payee–depositor may avoid the bank's right of charge back under either the Uniform Commercial Code or the depositor agreement by demanding part payment in cash and by entering the amount of the check opposite the "currency" section of the deposit slip. The banks, on the other hand, to avoid the consequences of final payment would have to caution their tellers to be overly scrupulous in examining deposit slips for proper entries prior to part payment of a check. In addition, the banks would be forced to make three entries in their ledger (*e.g.*, the amount of the check, the amount given in cash, and the amount credited to the account) and refrain from stamping "cash for deposit" on the back of the check.

In light of the decision in the instant case, it appears that the best way for a bank to handle a part cash–part credit transaction upon presentment of a check is to have the customer deposit the check in his account and then immediately either write a check against the deposit or make a withdrawal. This immediate withdrawal would not destroy the bank's agency status[34] but it would inconvenience the customer by making him fill out one more piece of paper and pay the additional charge for processing the check. Although such a procedure might initially cause some displeasure among depositors, it would have the overall effect of permitting the customer to draw against the deposited check while still retaining the bank's right of charge back.

However, even if the *Kirby* court had not found that final payment had occurred, it still could have held the bank accountable for the item since the bank did not give notice of dishonor within the time limits prescribed.[35] Section 4–301 clearly indicates that a payor may revoke its settlement and recover any payment if before the "midnight deadline"[36] it

33. Also, it should be noted that the phrase is "paid *the item* in cash," not paid part of the item in cash and credited the balance to depositor's account.

34. UNIFORM COMMERCIAL CODE § 4–201(1), after describing the bank's agency status, states: "This provision applies . . . even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn . . . ."

35. The court could also have reasoned that the bank's actions evidenced a "contrary intent" within the meaning of section 4–201 except for the fact that the depositor's agreement deleted this phrase from its text.

36. *See* note 14 *supra*.

either "returns the item" or "sends written notice of dishonor." In the *Kirby* case it is undeniable that the bank failed to give notice of dishonor prior to its midnight deadline[37] and thus pursuant to section 4–302[38] the bank should be held accountable for the item.

In dicta, the *Kirby* court did in fact state that since the bank gave oral but not written notice of dishonor it failed to meet its obligation under section 4–301. However, a payor bank may be able to give *oral* notice of dishonor prior to its midnight deadline and fulfill its obligation under section 4–301. Although subsection 1 of section 4–301 states that in order to exercise its right of charge back a payor bank must send written notice of dishonor, subsection 3 states that:

> *Unless previous notice of dishonor has been sent* an item is dishonored at the time when for purposes of dishonor it is returned or notice sent in accordance with this section.[39]

In *Leaderbrand v. Central State Bank of Wichita,*[40] the court indicated that the first phrase of subsection 3 is a reference to section 3–508, which states that notice of dishonor may be given in any reasonable manner, whether it be oral or written.[41] Although due to the peculiarities of the case[42] the court was ultimately able to base its decision on section 3–511,[43] its position with respect to oral notice is further supported by comment 3 to section 4–301, which, in discussing the time of notice requirement of subsection 3, also makes specific reference to section 3–508. Therefore, in the interest of permitting "the continued expansion of commercial practices through custom, usage and agreement of the parties"[44] it is submitted that the position taken by the *Leaderbrand* court appears to be the more valid point of view and, consequently, oral notice of dishonor should be effective within the provisions of section 4–301.[45]

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37. The bank received the check on December 30, 1966, but did not advise payees of dishonor until January 5, 1967.

38. UNIFORM COMMERCIAL CODE § 4–302 states:

> In the absence of a valid defense . . . if an item is presented on and received by a payor bank the bank is accountable for the amount of (a) a demand item (where the bank) does not pay or return the item or send notice of dishonor until after its midnight deadline.

39. UNIFORM COMMERCIAL CODE § 4–301(3) (emphasis added).

40. 202 Kan. 450, 450 P.2d 1 (1969).

41. UNIFORM COMMERCIAL CODE § 3–508(3) reads in pertinent part: "Notice may be given in any reasonable manner. It may be oral or written and in any terms which identify the instrument and state that it has been dishonored."

42. In *Leaderbrand* the payee personally presented a check to the payor bank for payment and on two separate occasions was orally informed that the drawer's account lacked sufficient funds. The payee then deposited the check in a collecting bank and when the payor bank failed to respond prior to its midnight deadline, sued the payor bank for the amount of the check. It is apparent from these facts that the case is squarely within UNIFORM COMMERCIAL CODE § 3–511. *See* note 43 *infra.*

43. UNIFORM COMMERCIAL CODE § 3–511(4) provides: "Where a draft has been dishonored by nonacceptance a later presentment for payment and any notice of dishonor and protest for nonpayment are excused unless in the meantime the instrument has been accepted."

44. UNIFORM COMMERCIAL CODE § 1–102(2)(b).

45. There is also the contra argument that in requiring written notice the problems of mistake and ambiguity associated with oral notice might be alleviated.

Another issue raised, but left unresolved, by the majority opinion in *Kirby* is whether or not provisions of the Code can be varied by agreement. Subsection 1 of section 4–103 states that the effect of the provisions of Article 4 may be varied by agreement, except that no agreement can disclaim a bank's responsibility or limit the measure of damages for its own lack of good faith or failure to exercise ordinary care. While "good faith" is defined in subsection 19 of section 1–201 as "honesty in fact in the conduct or transaction concerned," comment 4 to section 4–103 indicates that nowhere is the term "ordinary care" defined and that it is used in its normal tort meaning and not in any special sense relating to bank collections.[46]

Section 4–202, in discussing the time for taking action by a collecting bank, indicates in subsection 2 that a collecting bank acts "seasonably"[47] if it acts by its "midnight deadline" following receipt of the item. Subsection 2 also provides that "taking proper action within a reasonably longer time may be seasonable but the bank has the burden of so establishing." Thus, it would seem clear from section 4–202 that a collecting bank may, by agreement with its customer, extend its time for taking action, subject to the burden of establishing the agreement[48] and the fact that it is seasonable. However, part 3 of Article 4, in defining the duties of a payor bank, does not mention the term "ordinary care." It speaks merely of the bank's midnight deadline. Whether or not a payor bank can vary the time in which it must act, the practical difficulties in making the agreement binding on third parties seems to be an insurmountable barrier.[49] Nonetheless, subsection 2 of section 4–103 does provide that "Federal Reserve regulations and operating letters, clearing house rules, and the like" are effective as agreements even if specific assent is not obtained. Therefore, in this regard the conclusion seems to be that time limits applicable to a payor bank may be varied by appropriate Federal Reserve regulations, operating letters or clearing house rules, but not by the payor bank individually contracting with its own customer.[50]

In conclusion, it appears from an examination of the traditional rule of payment in cash that the *Kirby* court erred by holding that part payment plus certain documentary evidence is sufficient to establish that a payor bank has "paid the item in cash." A better approach would have

46. This has led one authority to believe that a bank many contract out of duties of diligence and reasonableness to the extent that such duties are not comprehended in the concept of "ordinary care." Leary, *supra* note 11, at 342.

47. UNIFORM COMMERCIAL CODE § 1–204(3) states that "[a]n action is taken 'seasonably' when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time."

48. The bank would have to prove that the customer's assent to the proposed collection method had been secured.

49. Leary, *supra* note 11, at 344.

50. One authority does not believe the banks and their customers will avail themselves of the privileges of subsection 4–103(1) to any great extent since the rules of Article 4 are so reasonably fair and workable that banks and depositors will be delighted to have them and will have little reason or desire to vary them by contract. Malcolm, *supra* note 10, at 278.

been to hold that the bank gave defendant provisional credit but that it failed to revoke the credit within the time limits specified and thus became accountable for the item. If this case is followed in other jurisdictions the overall affect would be to slow down banking transactions, increase the cost of doing business, and abolish a convenient banking technique relied upon by depositors. With the ever increasing number of checks in use, it is submitted that these results are undesirable to both the banking industry and the public.

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