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Attorneys—Duty of Profession To Protect Clients' Funds—Clients' Indemnity Plans

In increasing measure the legal profession has come to recognize its public responsibilities. One of these responsibilities is to protect clients from the dishonesty of lawyers. The lawyer who handles funds of a client is a fiduciary in the highest sense. Occasionally, however, an attorney misappropriates the funds of his client. The client's remedy against the lawyer is probably futile, for an embezzler will generally have no funds to cover the loss. Although misappropriation is rare[1] it receives much publicity when it does occur.[2] Embezzlement and loss with consequent publicity impair the reputation of the entire legal profession.

In dealing with the problem posed, two alternative courses of action are available. One is directed to prevention, the other to reimbursement. Three preventive factors have proven most effective. The first and most important is the personal and professional standard of honesty. The second is an office practice which removes or reduces temptations by strict adherence to the principle that a lawyer must never commingle the funds of the client with his own.[3] The third is directed to detection and punishment. A method of detection employed in British Commonwealth countries is a rigid system of auditing the accounts of lawyers.[4] This would be an effective deterrent to a potential embezzler.

1. See Smith, *The Client's Security Fund: A Debt of Honor Owed by the Profession*, 44 A.B.A.J. 125 (1958).

2. "A very shocking case of embezzlement arose within the last year when an attorney for the families of a number of persons who were killed in an airplane accident embezzled the entire proceeds of the settlement which he had negotiated on their behalf. The defendant airlines had given him a check payable to his order as attorney for all the plaintiffs and he simply pocketed the proceeds amounting to $250,000. Widows and orphans were left high and dry. This occurrence . . . was widely publicized in the newspapers . . . ." Voorhees, *Clients' Security Funds: How They Grew in 1962*, 49 A.B.A.J. 251, 253 (1963).

3. CANONS OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASSOCIATION 11, states: "Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him."

4. In England periodic auditing is required by legislation. "Every solicitor shall once in each period of twelve months . . . unless he satisfies the Council that owing to the circumstances of his case it is unnecessary so to do, deliver to the Society a certificate signed by an accountant . . . stating . . . the accountant has examined the books, accounts and documents produced to him and from the information and

> A law office needs a periodic examination of its books by a professional accountant in the same way and for the same reasons that the affairs of any other firm will require an audit when it deals with moneys or accounts belonging to the public. No honest law office would resist or resent a spot examination of its books unless, perhaps, for the reason that it had recently had an accountant's audit of its own, in which case a bar-association check would be unnecessary. An audit of all law offices might be too expensive and a few spot checks here and there should suffice to preserve rectitude in areas of the bar where it may be in jeopardy.[5]

Auditing would spur better law office management generally, a matter in which lawyers have been notoriously lax, but in which they have greatly improved in recent years.[6] As for punishment of the guilty attorney, criminal prosecution and immediate disbarment provide strong deterrents.

Despite all efforts at prevention, unfortunately, there will be some instances of embezzlement which raise the question who shall bear the loss. There is a strong movement to support a system under which the bar will bear the loss through a fund for the indemnification of clients. Such a plan has been implemented in several states[7] as well as in several members of the British Commonwealth.[8] The states which have implemented such plans have not done so by statute but by voluntary action of the bar associations. Most existing indemnity plans provide for the establishment of a fund made up of contribu-

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explanations given to him, that during said accounting period the solicitor or his firm has complied with any rules made . . . ." Solicitors Act, 1957, 5 & 6 Eliz. 2, c. 27, § 30. This act was almost certainly inspired by the organization of solicitors itself as the Law Society had earlier required such auditing. See Lund, *The Legal Profession in England and Wales*, 35 J. AM. JUD. SOC'Y 134 (1952).

5. Voorhees, *supra* note 2, at 253.

6. See generally A.B.A. COMM. ON ECONOMICS OF LAW PRACTICE, THE LAWYER'S HANDBOOK 153-224 (1962).

7. "[A]t present 16 bar associations have funds in operation—Alaska, Arizona, Colorado, Connecticut, Illinois, Indiana, Louisiana, New Hampshire, New Jersey, New Mexico, New York, Ohio, North Dakota, Pennsylvania, Vermont, and Washington. In addition, the following states are in the process of establishing funds—Iowa, Maine, Minnesota, Oregon, and South Dakota . . . . [S]everal local bar associations have also established funds, including Cleveland, Akron, Baltimore, the New York County Lawyers' Association and the Los Angeles Connty Bar Association." Committee on Clients' Security Fund, *Report*, 88 A.B.A. REP. 427 (1963). For outlines of plans in nine states, see Voorhees, *Clients' Security Fund in 1961: A Progress Report*, 47 A.B.A.J. 494, 495 (1961).

8. A clients' security fund is required by statute in England. "A fund, to be known as 'The Compensation Fund,' shall be maintained . . . . Where it is proved to the satisfaction of the Council that any person has sustained loss in consequence of dishonesty on the part of any solicitor or any clerk or servant of a solicitor in connection with that solicitor's practice as a solicitor or in connection with any trust of which that solicitor is a trustee, then . . . the Society may, if the Council think fit, make a grant to that person out of the Compensation Fund for the purpose of relieving or mitigating that loss." Solicitors Act, 1957, 5 & 6 Eliz. 2, c. 27, § 32.

tions by members of the bar association of the state.[9] The funds are administered by the bar associations which receive the claims and make payments at their discretion. Another indemnity plan adopted by the bar associations of at least two states[10] provides for annual contributions by practicing attorneys for the premium of an insurance policy under which the insurance company agrees to reimburse the bar association for payments by the bar association to the victims of defaulting attorneys. In order that the funds will not be unbearbly burdened at their inception, most plans provide that no claims will be recognized that arose prior to the inauguration of the fund.[11] Some states have set a maximum amount of reimbursement which a defrauded client may receive.[12] If, in any year, a fund is not large enough to pay all claims in full, the bar association may either make a pro rata distribution or carry the unsatisfied claims over to the next year.

Two features of a clients' indemnity plan seem desirable. First, it should provide uniform protection for clients of all attorneys practicing within the state, and second, it should provide for uniform participation by all practicing attorneys in the state. In states where the indemnity plans have been adopted by integrated bar associations (which each practicing attorney is required to join), these criteria are met as a matter of course. However, these plans have been adopted in states with non-integrated as well as integrated bar associations, and, of course, adoption by a non-integrated bar which refuses to recognize the claims of a client of a non-member attorney[13] would result in less than uniform protection of clients. In these states legislation should be enacted whereby the non-member practicing attorneys would be required to contribute to the bar association the amount assessed each member for the fund, thereby giving uniform protection to the clients of all attorneys of the state and uniform participation by all practicing attorneys. In states where no indemnity plan has yet been adopted by the bar association, legislation should require all practicing attorneys in the state to contribute an annual

9. For instance in 1961, in Ohio which has a non-integrated bar, each member of the bar asscciation contributed $1.10 which totaled an appropriation to the fund of $10,000. Voorhees, *supra* note 7, at 495.

10. New Hampshire and Vermont. In Vermont in 1961, the annual premium was $800 which required an assessment of $2.00 per member of the non-integrated bar. This insurance was carried by the American Fidelity Company which guaranteed indemnity up to $10,000 for losses caused by one lawyer. Voorhees, *supra* note 7, at 495.

11. Voorhees, *supra* note 2, at 251.

12. In Vermont and Washington, the limitation on payments is $10,000 for losses caused by one lawyer. In Arizona, the limitation on payments is $25,000 per claimant. Voorhees, *supra* note 7, at 495.

13. For instance, in Ohio which has a non-integrated bar, payments are limited to claims against members of the bar association only. *Ibid.*

specified sum in order to establish and maintain an indemnity fund.[14] The fund could be used for direct disbursements to defrauded clients or for payment of an insurance premium. The statute should provide for a regulatory agency which would receive annual assessments from the attorneys and pay claimants at its discretion.

Some attorneys would be critical of such a statute, asserting that it requires each attorney to be responsible for the consequences of embezzlement by other attorneys of his state. However, it is the duty of the profession, which is given the sole authority to practice law, to assure the public that there is no danger of loss in permitting funds to be handled by attorneys in their capacity as a responsible fiduciary. Such legislation would relieve possible doubt and hesitancy of a client about to engage an attorney to transact legal matters involving the client's funds. As a result, the public would deal with lawyers more freely, thereby promoting a more harmonious attorney-client relationship.

The following proposed statutory plan is designed to provide indemnity protection for defrauded clients in states where no indemnification is provided.[15]

> A fund, to be known as "the Clients' Security Fund," shall be maintained and administered in accordance with the following standards.
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> (1) The fund shall be held, maintained and administered by a committee which is to consist of _____ members of the legal profession appointed for one-year tenures by the Chief Justice of the State Supreme Court. Vacancies are to be filled by appointment for the remainder of the one-year term by the Chief Justice of the State Supreme Court.
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> The members of the committee are to elect a chairman from their number at the first meeting after appointment.
>
> The members of the committee are to receive an annual compensation of _____.
>
> (2) Each practicing attorney in the State shall be required to pay annually into the fund an amount to be determined by the committee not to exceed _____. This obligation of the practicing attorney creates a debt.
>
> (3) Where it is proved to the satisfaction of the committee that subsequent to the passage of this statute any person has sustained loss in consequence of dishonesty on the part of any practicing attorney of this state or any agent of an attorney in connection with that attorney's practice, the committee may at its discretion make a grant to that person out of the fund for the purpose of relieving or mitigating that loss.

14. Such contributions have been required by law in England. "Every solicitor shall on each occasion on which a practicing certificate is issued to him pay to the Society . . . a contribution . . . of such sum not exceeding ten pounds as the Council may from time to time determine, and the Society shall pay that contribution into the fund . . . ." Solicitors Act, 1957, 5 & 6 Eliz. 2, c. 27, Second Schedule § 2.

15. It is recognized that this statute requires modification to conform to general statutes of the jurisdiction concerning administrative agencies.

In no instance is a claimant to receive a grant in excess of _____.

(4) The committee shall have the power to summons witnesses and subpoena records. The committee is required to give notice. Once a grant is made, the committee may pursue an action against the attorney for the amount of the grant paid the defrauded client.

(5) Definitions.

(a) "Member of the legal profession" is any person who holds a degree in law.

(b) "Practicing attorney" is any person engaged in the active practice of law.

Conflict of Laws—Desirability of Federal Legislation in Commereial Aviation

Most commercial aviation is interstate in nature. Air carriers operate under a peculiar condition, however, in that both the standard and extent of their liability in tort may change each time they fly over a state line.[1] Because of the application of state law of torts, in one state strict liability may be imposed upon the carrier,[2] whereas in another, the carrier may be liable only if negligent.[3] A presumption of negligence may arise as to the carrier in some states[4] while res ipsa loquitur may be applicable in other states.[5] The extent of liability may be limited in amount by statute[6] or may be unlimited.

1. "An air traveler from New York may in a flight of a few hours duration pass through several of those commonwealths. His plane may meet with disaster in a state he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one state and end in another. The place of injury becomes entirely fortuitous." Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 527, 211 N.Y.S.2d 133 (1961).

2. Margosian v. United States Airlines, 127 F. Supp. 464 (E.D.N.Y. 1955); Hahn v. United States Airlines, 127 F. Supp. 950 (E.D.N.Y. 1954); RESTATEMENT, TORTS § 520, comment *b* (1939); Vold, *Strict Liability for Aircraft Crashes and Federal Landings*, 5 HASTINGS L.J. 1 (1953).

3. *E.g.*, Arrow Aviation, Inc. v. Moore, 266 F.2d 488 (8th Cir. 1959); Lunsford v. Tucson Aviation Corp., 73 Ariz. 277, 240 P.2d 545 (1952); Jackson v. Stanol, 253 N.C. 291, 16 S.E.2d 816 (1960).

4. *E.g.*, Johnson v. Eastern Airlines, Inc., 177 F.2d 713 (2d Cir. 1949); Kamienski v. Bluebird Air Service, Inc., 321 Ill. App. 340, 53 N.E.2d 131 (1944).

5. *E.g.*, Smith v. Pennsylvania Central Airlines Corp., 76 F. Supp. 940 (D.D.C. 1948); McCarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 37 VA. L. REV. 55 (1951).

6. See the situation in Kilberg v. Northeastern Airlines Inc., *supra* note 1, where the liability of the air carrier was limited to $10,000 by a Massachusetts statute but no such limit was imposed under New York law.

The liability may be determined either by statute[7] or by common law principles. Since the standard and extent of liability are determined by the law applicable to the particular conduct in a certain jurisdiction, this situation makes necessary choice of law rules that identify the jurisdiction whose law will be applied.[8] The choice of law rules in the area of torts are in controversy.[9] A substantial majority of the courts follow the choice of law rule that the law of the place of injury governs the substantive rights of the parties in a tort action.[10] Some courts, however, have abandoned this rule and determined the applicable law by reference to the state having "the most significant relationship with the occurrence and with the parties.[11] The rule under the Federal Tort Claims Act as construed in *Richards v. United States*,[12] is that in multistate tort actions the applicable substantive law is the whole law of the state where the negligence occurred, including its choice of law rules.[13]

The public interest demands continued expansion of the air carrier industry,[14] and uncertainty as to the law by which tort liability will be determined may be a hindrance to its development.[15] Therefore, the basic values of certainty, predictability, and uniformity of result should be present in the law which governs the tort liability of the air carrier.[16] These values require that a case be treated the same

7. See United States v. Praylow, 208 F.2d 291 (4th Cir. 1953), *cert. denied*, 347 U.S. 934 (1954) (South Carolina); Prentiss v. National Airlines, 112 F. Supp. 306 (D.N.J. 1953) (New Jersey).

8. See GOODRICH, CONFLICT OF LAWS 172-76 (4th ed. 1964).

9. *Id.* at 165-67.

10. *Ibid.* See also Riley v. Capital Airlines, Inc., 13 App. Div. 2d 889, 215 N.Y.S.2d 295 (1961). *But see* Rheinstein, *The Place of the Wrong*, 19 TUL. L. REV. 4 (1944).

11. "Where more than one state has sufficient substantial contact with the activity in question, the forum state, by analysis of interests possessed by the states involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity." Richards v. United States, 369 U.S. 1, 15 (1962). See dissent of Judge Kaufman in Pearson v. Northeast Airlines, Inc., 307 F.2d 131, 146 (2d Cir. 1962), *reversed on rehearing*, en banc, 309 F.2d 553 (1962); Goodrich, *op. cit. supra* note 8, at 168; RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 8, 1963).

12. 369 U.S. 1 (1962).

13. Richards v. United States, *supra* note 11. See also notes 39-42 *infra*.

14. Hardman, *Aircraft Passenger Accident Law: A Reappraisal*, 1961 INS. L.J. 688, 694.

15. *Id.* at 697. The author points out that since potential liability cannot be determined with any great accuracy insurance premiums must be computed on the basis of the most unfavorable circumstances.

16. Sweeney, *Is Special Aviation Liability Legislation Essential?* (pts. 1-2), 19 J. AIR L. & COM. 166, 316 (1952). Sweeney's article is a summary of a report he originally prepared for the Civil Aeronauties Board in 1941. Certainty demands clear, equal and foreseeable rules of law which enable those who are subject to them to order their behavior in such a manner as to avoid legal conflict or to make clear predictions of their chances in litigation. See Neuhaus, *Legal Certainty versus Equity in the Conflict of Laws*, 28 LAW & CONTEMP. PROB. 795 (1963). Predictability is, or

regardless of the particular forum in which the suit may be brought.[17] The choice of law formulas fail to supply these values.[18] If the traditional rule that the law of the place of injury governs is applied, then the choice of law will depend on the fortuitous place of the crash and prediction of the standard of liability prior to the crash and measure of damages which will be imposed is rendered impossible.[19] On the other hand, the choice of law rule based upon the state having the most significant relationship to the occurrence is so vague that forum shopping would be encouraged and inconsistent results produced.[20] Legislation has been suggested as a solution to the problem.[21]

Uniform state legislation has been proposed and, in addition, several arguments have been advanced in support of the use of state law rather than federal law. It has, for example, been argued that, liability being a matter of common law and dependent upon local social policy, the liability of aircraft operators should be left to the individual state.[22] It has also been suggested that a federal statute could not constitutionally extend to the liability of aircraft operators carrying passengers exclusively in intrastate operations.[23] It may also be urged that even if a federal statute could constitutionally extend to intrastate operations, a state aviation liability statute would nevertheless be sustained as an exercise of the state's police power in the absence of congressional legislation[24] and would not necessarily con-

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consists of, the ability of persons, at the time they are engaged in activity, to predict what the legal consequences of that conduct, if litigated, would be held to be. See Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 3 (1963). Uniformity of result will imply that "when the dominant law attaches certain legal consequences to an occurrence, these consequences should follow wherever suit is instituted." Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 969 (1952).

17. See Cheatham & Reese, *supra* note 16, at 969.

18. See EHRENZWEIG, CONFLICT OF LAWS § 223, at 586 (rev. ed. 1962).

19. "But the application of the law of only one state to a particular dispute serves no federal end other than fulfilling the justifiable expectations of the parties." Note, 74 HARV. L. REV. 1655 (1961). See Rheinstein, *supra* note 10, at 28-29. The lack of predictability and certainty to the parties is accentuated by the fortuitous place of the accident.

20. The possibility of forum shopping leading to inconsistent results is pointed out in Pearson v. Northeast Airlines, *supra* note 11, at 145.

21. Nadelmann, *Marginal Remarks on the New Trends in American Conflicts Law*, 28 LAW & CONTEMP. PROB. 860, 865 (1963); Sweeney, *supra* note 16; Note, 36 N.Y.U.L. REV. 723 (1961); Note, 37 Notre Dame Law. 194, 205 (1961).

22. Sweeney, *supra* note 16, at 323.

23. *Ibid.*

24. *But cf.*, "So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear aud manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so persuasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the

stitute an undue burden on interstate commerce if it were a proper exercise of the police power, since any regulation of interstate commerce would only be incidental.[25] Under any system of uniform state laws, however, the questions of conflicts of laws would still be troublesome unless the uniform act was adopted by all of the states.[26] The National Commissioners on Uniform State Laws approved the Uniform Aviation Liability Act in 1938.[27] The act applied "if such injuries occurred within this State or if the contract of carriage was made within this State even if the injuries occurred outside of this State"[28] and also to property damaged within the state.[29] The act was withdrawn in 1943[30] and in 1956 a special committee appointed by the commissioners, observing that a federal legislative program might be forthcoming, recommended that a new aeronautical code be drafted.[31] A statute which is controversial, as any uniform aviation liability statute would be, is not likely to be uniformly adopted by all of the states.[32]

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federal system will be assumed to preclude enforcement of state laws on the same subject." Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947).

25. In Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276, 279 (1961), the Court upheld a state statute saying that, "if Lilly is engaged in intrastate as well as interstate aspects of the New Jersey drug business, the State can require it to get a certificate of authority to do business."

26. Sweeney, *supra* note 16, at 322.

27. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTY-EIGHTH ANNUAL CONFERENCE 68-94 (1938).

28. UNIFORM AVIATION LIABILITY ACT § 301(a), in 9 J. of AIR L. & COM. 726, 731 (1938).

29. UNIFORM AVIATION LIABILITY ACT § 201(a).

30. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FIFTY-THIRD ANNUAL CONFERENCE 67 (1943). Also, see discussion pertaining to the act in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FIFTY-FIRST ANNUAL CONFERENCE 114-31 (1941).

31. "Since their preparation the development of aeronautical law, the widespread construction of airports and the increase in air traffic have brought development which render the provisions of these original Acts insufficient in many areas to cover the needs of State legislation. . . .

"The Committee feels that in some of the areas in which states may act to the extent that the same has not been preempted by the Federal Government, the availability of State Legislation will tend to retard the assumption of additional federal authority." HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE SIXTY-FIFTH ANNUAL CONFERENCE 179-80 (1956).

32. THE UNIFORM AVIATION LIABILITY ACT § 301(a) imposed strict liability on the air carrier. This obviously made the statute controversial and was a contributing factor to its being withdrawn in 1943. See PROSSER, TORTS 530-32 (3d ed. 1964). But the difficulties of proof of negligence have bolstered proposals for imposition of strict liability. See Note, 37 NOTRE DAME LAW. 194, 205 (1961). The standard of liability to which an air carrier should be held, however, is not within the scope of this discussion. The standard, however, would be an essential feature of any proposed statute. Several writers have urged that the air carrier should be held strictly

Because of the interstate character of aviation, the enactment of a federal act has repeatedly been urged.[33] The exercise of federal power would be sustained under the commerce clause,[34] and would no doubt be extended so as to include all aircraft which use any part of the navigable air space of the United States.[35] The proponents of a federal act urge that it would bring uniformity in the standard of liability, the application of common law principles, the defenses available and the amounts recoverable.[36]

There are two approaches which such an act might take.[37] Congress could leave unaffected the state law as to liability and damages and prescribe the choice of law rule only, the method followed in the Federal Tort Claims Act.[38] In light of the difficulties encountered under the Federal Tort Claims Act, however, this approach should be utilized with caution.[39] The act provided for liability "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[40] Three variant interpretations were placed upon this prescribed choice of law rule before the Supreme Court construed the provision in *Richards v. United States*.[41] It has been suggested that the Court's decision was unfortunate.[42] If Congress were to adopt this approach, three likely alternatives for the choice of law rule would be the law of the place of injury, the law of the state

liable, but that the amount of its liability should be limited. See Hardman, *supra* note 14, at 698-700; Sweeney, *supra* note 16, at 324-35.

33. Hardman, *supra* note 14, at 697; Nadelmann, *supra* note 21, at 865; Sweeney, *supra* note 16, at 323.

34. U.S. CONST. art. I, § 8.

35. "Air is an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water." Northwest Airlines v. Minnesota, 322 U.S. 292, 303 (1944) (concurring opinion). See 1 SCHWARTZ, COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 208-16 (1963).

36. Hardman, *supra* note 14, at 697.

37. Mishkin, *The Variousness of Federal Law*, 105 U. PA. L. REV. 797 (1957).

38. Ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

39. See Note, 43 IOWA L. REV. 125 (1959), for discussion of the choice of law under the Federal Tort Claims Act.

40. 60 Stat. 843 (1946), 28 U.S.C. § 1346(b) (1958).

41. *Supra* note 12. Voytas v. United States, 256 F.2d 786 (7th Cir. 1958), concluded that the provision directed application of only the internal law of the state where the act or omission occurred. Landon v. United States, 197 F.2d 128 (2d Cir. 1952), concluded that the court would have to refer to the whole law of the state where the act or omission occurred. United States v. Marshall, 230 F.2d 183 (9th Cir. 1956), concluded that the internal law of the place where the negligence had its operative effect should control.

42. "Thus, suppose that the negligence occurs in State A and the injury in State B, in which plaintiff resides and brings suit. An individual defendant's liability would be determined by the internal law of State B. That of the United States would be determined by the whole law of State A." 61 MICH. L. REV. 181, 183 (1962). See also 15 VAND. L. REV. 1322 (1962).

having the "most significant contacts" with the occurrence, and the law of the state where the contract of carriage was made.[43] Neither of these three rules alone would produce predictability, certainty, and uniformity of result. The use of the law of the place of injury would bring about uniformity of result to the air carrier but produce neither predictability nor certainty. The application of the law of the state having the most significant contacts with the occurrence might generate forum shopping and lead to inconsistent results. Resort to the law of the state where the contract of carriage was made would offer predictability and certainty since the air carrier, at the time he is engaged in the activity, would know the law to be applied in event of a crash and thus, could predict the legal consequences of his conduct in the event of litigation. However, as the contracts of carriage of the passengers for a single flight might have been concluded in several different states, the results of the litigated cases would not be uniform even as to a single accident, since the various laws might not create the same legal consequences. The contract of carriage rule, further, would not cover situations involving damage to property and injury to persons on the ground, since no contract of carriage would exist.

Another approach would be a federal substantive law to prescribe liability, corresponding to the Warsaw Convention of 1929, which regulates international aviation.[44] The federal substantive law would displace local policy regarding liability in air carrier accidents,[45] since under the supremacy clause of the United States Constitution[46] the state law would be supplanted.[47] The Federal Employer's Liability Act, which provides for liability of the railroad carrier for injuries of its employees, is an example of the federal substantive law approach to a similar problem.[48] A federal substantive law governing the liability of interstate air carriers and other aircraft coming within the federal jurisdiction would eliminate conflict of laws difficulties.[49] A uniform system of liability would be secured, and the standard of conduct required of the air carrier would be both predictable and

43. See Kilberg v. Northeast Airlines, Inc., *supra* note 1, where plaintiff was unsuccessful in bringing suit based on breach of contract of carriage. The Uniform Aviation Liability Act provided for the law of the place of contract of carriage as an alternative choice of law rule. See note 28 *supra*.

44. The United States, though not a signatory to the Convention, became a party to it in 1934. See 49 Stat. 3000 (1934).

45. Baxter, *supra* note 16, at 25.

46. U.S. CONST. art. VI.

47. See Testa v. Katt, 330 U.S. 386 (1947); Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 582 (1953).

48. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1958).

49. Sweeney, *supra* note 16, at 322.

certain since one law would occupy the field. Uniformity of result could therefore be expected.

A federal substantive law is clearly the most feasible method of dealing with the problems which have been posed. The problem of what standard of liability such a law should impose on the air carrier has prompted considerable discussion.[50] An extended treatment of the standard of liability is beyond the scope of the present discussion but the alternatives merit attention. Basically, the choice is between liability only if negligent and absolute liability. Difficulty of proof[51] and the uncertainty of application of common law defenses[52] are hardships imposed on a party plaintiff if he is required to prove negligence. There is authority, however, for the application of res ipsa loquitur to airplane crashes.[53] Alternatively, by reasoning that the burden of loss should be allocated to the enterprise as a cost of doing business the imposition of absolute liability has been recommended.[54] Any statute, however, should perhaps make a distinction between the standard of liability applicable to injured third persons or their property on the ground and injured passengers who have a contract with the air carrier.[55] Likewise, a limitation on the amount of recovery might be incorporated in the statute.[56] An important consideration is that the imposition of absolute liability might make necessary a requirement that the air carrier have accident liability insurance.[57] Setting aside the standard of liability required of the carrier and its ramifications, the basic outlines of a proposed statute setting forth a federal substantive law would include the following provisions:[58]

SECTION 1. DEFINITION OF TERMS

Air commerce means interstate, overseas, or foreign air commerce or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation or aircraft which directly affects,

50. See, *e.g.*, Hardman, *supra* note 14; Sweeney, *supra* note 16, at 168-76, 324-32.
51. Sweeney, *supra* note 16, at 171-72.
52. *Id.* at 173.
53. See note 5 *supra*.
54. Hardman, *supra* note 14, at 698.
55. See Sweeney, *supra* note 16, at 324-25. *But cf.*, Orr, *Is Aviation Ultra Hazardous*, 21 INS. COUNSEL J. 48 (1954).
56. See the limitations on recovery in the International Air Transportation Agreement, 49 Stat. 3000, 3019 (1934), to which the United States is a party. *Supra* note 44.
57. See Hardman, *supra* note 14, at 699.
58. The outlines have drawn on the Federal Employer's Liability Act, *supra* note 48, the Uniform Aviation Liability Act, *supra* note 28, and the Federal Aviation Act of 1958, 72 Stat. 737 (1958), 49 U.S.C. § 1301 (1958). As indicated, only the basic outlines of a proposed statute are set out. Since the standard of care required of an air carrier is beyond the scope of this article, *supra* note 32, the proposed outline merely points to a method and is not exhaustive.

or which may endanger safety in, interstate, overseas, or foreign air commerce.

Aircraft means any contrivance known or hereafter invented, used, or designed for navigation of or flight above the surface of the earth.

Section 2. Liability

Every air carrier while engaged in air commerce shall be liable as provided in Section 3.

(1) for bodily injuries to passengers of the aircraft being carried for compensation and for death resulting therefrom.

(2) for bodily injuries, for death resulting therefrom, and for damages to property caused by the ascent or descent or the attempt to ascend or the flight of an aircraft, or by the falling of an object therefrom.

Section 3. Amount of Recovery and Limitation of Liability.

Section 4. Right of Action for Whom the Benefit of Recovery is Given.

The right of action is given to the person suffering injury or owner incurring property damage, or in case of death of such person or owner, to his or her personal representative. In case of death of the person suffering injury or the owner, the recovery is for the benefit of the surviving widow or husband and children of such person or owner; and if none, then of such next of kin dependent upon such person or owner.

Criminal Law—Discovery in Criminal Cases

Whether the modern discovery practices of civil procedure should be used in criminal cases depends upon whether we view the criminal trial as primarily an adversary proceeding between the litigants or as a process for the ascertainment of facts through which justice for both the state and the accused is hopefully attained within the framework of the constitutional safeguards of the Bill of Rights. If the latter is the true purpose of the trial, then the machinery of discovery can be useful in clarifying the issues and expediting the trial, as well as in aiding the preparation of the case which is so necessary in light of its procedurally adversary nature.

At common law there was no criminal discovery.[1] The reasons traditionally given are: the fear of perjured testimony, intimidation of witnesses, and tampering with documents by the defendant;[2] the notion that there can be no mutuality of discovery because the defendant is protected by the fifth amendment privilege against self-incrimination;[3] and, lastly, the fear that the defendant already is being favored in our criminal procedure, and to give him the additional

1. 6 WIGMORE, EVIDENCE § 1859g (3d ed. 1940); 2 WHARTON, CRIMINAL EVIDENCE § 671 (12th ed. 1955); FLETCHER, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960); LOUISELL, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961); Note, *Criminal Discovery—the State of the Law*, 6 UTAH L. REV. 531 (1959).

2. See, *e.g.*, State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953), in which Chief Justice Vanderbilt said, "In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense. . . . Another result of full discovery would be that the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime. . . . All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings. The presence of perjury in criminal proceedings today is extensive despite the efforts of the courts to eradicate it and constitutes a very serious threat to the administration of criminal justice and thus to the welfare of the country as a whole . . . . To permit unqualified disclosure of all statements and information in the hands of the State would go far beyond what is required in civil cases; it would defeat the very ends of justice." *Id.* at 210, 98 A.2d at 884.

3. See, *e.g.*, State v. Rhoads, 81 Ohio St. 397, 91 N.E. 186 (1910), where the court said: "The state cannot compel the prisoner at the bar to submit his private papers or memoranda to the state for use or even examination, for he cannot be required to testify in the case, nor to furnish evidence against himself. Then, why should the accused be allowed to rummage through the private papers of the prosecuting attorney? Neither the sublime teachings of the Golden Rule to which we have been referred, nor the supposed sense of fair play, can be so perverted as to sanction the demands allowed in this case." *Id.* at 424, 91 N.E. at 192.

advantage of discovery would be to compound the existing imbalance.[4]

There is a constant threat of perjury whenever testimonial evidence is given. Since there is good reason to believe that perjury, or at least questionable testimony, is somewhat common in civil cases,[5] it seems inconsistent to allow full discovery in civil cases despite this danger while denying it in criminal cases because of it. Furthermore, to allow these fears to impede the use of discovery indicates a lack of confidence in our judicial system, which is not conducive to the administration of justice. The fear of intimidation of witnesses stems from the practices of an organized criminal element, and while, in a small number of cases, this might be a genuine consideration, it can largely be obviated by the incorporation of the "protective order"[6] as used in federal civil procedure into state criminal procedures.

It is said that discovery would prejudice the prosecution because it's own right of discovery would be limited by the defendant's fifth amendment privilege against self-incrimination. It may be asked, however, just how effective the privilege is in deterring discovery by the prosecution? Despite the lack of formalized rules permitting discovery the prosecution may easily circumvent this barrier.[7] Professor Wigmore has said that the fifth amendment privilege protects evidence sought to be produced under "testimonial compulsion,"[8] and the general rule is that the defendant's body itself does not come within the privilege.[9] Thus, blood tests, urine specimens, fingerprints, hand-

4. The most famous articulation of this idea is that of Judge Learned Hand in United States v. Garsson, 291 Fed. 646 (S.D.N.Y., 1923), "Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. . . ." *Id.* at 649.

5. See, *e.g.*, McClintock, *What Happens to Perjurers*, 24 MINN. L. REV. 727 (1940); Perrington, *The Frequency of Perjury*, 8 COLUM. L. REV. 67 (1908); Whitman, *A Proposed Solution to the Problem of Perjury in Our Courts*, 59 DICK. L. REV. 127 (1955); *The Problem of Successful Perjury*, 78 SOL. J. 423 (1934). For an article criticizing these fears of perjury as being unsubstantial, see Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1134 (1951).

6. FED. R. CIV. P. 30(b), which is applicable to depositions, interrogatories, and discovery of documents, provides in pertinent part: "[U]pon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place . . . or the court may make any order which justice requires to protect the party or witness from annoyance, embarrassment or oppression." This would authorize a trial court upon a proper showing to seal off information or the identity of witnesses.

7. See INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION 142-97 (3d ed. 1953).

8. 8 WIGMORE, EVIDENCE § 2263, at 379 (McNaughton rev. 1961).

9. INBAU, SELF-INCRIMINATION 7 (1950) (collecting authorities).

writing, and voice recordings[10] may be taken. Although in the federal courts the prosecution must contend with the *Mallory-McNabb Rule*,[11] this protection has not been extended to the defendant in a state criminal proceeding. Accordingly, the prosecution can make effective use of interrogation. Furthermore, some courts have held that where the accused stands mute in the face of accusations by his interrogator, this constitutes an admission by silence.[12] Finally, the fifth amendment privilege against self-incrimination supposedly protects the defendant who, for one reason or another, refuses to take the stand in his behalf. Yet, according to statistics, his failure to take the stand is nearly always fatal and conviction results.[13]

The argument that to allow discovery by the defendant would further compound an already existing imbalance, even in light of the construction given the fourth,[14] fifth,[15] and sixth amendments[16] by the United States Supreme Court, fails to take into consideration the numerous advantages of the prosecution. Initially, the prosecution has at its disposal far more extensive investigative resources than even the largest private firms specializing in criminal law, and the disparity is even more pronounced when the crime comes within the jurisdiction of the federal government because of the vast resources and highly skilled personnel of the Federal Bureau of Investigation. With the increasing use of scientific methods of gathering evidence, the defense

10. See INBAU, SELF-INCRIMINATION (1950); Weintraub, *Voice Identification, Writing Examplars and the Privilege Against Self-Incrimination*, 10 VAND. L. REV. 485 (1957).

11. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). FED. R. CRIM. P. 5(a) requires the police to bring the arrested person before a magistrate "without unnecessary delay" so that he can be advised of his right to remain silent and to retain counsel. Confessions or admissions obtained from the accused during this period of "unnecessary delay" and before he has been advised of his rights, are excluded from evidence at trial.

12. The theory being that an innocent man must be expected to cry out his innocence in the face of accusation. See, *e.g.*, People v. Nitti, 312 Ill. 73, 90-94, 143 N.E. 448, 454-55 (1924); Commonwealth v. Vallone, 347 Pa. 419, 421-24, 32 A.2d 889, 890-91 (1943). The jurisdictions which refuse to accept this theory exclude evidence of admission by silence either because it is not probative of guilt, or because it in some measure intrudes upon the privilege against self-incrimination. A collection of cases on the subject is found in 4 WIGMORE, *op. cit. supra* note 1, § 1072. See also Note, *Silence As Incrimination in Federal Courts*, 40 MINN. L. REV. 598 (1956).

13. Based upon data from the Administrative Office of the United States Courts, "in 99 per cent . . . of all criminal cases tried in the eighty-six judicial districts at the federal level, defendants who did not take the stand were convicted by juries." The plight of the defendant who refuses to take the stand in his own behalf will be somewhat alleviated by the recent decision of the United States Supreme Court in Griffin v. California, 380 U.S. 609 (1965), which held that the fifth amendment, and its bearing on the states by reason of the fourteenth amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

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

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

16. Gideon v. Wainwright, 372 U.S. 335 (1963).

counsel is at a serious disadvantage.[17] The traditional requirement of giving adequate notice to the accused is being relaxed. The prosecution is being freed from the restrictions of pleading and proof; indictments are more general in terms, and the courts are paying mere lip service to the requirement of specificity.[18] While it is true that most jurisdictions permit a bill of particulars,[19] courts have increasingly refused to grant them.[20] In addition, the prosecution may amend liberally, both as to form and substance, in order to bring its pleadings into conformity with the proof.[21] In view of these things, can the prosecution honestly be said to be at a significant disadvantage?

The increasing tendency to allow reasonably expansive pleading by the prosecution will significantly aggravate the plight of the accused unless he is given adequate means to prepare for a shift in theory, both factual and legal. In this connection, it should be noted that not all "surprise" at trial is readily curable by the granting of a continuance.[22] It must also be remembered that in the absence of legislation there is no absolute right to discovery, and most states have no such legislation.[23] The states are free to adopt their own rules of criminal procedure so long as these rules comply with minimum requirements of fairness imposed upon the states by the due process clause of the fourteenth amendment. Thus, there is great variation in local development of discovery of defendant's pre-trial statements to investigators,[24] and there are a few decisions that have permitted

17. Goldstein, *The State and the Accused: Balance of Advantage In Criminal Procedure*, 69 YALE L.J. 1149 (1960).

18. *Id.* at 1177; MORELAND, MODERN CRIMINAL PROCEDURE ch. 15 (1959); Note, *Streamlining the Indictment*, 53 HARV. L. REV. 122 (1939).

19. *E.g.*, FED. R. CRIM. P. 7(f) authorizes the trial court, in its discretion, to grant a motion for a bill of particulars.

20. Wong Tai v. United States, 273 U.S. 77 (1927); United States v. Cohen, 145 F.2d 82 (2d Cir.), *cert. denied*, 323 U.S. 799 (1945) (deuial of a bill of particulars is "seldom if ever a reversible error"); People v. Sims, 393 Ill. 238, 66 N.E.2d 86 (1946).

21. This is the result of the decision in Berger v. United States, 295 U.S. 78 (1935), which enunciated the doctrine of the "harmless error" so long as the departure from the allegation had not materially prejudiced the accused in making his defense. *Id.* at 82-83.

22. Goldstein, *supra* note 17, at 1180.

23. See generally Dowling, *Pre-Trial Inspection of Prosecution's Evidence by Defendant*, 53 DICK. L. REV. 301 (1949); Fletcher, *supra* note 1. Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221 (1957).

24. See, *e.g.*, ILL. REV. STAT. ch. 38, § 114-10 (1963), which provides in substance that upon motion of the defendant before trial the prosecutor must furnish the defendant a copy of the written confession, and if oral, a list of witnesses to its making. Failure to comply with defendant's request will result in exclusion from evidence at the trial. The Illinois Supreme Court has held that this is mandatory upon motion by the defendant, People v. Dupree, 26 Ill. 2d 320, 186 N.E.2d 237 (1963). Compare MD. R. CRIM. P. 728, which is discretionary with the trial court and is not granted as a matter of right.

discovery of defendant's statements in the absence of statutes.[25] A California decision went so far as to permit the defendant to obtain at trial a statement made by a prosecution witness to the police.[26] However, the fear that the addition of an extensive right of discovery to the defendant's arsenal might completely weight the odds against the state has made decisions like this one all too infrequent.

Federal courts continue to bar the door to discovery if the moving party fails to adequately specify the matter sought to be discovered. The door is even more securely barred against discovery for the purpose of justifying discovery.[27] Discovery in federal courts has been further restricted by the Jencks Act,[28] which prohibits pretrial discovery of statements given by witnesses to government agents, although it does authorize limited discovery of such statements at the trial. Apart from the prosecution's discovery by means of the grand jury, there is little pretrial criminal discovery available in the federal courts.[29] Only if the defense fortuitously knows of specific items discoverable under rule 16[30] or rule 17[31] can it invoke discovery. Moreover, there is no procedure for discovering the names and addresses of witnesses. Since the *Jencks* case,[32] the federal courts have been reluctant to exercise their inherent powers to permit discovery. The trend of recent cases is against discovery of defendant's confessions[33] and of documents voluntarily surrendered by third parties,[34] even though the United States Supreme Court has consistently declared that discovery is "the better practice."[35]

The allowance, although limited, of pretrial discovery to the defendant has activated speculation on the possibilities of extending the *formal* right of discovery to the prosecution. A number of states

25. See Powell v. Superior Court, 48 Cal. 2d 704, 312 P.2d 698 (1957); State v. Dorsey, 207 La. 928, 22 So. 2d 273 (1945); People v. Johnson, 356 Mich. 619, 97 N.W.2d 739 (1959); State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958); State v. Thompson, 54 Wash. 2d 100, 338 P.2d 319 (1959).

26. People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956).

27. Palermo v. United States, 360 U.S. 343 (1959).

28. 18 U.S.C. § 3500 (1958). See the restrictive interpretation put on the Jencks Act in Palermo v. United States, *supra* note 27.

29. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964).

30. FED. R. CRIM. P. 16.

31. FED. R. CRIM. P. 17.

32. United States v. Jencks, 353 U.S. 657 (1957), had merely held that defense counsel, *at trial*, must be given access to prior statements of a witness on the stand regarding the subject matter of that witness's testimony.

33. *E.g.*, United States v. Murray, 297 F.2d 812 (2d Cir.), *cert. denied*, 369 U.S. 828 (1962); Shores v. United States, 174 F.2d 838, (8th Cir. 1949).

34. *E.g.*, United States v. Hanlin, 29 F.R.D. 481 (W.D. Mo. 1962); United States v. Brown, 179 F. Supp. 893 (E.D.N.Y. 1959).

35. Cicenia v. Lagay, 357 U.S. 504, 511 (1958); Leland v. Oregon, 343 U.S. 790, 801 (1952).

have statutes which require a defendant to specifically plead certain defenses such as insanity[36] or alibi,[37] and to reveal in advance of trial the names of the witnesses who will be called in support of such defenses. These statutes have been sustained[38] over the objection that they violate the constitutional privilege against self-incrimination on the grounds that they do not compel the defendant to reveal or produce anything that he would not reveal anyway, and that they merely regulate the procedure by which he presents his case. California, which has been the leader in the field of discovery, has permitted discovery by the prosecutor in the absence of enabling legislation. In *Jones v. Superior Court*,[39] the California Supreme Court, in an opinion by Justice Traynor, upheld a portion of a trial court's order which required the defendant in a rape case to reveal the names and addresses of witnesses he intended to call, and to produce before trial reports and X-rays he intended to introduce in evidence to support his defense of impotence.

Since the prosecution has substantial resources for marshalling evidence, particularly now with the advantage of scientific aids, the defendant should have access to evidence that he might not be able to secure independently. Should the circumstances of a case justify secrecy, the prosecution remains free to show them. Conversely, if the defendant can demand pretrial discovery, it is neither consistent nor reasonable for him to insist on reserving his own surprises for trial. The courts that have passed on the question have held that neither the fifth amendment privilege against self-incrimination nor the due process clause of the fourteenth amendment prevents disclosure by the defendant prior to trial.[40] Therefore, he can be required to make that decision before trial if discovery of the prosecution's case is made available.

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36. ARK. STAT. ANN. § 43-1301 (1947); CAL. PEN. CODE § 1016; COLO. REV. STAT. ANN. § 39-8-1 (1953); FLA. STAT. § 909.17 (1961); IND. ANN. STAT. § 9-1701 (1956); IOWA CODE § 777-18 (1958); MICH. COMP. LAWS §§ 768.20-21 (1948); UTAH CODE ANN. § 77-22-16 (1953); VT. STAT. ANN. tit. 13, §§ 6561-62 (1959); WASH. REV. CODE § 10.76.020 (1951); ARIZ. R. CRIM. P. 192A (1956).

37. IND. ANN. STAT. §§ 9-1631 to -1633 (1956); IOWA CODE § 777-18 (1958); KAN. GEN. STAT. ANN. § 62.1341 (1949); MICH. COMP. LAWS §§ 768.20-21 (1948); MINN. STAT. § 630.14 (1947); N.Y. CODE CRIM. PROC. § 295-1 (1958); OHIO REV. CODE ANN. § 2945.58 (1958); OKLA. STAT. tit. 22, § 585 (1961); S.D. CODE § 34.2801 (1939); UTAH CODE ANN. 77-22-17 (1953); VT. STAT. ANN. tit. 13, §§ 6561-62 (1958); WIS. STAT. ANN. § 955.07 (1957); ARIZ. RULES CRIM. PROC. 192B (1956); N.J. RULES 3:5-9 (1958).

38. See, *e.g.*, People v. Wudarski, 253 Mich. 83, 234 N.W. 157 (1931); People v. Shulenberg, 279 App. Div. 1115, 112 N.Y.S.2d 374 (1952); State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931); State v. Kopacka, 261 Wis. 70, 51 N.W.2d 495 (1952). In the other states they have been accepted without question.

39. 58 Cal. 2d 56, 372 P.2d 919 (1962).

40. *Supra* notes 38 & 39.

The case method, while it does allow gradual development, is too haphazard for an area which seems to require defined rules of procedure.[41] Legislation seems preferable because it could define the scope of discovery available to both the prosecution and defense and establish workable rules to guide the bench and bar alike. While there is a limited body of case law on the right of defendant's discovery, there is virtually no authority by which the discovery rights of the prosecution can be delineated. Thus, any rules laid down will have to be the result of a legislative policy determination balancing the fifth amendment privilege against self-incrimination with the need to obtain evidence, as well as the desire to prevent surprise and secure mutuality.

Civil discovery rules could be used as a model in the criminal area, but criminal rules could not be as broad since they would have to work within the confines of the self-incrimination privilege. Physical and mental examinations have been allowed in criminal cases and should be continued. Demands for admissions could not be used because they clearly violate the fifth amendment privilege against self-incrimination. Depositions of and interrogatories to the defendant could be limited to questions regarding the names and addresses of witnesses. Motions for inspection could also be used with the qualification that the moving party specify the type of evidence sought to be inspected. Another discovery device that could be profitably incorporated into a statute is the procedure used in the state of Washington,[42] which provides for an interchange of witness lists, and an allowance of amendments to this list. This device, coupled with the sanction that any witness not on the list will be excluded from testifying at the trial, unless there is a showing of good cause, would be an aid to the furtherance of discovery and help prevent surprise. A statute drafted along these lines should be accompanied by a proviso denying the use of discovery to either the prosecution or defendant, except for directly incriminating admissions, unless the latter waives his special status as an *accused.* While such a waiver would render the defendant amenable to inquiry, his status as a witness at the trial itself would provide protection from incriminating questions. It is submitted that a "waiver" statute is the most desirable solution since it gives the defendant the choice of either retaining the full force of the fifth amendment privilege against self-incrimination or of invoking the full use of discovery machinery.[43]

41. The case method is advocated by Professor Fletcher. Fletcher, *supra* note 1.
42. WASH. REV. CODE § 10.37.030 (1951).
43. Goldstein, *supra* note 17, at 1198.

Notice to Interested Parties in Probate Proceedings

Approximately one-third of the states have statutes[1] which allow a will to be probated without requiring that notice be given to the interested parties.[2] Most of these statutes are patterned after the ancient probate in common form,[3] an *ex parte* summary-type proceeding which could be initiated immediately after a testator's death by anyone who produced the will. No notice was required primarily because interested parties usually received actual notice anyway,[4] and because the early methods of notice were extremely inadequate, expensive and time consuming. Today, however, there are several efficient modes of serving notice which are readily available.[5] Also the need for notice has greatly increased, because in its absence, interested parties often do not receive knowledge of the death of the testator or of the probate of the will until it is too late.[6] Thus, the right of interested parties to contest the will or to otherwise guard their interests is not protected by law in every state, but is subjected to the contingencies of officious notification by friends, relatives, or the proponents of the will. Certainly a system which deprives interested parties of this opportunity to contest is unfair to them.

The Supreme Court of the United States has recognized the unfairness of inadequate notice in the case of *Mullane v. Central Hanover Bank & Trust Co.*,[7] which concerned notice to beneficiaries of a com-

1. The following fifteen states do not require notice to interested parties: ARK. STAT. ANN. § 60-208 (1947); DEL. CODE ANN. tit. 12, § 1304 (1953); GA. CODE ANN. § 113-601 (1959); KY. REV. STAT. § 394.220 (1963); MISS. CODE ANN. § 503 (1957); MO. REV. STAT. § 473.047 (1959); N.H. REV. STAT. ANN. § 550:4 (1955); N.J. REV. STAT. § 3a:3-17 (1951); N.C. GEN. STAT. § 31-12 (1950); ORE. REV. STAT. ch. 115 (1953); S.C. CODE ANN. § 19-253 (1962); TENN. CODE ANN. 32-201 (1955); VA. CODE ANN. § 64-18 (1950); WASH. REV. CODE ANN. § 11.20.020 (1963); W. VA. CODE ANN. § 4070 (1961).

2. Interested parties are usually considered to be those persons who would gain if the will were not probated. This includes heirs at law and beneficiaries under a prior will.

3. ATKINSON, WILLS § 93 (2d ed. 1953).

4. Sheldon S. Levy aptly explains the situation as follows: "At the time probate in common form was initiated in England, traveling was a luxury, members of a family seldom lived more than a few miles apart, and more often, resided together in the same town or village. A death in the family was almost immediately made known to all persons who might conceivably have an interest in the testator's will." Levy, *Probate in Common Form in the United States: The Problem of Notice in Probate Proceedings*, 1952 WIS. L. REV. 420, 435.

5. The usual methods of notice are publication, registered mail, and personal service.

6. "Today the situation is often quite different. A cross-country airplane or railroad jaunt is a common occurrence. Families are no longer closely-knit units, but may instead be dispersed throughout the length and breadth of our nation. Many of our states could encompass two or three Englands within their borders, and a testator's death can no longer be considered actual notice to members of his family." Levy, *supra* note 4, at 435.

7. 339 U.S. 306 (1949).

mon trust pool. The court held that notice by publication alone to known, interested parties does not satisfy due process under the fourteenth amendment because "it is not reasonably calculated to reach those who could easily be informed by other means at hand."[8] While the court has not yet applied this standard to probate notice, it has been extended to bankruptcy and condemnation proceedings, as well as to tax lien foreclosures.[9] Presumably, it will include probate also, if and when the appropriate case arises. One might have expected that the *Mullane* holding would have at least stimulated the interest of state legislatures, and perhaps resulted in a re-evaluation of their notice-to-heirs statutes. Yet, as evidenced by the few changes in the statutes since this 1950 decision, this has not been the case. Apparently, the state legislatures are content to wait for the Supreme Court to take the next step.

Any statute adopted for the purpose of alleviating the problem of inadequate notice should fulfill three basic values. Fairness to all interested parties is certainly the paramount consideration. Second, the method utilized in the probate procedure must be both practical and efficient, without being expensive or time consuming. Third, the interest of society in having a rapid and final settlement should always be a factor. The latter two values are adequately satisfied by statute in most states, but the first value is severely minimized in the sixteen states which have no notice requirements. Hence, the problem becomes one of retaining an effective means of probating a will, while incorporating a mechanism which will insure that interested parties receive notice of all impending probates, and are thereby given the opportunity to adequately protect their interests. Such a procedure is needed to satisfy our basic notions of fairness and due process.

Almost all of the authorities in the probate field have agreed that some system of notice to interested parties should be required. The principal controversy has stemmed from the various forms which the procedure should take. After six years of intensive study and research, the Model Probate Code[10] was published in 1946, with contributions from Lewis M. Simes, Paul E. Basye, R. G. Patton, Thomas E. Atkinson and others. Undoubtedly the most comprehensive work in the field of probate law, the Code retains the probate in common form,[11] but requires that notice be sent to interested parties by publication and

8. *Id.* at 319.

9. Schroeder v. City of New York, 371 U.S. 208 (1962) (condemnation); Walker v. City of Hutchinson, 352 U.S. 112 (1956) (condemnation); Covey v. Town of Somers, 351 U.S. 141 (1956) (tax lien foreclosure); City of New York v. New York, N.H.&H. R.R., 344 U.S. 293 (1953) (bankruptcy). See Note, 70 HARV. L. REV. 1257 (1957); 32 WASH. L. REV. 165 (1957).

10. MODEL PROBATE CODE (Simes 1946).

11. MODEL PROBATE CODE § 68 (Simes 1946).

registered mail or personal service within a short period *after* the probate.[12] This allows an immediate probate of the will and the continuous possession of the assets by the executor, while providing all interested parties with the opportunity to contest. This method has been criticized by Sheldon S. Levy, who advocates that probate in common form be abolished and that notice to interested parties be required before probate.[13] Mr. Levy contends that this scheme is followed in two-thirds of our states today.

According to its proponents, the principal advantage of prior notice is that it provides a single judicial proceeding,[14] where all interested parties may have their interests represented and the will may be finally adjudicated. It has the effect of consolidating the *ex parte* probate and the will contest, thus, alleviating the need for a second proceeding. While this method does have merit, it has many disadvantages. Its greatest defect is that it over emphasizes the negative. By providing for the single proceeding, it does so at the expense of a speedy disposition[15] of the probate since the proceeding must be delayed for weeks, possibly months, until notice is sent and received, and until a reasonable time has passed, during which the interested parties may file objections. This sacrifice is accentuated further by the fact that only a small percentage of wills are ever contested.[16] Therefore, in the great majority of cases, the probate can be effectively handled without the burden of waiting for all interested parties to receive notice.

Many state legislatures have refused to recognize the need for immediate, speedy probate and have provided the means by which a special administrator may be appointed by the court to administer the estate in the interim period before probate.[17] They claim that this permits continuous administration of the estate in the absence of a permanent executor. This procedure has two failings which are readily apparent. It requires two accountings, one by the special administrator and a second by the permanent executor, while the "subsequent notice system" allows the personal representative to supervise the estate assets immediately after death and administer

12. MODEL PROBATE CODE § 70 (Simes 1946).

13. Levy, *supra* note 4.

14. The advocates of the *ex parte* proceeding with subsequent notice have been severely criticized due to the "administrative" nature of their method. It is argued that where the substantive rights of parties are to be affected, the judicial proceeding is preferred. Lurvey, *Appointment of Personal Representatives Without Prior Notice; Reduction in Number of Appeals and Appealable Orders,* 1948 WIS. L. REV. 468.

15. Patton, *Improvement of Probate Statutes—The Model Code,* 39 IOWA L. REV. 446, 454 (1954).

16. Niles, *Model Probate Code and Monographs on Probate Law: A Review,* 45 MICH. L. REV. 321, 327 (1947).

17. Levy, *supra* note 4, at 432; Lurvey, *supra* note 14, at 468.

them through probate with only one accounting at the end of the final administration. This certainly dispenses with the added expense and complexity of two accountings.[18] A more significant failing is the limited ability of a special administrator, who may act only in a custodial capacity during the interim months.[19] He cannot actively invest the assets, make payments to creditors, or generally operate the estate as effectively as the chosen personal representative of the deceased who usually has a thorough knowledge of the estate and the confidence of the heirs. Thus, it would seem that the disadvantages of prior notice clearly outweigh the value of the single proceeding.

A second argument advanced against the Model Probate Code method of notice is that in the summary proceeding before notice has been given, there is always the danger that unscrupulous parties may gain control of the estate as executors.[20] The comment to section 68 of the Model Probate Code, however, points out that this fear is obviated by the power of the judge, in his discretion, to require notice prior to the hearing.[21] Moreover, even if an improper person does gain control, this control will be short-lived because section 70 requires notice to interested parties of the appointment of the personal representative as soon as letters are issued.[22]

Another argument presented by the proponents of prior notice is that the period during which a contest may be brought is "generally markedly shorter" in the states requiring prior notice than in those using the common form method.[23] If this is indeed true, it certainly need not be. Each system requires a period for sending notice, a reasonable period in which interested parties may file their objections, and a short time for the actual probate proceeding, and although the order of these events is not the same in the two systems, the total amount of time in reaching a final decree should be approximately the same.

A functional problem in requiring notice to interested parties involves the manner of ascertaining the names and addresses of all interested parties. The main difficulty stems from the fact that any potential intestate successor or beneficiary under a prior will, no

18. Professor Atkinson points out that "special administration is always a complication and an expense and has sometimes become a racket." Atkinson, *A Model Probate Code*, 79 TRUSTS & ESTATES 325-26 (1944).

19. The function of a special administrator is to preserve the estate, and he has no general power to sell, encumber, lease or distribute property. Annot., 148 A.L.R. 275 (1944).

20. Atkinson, *supra* note 18, at 327; Levy, *supra* note 4, at 427.

21. MODEL PROBATE CODE § 68, comment (Simes 1946).

22. MODEL PROBATE CODE § 70 (Simes 1946).

23. Levy, *supra* note 4, at 427.

matter how remote, may be an interested party, and that up-to-date addresses are often impossible to find. The most feasible system, which has been adopted by many of the states as well as the Model Probate Code,[24] is to require the proponents of the will to include in the petition for probate the names and addresses of all parties who can "reasonably" be ascertained and require notification to each person on the list. One ancillary problem which has perplexed many legislatures is the effect on the probate judgment of either the failure of the proponent to notify one of the listed parties or the failure to include a party on the list that should have been included. If proper notice is considered a condition precedent to the jurisdiction of the probate court, then defective notice renders the whole proceeding void, thus necessitating a second probate.[25] This measure certainly deters the proponents from acting fraudulently or inefficiently, and appears to be a just remedy for the failure to notify a known interested party who is mentioned in the petition. However, it is somewhat anomalous to say that notice is a condition precedent to the jurisdiction of the court in the situation where notice is not required to be sent until after the proceeding has terminated. Also, this remedy may work injustice upon a proponent who has acted carefully, yet failed to include in the petition the name of an interested party which should have been included. Perhaps, the best solution in this instance is to say that a defect of this nature is not jurisdictional and does not void the whole proceeding, but merely makes it voidable. Then the court in its discretion may examine the circumstances and the effect of the lack of notice, and make its determination of each case on the basis of fairness to the parties involved.

It is proposed that the following statutes be adopted:

MODEL PRORATE CODE

§ 65 *Contents of Petition for Probate . . .*
A petition for probate of a will . . . shall state:
(b) The names, ages and residence addresses of the heirs and devisees, if any, so far as known or can with reasonable diligence be ascertained. . . .

§ 68 *Hearing on Petition Without Notice.*
Upon filing the petition for probate . . . if no demand for notice has been filed . . . and if such petition is not opposed by any interested person, the court may, in its discretion, hear it forthwith or at such time and place as it may direct, without requiring notice.

§ 70 *Notice of Appointment of Personal Representative.*
In all cases where notice by publication of the hearing on the petition

24. MODEL PROBATE CODE § 65 (Simes 1946).
25. Levy, *supra* note 4, at 437.

for probate . . . has not been given, the clerk shall, as soon as general letters are issued, cause to be published a notice of the appointment of the personal representative. . . . A copy of such notice shall also be served personally or by registered mail on each heir and devisee whose name and address is known.

PROPOSED STATUTE

Failure To Give Notice To Interested Parties.

The failure of a proponent of the will to give notice to an interested party as required in § 70 does not void the probate proceeding but renders it voidable where the court finds that the substantive rights of a party who did not receive or have actual notice of such proceeding were adversely affected in the original proceeding.

Tax Consequences of Widow's Allowances

Since the assets of the estate of a decedent are distributed only when the estate is settled, it is imperative under modern conditions that the dependent members of the family receive money or the use of other personalty for their support during the period of administration; thus, every American jurisdiction has legislation designed to protect the family from economic hardship during this period.[1] Even if a sum sufficient for this purpose will exhaust the entire estate, it is believed that such property can be used more advantageously during the period of the family's economic readjustment than at a later time.[2]

Problem

Widow's allowance statutes take many forms. Some statutes give a fixed sum payable to the widow on the husband's death,[3] while most direct the probate court to use its sound discretion to set an allowance which is reasonable considering the circumstances and the decedent's estate and the family's standard of living.[4] Some of the factors con-

1. 3 VERNIER, AMERICAN FAMILY LAWS § 228 (1935).

2. ATKINSON, WILLS § 34 (2d ed. 1953). Professor Atkinson cites a case where a widow was awarded $10,000 per month for eighteen months. *Id.* at 134. *But cf.*, Townsend v. Wood, 342 Mass. 481, 174 N.E.2d 420 (1961), citing Dale v. Hanover Nat'l Bank, 155 Mass. 141, 29 N.E. 371, 372 (1891), where the court held that the Massachusetts statute was designed only "'to provide for the necessities of the widow and minor children for a short time, until they have an opportunity to adjust to their new situation.'"

3. *E.g.*, COLO. REV. STAT. ANN. § 152-12-16 (1953) ($3500); KAN. GEN. STAT. ANN. § 59-403 (1949) ($750).

4. *E.g.*, CAL. PROB. CODE § 680; ILL. REV. STAT. ch. 3, § 178 (1961); OKLA. STAT. ANN. tit. 58, § 314 (1951). See Annot., 90 A.L.R.2d 687-88 (1964).

sidered by the courts under the latter type statutes in determining the amount of the allowance are the value,[5] size,[6] "condition,"[7] and solvency[8] of the estate, as well as the widow's age,[9] social position or station in life,[10] and the manner of living to which she has been accustomed.[11] Some statutes provide for consideration of the widow's separate means in determining the amount of the allowance which she is to receive.[12] Some statutes treat all or part of the allowance as an advancement[13] either under the decedent's will or of the statutory intestate share. The majority grant the allowance entirely out of the estate before distribution, exempt it from the claims of creditors, and do not consider such property as part of the probate estate.[14] The duration of allowances varies. They may be for a stated time,[15] for the period of administration[16] or for a combination of the two periods.[17] A few statutes allow the widow property of a stated amount or cash in lieu of such property;[18] others allow the surviving spouse to take property in lieu of any cash allowance awarded by the probate court;[19] a few others merely allow sufficient provisions, wearing apparel, furniture, *et cetera*, to maintain the family for a stated period of time.[20] Under one "discretion" statute it has been held proper to reduce the amount of the allowance when partial distribution of estate assets has caused a change in the relative size of the estate and the amount of the allowance.[21] Since in most states the allowance payments diminish

5. Bryan v. Quinn, 233 Miss. 366, 102 So. 2d 124 (1958); *In re* Coon's Estate, 107 Cal. App. 2d 531, 237 P.2d 291 (1951).

6. *In re* Nolan's Estate, 56 Ariz. 361, 108 P.2d 388 (1940).

7. Baldwin v. Tradesmen's Nat'l Bank, 147 Conn. 656, 165 A.2d 331 (1960).

8. *In re* Bundy's Estate, 121 Utah 299, 241 P.2d 462 (1952).

9. *In re* Estate of Stump, 89 Ohio L. Abs. 570, 185 N.E.2d 334 (P. Ct. 1962); *In re* Estate of Clark, 99 Ohio App. 458, 125 N.E.2d 917 (1955).

10. *In re* Estate of Croke, 155 Ohio St. 434, 99 N.E.2d 483 (1951).

11. *In re* Estate of Clark, *supra* note 9.

12. *E.g.*, FLA. STAT. ANN. § 731.36 (1963); NEV. REV. STAT. § 146.030 (1963); S.D. CODE § 35.1306 (Supp. 1960).

13. *E.g.*, LA. CIV. CODE ANN. art. 3221 (West 1952) (all); MICH. STAT. ANN. § 27.3178(138) (1962) (any allowance in addition to the first year's); N.H. REV. STAT. ANN. § 560:1 (1955) (all).

14. *E.g.*, MO. ANN. STAT. § 474.260 (Supp. 1964).

15. *E.g.*, GA. CODE ANN. § 113-1002 (Supp. 1963) (one year); IND. ANN. STAT. § 6-403 (1953) (one year if the estate is solvent; six months if insolvent); IOWA CODE ANN. § 633.374 (1964) (12 months).

16. *E.g.*, MICH. STAT. ANN. § 27.3178(138) (1962); MINN. STAT. ANN. § 525.15 (Supp. 1964); WASH. REV. CODE ANN. § 11.52.040 (1963).

17. *E.g.*, MINN. STAT. ANN. § 525.15 (Supp. 1964) (administration period, but not more than 18 months); MONT. REV. CODES ANN. § 91-2403 (1947) (until settlement of estate but not longer than 18 months).

18. *E.g.*, TEX. PROB. CODE § 273 (1956).

19. *E.g.*, MO. REV. STAT. ANN. § 474.260 (Supp. 1964).

20. *E.g.*, FLA. STAT. ANN. § 731.36 (1964). See Annot., 158 A.L.R. 313 (1945), for the various types of provisions allowed under statutes of this type.

21. Matter of Guidotti's Estate, 155 Cal. App. 2d 814, 318 P.2d 737 (1957).

the distributable estate, it has been held proper to terminate allowance payments and deny further awards if the conduct of the surviving spouse has caused unjustifiable delay in the closing of the estate.[22] This melange of allowance statutes possesses one common objective—to help support the widow and minor children during the period of adjustment following the death of the deceased spouse.[23]

Section 2056 of the Internal Revenue Code of 1954[24] allows a deduction of up to fifty per cent of the adjusted gross estate for property which passes from the decedent to the surviving spouse as beneficial owner. If the estate assets which pass to the surviving spouse, aside from the widow's allowance granted by the state statute or state court, are equal to or in excess of the maximum amount allowed under the marital deduction,[25] then no estate tax benefit will be derived from the qualification of the allowance payments as the type of property for which a marital deduction is available. But if the estate assets which pass to the surviving spouse are less than the maximum amount for which a marital deduction is allowable, then the estate tax liability will be decreased if the allowance payments are also deemed to be marital deduction property. The state court's inter-

22. *In re* Bundy's Estate, *supra* note 8 (termination); Orr v. Orr, 89 Ga. App. 633, 80 S.E.2d 489 (1954) (denial of second year's award).

23. See note 1 *supra* and accompanying text.

24. INT. REV. CODE OF 1954, § 2056. (BEQUESTS, ETC., TO SURVIVING SPOUSE.)

"(a) ALLOWANCE OF MARITAL DEDUCTION.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) LIMITATION IN THE CASE OF LIFE ESTATE OR OTHER TERMINABLE INTEREST.—

(1) GENERAL RULE.—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and (B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse . . . ."

25. The purpose of the marital deduction is to equalize the estate tax between community property aud common law property states. Under the community property concept the wife's ownership of one half of the husband's earnings reduces the size of his estate. Were it not for the marital deduction the community property states would enjoy a lower estate tax than the tax in a common law property state where the wife is bequeathed an equivalent amount. See generally BOWE, TAX SAVINGS THROUGH ESTATE PLANNING 14-28 (1963); LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES 368-74 (2d ed. 1962); Mahon, *The Widow's Allowance and the Federal Tax Laws*, 41 TAXES 693 (1963).

pretation of the vested nature of allowance awards received under its statute is determinative of the treatment given the payments under the federal estate tax. The varied interpretations of these statutes enable some to qualify as marital deduction property and decrease the size of the taxable estate, while others appear to be non-qualified property interests which pass from the decedent.

Treatment Under the Internal Revenue Code

Section 812(b)(5) of the 1939 Code[26] recognized the various forms of allowance statutes and treated any amounts paid under state law for the support of the surviving spouse as a cost of administration which was properly deductible from the decedent's taxable estate. Deduction was allowed for amounts "reasonably required and actually expended during administration." However, it became apparent that such treatment discriminated in favor of estates located in jurisdictions which authorized liberal allowance payments, and this section was repealed in 1950.[27]

H.R. 8300, which was to become the Internal Revenue Code of 1954, had a specific provision dealing with allowance payments and the marital deduction. Section 2056(b)(7)[28] allowed any payments received under state law within one year after the death of the deceased spouse to be included as marital deduction property. The requirement that property "pass" from the decedent and the terminal interest rule created no problem; payments were to "be considered as passing to the surviving spouse" and not passing to any other person. The Senate objected to this section. The committee report stated:

> Under present law many widows' allowances qualify for the marital deduction without regard to the time of payments. It is believed that the House bill might raise some question as to the treatment under the marital deduc-

26. Int. Rev. Code of 1939, ch. 3, § 812, 53 Stat. 123, provides in relevant part, "For the purpose of the [estate] tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—(b) EXPENSES, LOSSES, INDEBTEDNESS, AND TAXES.—Such amounts—(5) reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by laws of the jurisdiction . . . under which the estate is being administered . . . ."

27. S. REP. No. 2375, 81st Cong., 2d Sess. 57 (1950).

28. H.R. 8300, 83d Cong., 2d Sess. § 2056(b)(7) (1954) (deleted in Senate), provides in relevant part, "(7) ALLOWANCE FOR SUPPORT OF SPOUSE.—In the case of an allowance under the laws of the jurisdiction under which the estate is being administered for the support of the spouse during the settlement of the estate, any amounts paid to such spouse within 1 year after the date of the decedent's death—(A) shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and (B) shall not, for purposes of paragraph (1), be considered as passing to any person other than the surviving spouse."

> tion of these widows' allowances to the extent not received within 1 year of the decedent's death.[29]

While this section would have limited the deduction in some situations, the results under the 1954 Code without it have not been favorable. Indeed, if discrimination motivated the repeal of section 812(b)(5), the provision of section 2056(b)(7) would have further alleviated the problem by disqualifying those allowance payments in jurisdictions which authorized liberal awards which were not received within one year of the decedent's death. The Senate, however, chose to allow all qualifying payments no matter when received.

Treatment under the 1954 Code, without the section dealing specifically with allowance payments, has already been discussed.[30] In the first case under the 1954 Code which challenged the deductibility of allowance payments, *Estate of Rensenhouse v. Commissioner*,[31] the Internal Revenue Service questioned whether a widow's allowance was an interest in property "passing from the decedent." During appeal the Service changed its mind and since then has consistently conceded this issue with one exception.[32] The subsequent litigation has centered about the question of whether these allowances are terminable interests. *Jackson v. United States*[33] apparently narrowed the types of allowances which qualify for the marital deduction. The underlying premise of this decision is that a definite interest in property must pass to the surviving spouse upon death of the decedent.[34] An interest which qualifies for the marital deduction is apparently created if the allowance statute grants the surviving spouse a definite amount of property upon the death of the decedent.[35] However, there is no identifiable property interest at the moment of death if there is a possibility that the surviving spouse might lose the status upon which the award depends, or if the state court has discretion to deny an

29. S. REP. No. 1622, 83d Cong., 2d Sess. 125 (1954).

30. See text accompanying notes 24 & 25 *supra*.

31. 27 T.C. 106 (1956), *remanded per curiam*, 252 F.2d 566 (6th Cir. 1958), *on remand* 31 T.C. 818 (1959), *acq.*, 1959-I CUM. BULL. 5.

32. In Estate of Denman v. Commissioner, 33 T.C. 361 (1959), *aff'd per curiam* 287 F.2d 725 (1961). There was insufficient personalty in the estate to pay the widow her allowance. The widow advanced the estate money with which to pay the award and the estate then claimed a marital deduction for repaying it to her. It was held that the allowance did not "pass from the decedent."

33. 376 U.S. 503 (1964).

34. "[I]n determining whether an interest in property is a terminable interest and whether the conditions of clauses . . . [(a)] and . . . [(b)] are met, the situation must be viewed as at the date of the decedent's death . . ." S. REP. No. 1013, 80th Cong., 2d Sess. 10 (1948). In the *Jackson* decision the court said: "The premise . . . is that an interest passing to a widow is normally to be judged as of the time of the testator's death rather than at a later time when the condition imposed may be satisfied . . . ." *Supra* note 33, at 509.

35. *E.g.*, KAN. GEN. STAT. ANN. § 59-403 (1949).

award or modify one which it has granted.[36] The Supreme Court's approval[37] of *Estate of Cunha v. Commissioner*,[38] which held that the mere right to receive a widow's allowance is not an interest in property, also supports this reasoning. An allowance which is granted only for the period of widowhood is also a terminable interest because the amount of property passing to the widow is not determinable at the decedent's death if death or remarriage terminates the right to subsequent payments.[39]

The purpose of section 2056 is to equalize the community property and the common law property states.[40] This is accomplished by allowing property passing between spouses to be taxed at the death of the surviving spouse rather than at the decease of each, with the terminable interest rule invalidating awards which would not be included in the survivor's estate.[41] Once received, allowance payments, like property which qualifies for the marital deduction, are the absolute property of the widow and become part of her estate if not consumed. Thus, property received under an allowance statute which does not qualify for the deduction under the *Jackson* decision is being taxed twice, a result inconsistent with the purpose of section 2056 and the intent of Congress regarding the treatment of property received under local allowance statutes. Although abolition of section 812(b)(5) was an attempt to end discrimination,[42] the present interpretation of section 2056 apparently creates discrimination in a different form.

It is evident from section 812(b)(5),[43] section 2056[44] and the Senate Committee report which disapproved section 2056(b)(7),[45] that the form of the widow's allowance is considered a matter of state policy. No attempt has been made to force a particular type of statute upon the states. While judicial interpretation of section 2056 has exerted a subtle influence upon the form of allowance statutes, only a few states have positively taken steps to qualify

36. See Annot., 144 A.L.R. 270 (1943); Comment, 50 A.B.A.J. 774 (1964); Note, 36 N.Y.U.L. REV. 1188, 1198 n.73 (1961); 20 U. CINC. L. REV. 134 (1951); 20 WASH. L. REV. 231 (1945).

37. *Supra* note 33.

38. 279 F.2d 292 (9th Cir. 1960).

39. For guidelines in determining whether a terminable interest is created by the state's widow allowance, see CASNER, ESTATE PLANNING 1-2 (Supp. 1964).

40. See note 24 *supra* and accompanying text.

41. Even if an interest is terminable it still may qualify if no other person will enjoy the property. See Treas. Reg. § 20.2056(b)-1(g). See also Hauser, *Recent Estate and Gift Tax Developments*, 51 ILL. B.J. 876, 882-83 (1963).

42. See note 26 *supra* aud accompanying text.

43. *Supra* note 26.

44. *Supra* note 24.

45. See note 29 *supra* and accompanying text.

awards paid under the statutes for the marital deduction.[46] It is submitted that if the form of the allowance is to be considered a matter of state concern, Congress should allow the states to determine the type of allowance which the widow is to receive and should give equal treatment to all. It is unjust discrimination to allow the taxable estates in one jurisdiction to be diminished by the amount of the allowance and not to allow this in other states. Furthermore, the litigation involved in adjudicating every type of allowance statute which either presently exists, or is created by subsequent state legislation, is costly, time consuming and very indefinite in result. The Internal Revenue Service has reportedly asked for legislation to provide for uniform statutory treatment of allowances paid under state law and end such troublesome litigation.[47]

Proposed Solution

Thirty five states[48] give the court some discretion in setting the amount of allowance which the widow is to receive. Less than ten grant a specific amount of property.[49] Under some of the "discretion"

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46. CONN. GEN. STAT. § 45-250 (1949), was revised in 1961 to give the court the power to indefeasibly vest the allowance in the widow and her estate. See Second National Bank of New Haven v. United States, 222 F. Supp. 446 (D. Conn. 1963), for a discussion of the Connecticut statute. IOWA CODE ANN. § 633.375 (1964), allows *increases* only in the amount of the allowance. The comments to this section indicate that its purpose is to take advantage of the marital deduction.

47. See Hauser, *supra* note 41.

48. ALASKA STAT. § 13.30.120 (1962); ARIZ. REV. STAT. ANN. §§ 14-514 to -516 (1956); ARK. STAT. ANN. § 62-2501 (Supp. 1963); CAL. PROB. CODE § 680; CONN. GEN. STAT. § 45-250 (Supp. 1963); GA. CODE ANN. §§ 113-1002 (Supp. 1963), 113-1004 (1935); HAWAII REV. LAWS § 317-21 (1955); IDAHO CODE ANN. §§ 15-501 to -503 (1947); ILL. REV. STAT. ch. 3, § 178 (1961); IND. ANN. STAT. §§ 6-402 (Supp. 1964), 6-403 (1953); IOWA CODE ANN. §§ 633.374 to -.375 (1964); ME. REV. STAT. ANN. cb. 156, § 14 (1954); MASS. GEN. LAWS ANN. ch. 196, §§ 1-8 (1955); MICH. STAT. ANN. § 27.3178(138) (1962); MINN. STAT. ANN. § 525.15 (Supp. 1964); MISS. CODE ANN. § 561 (1942); MO. ANN. STAT. § 474.260 (Supp. 1964); MONT. REV. CODES ANN. §§ 91-2401 to -2403 (1947); NEB. REV. STAT. § 30-103 (1956); NEV. REV. STAT. §§ 146.010 to -030 (1963); N.J. REV. STAT. § 3A: 3-24 (Supp. 1964); N.M. STAT. ANN. § 31-4-1 (1953); N.D. CENT. CODE § 30-16-10 (1960); OHIO REV. CODE ANN. § 2117.20 (Baldwin 1964); OKLA. STAT. ANN. tit. 58, § 314 (1965); ORE. REV. STAT. §§ 116.005 to -.015 (1963); R.I. GEN. LAWS ANN. §§ 33-10-1 to -2, 33-10-4 (1956), 33-10-3 (Supp. 1964); S.D. CODE § 35.1304 (Supp. 1960); TENN. CODE ANN. § 30-802 (1955); TEX PROB. CODE § 273 (1956); UTAH CODE ANN. § 75-8-1 (1953); VT. STAT. ANN. tit. 14, § 404 (Supp. 1963); WASH. REV. CODE ANN. § 11.52.040 (1963); WIS. STAT. ANN. § 3.13.15 (1958); WYO. STAT. ANN. §§ 2-210 to -211 (1957).

49. ALA. CODE tit. 7, §§ 661-69 (1957); COLO. REV. STAT. ANN. § 152-12-16 (1953); DEL. CODE ANN. tit. 12, § 2307 (Supp. 1964); KAN. GEN. STAT. ANN. § 59-403 (1949); MD. ANN. CODE art. 93, § 337 (1957); N.C. GEN. STAT. § 20-15 (Supp. 1963); PA. STAT. ANN. tit. 20, § 320.211 (Supp. 1964); S.C. CODE ANN. §§ 34-1, 34-41 (1962). The "remaining states" have statutes which either grant a fixed sum plus certain household possessions or grant merely household possessions or other types of property.

statutes the terminable interest rule will prevent any part of the allowance from qualifying as marital deduction property, while, presumably, allowances paid under the "specific amount" statutes will qualify. It is submitted that a provision is necessary in section 2056 to equalize the treatment of allowances paid under state law. The proposed federal statute should consider that the problem of ascertaining the value of the deceased's estate causes delays in the granting of the allowance. The probate court may need this figure to use as a basis of the final award. More often the reason for this delay in securing the allowance is a deliberate hesitancy to seek any allowance until it is ascertained that such awards will be advantageously used as marital deduction property.[50] Whatever the reason for the delay, cases indicate that it may be more than one year after the death of the deceased spouse before the court decree is rendered granting the award.[51] If the proposed statute limits the deduction to amounts actually received within one year of death, the reasons for the Senate's objection to section 2056(b)(7)[52] become a reality in that payments which presently qualify may not be included in the marital deduction. Instead, the following statute, designed to treat all allowances whenever actually received and in whatever amount received equally, is suggested as an addition to section 2056(b):

> (7) *Allowance for Support of Spouse.*—Any allowance authorized and paid during the period of administration prior to distribution of the estate, under a state statute or a decree of a state court empowered to make such an award, shall be allowed as a marital deduction to the amount thereof but not to exceed [$10,000][53] provided that the total marital deduction allowed under this section shall not exceed 50% of the adjusted gross estate.

50. If the estate tax has already been paid by the time the court grants the allowance award, the executor of the estate must file for a refund of the tax.

51. *E.g.*, note 33 *supra* (14 months); note 6 *supra* (2 years).

52. Note 29 *supra* and accompanying text.

53. This figure is purely arbitrary. It is submitted that the manner in which an amount of this type should be calculated would be to make a study of the size of statutory and court-awarded allowances and arrive at a figure which is reasonable and which would afford the most uniform treatment. While the size of allowances do vary considerably, see notes 1-20 *supra* and accompanying text, it should not be too difficult to arrive at a just amount.