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The Civil Jury Trial and the Law-Fact Distinction

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I

THE PROBLEM

THE CATEGORIES of "questions of law" and "questions of fact" have been the traditional touchstones by which courts have purported to allocate decision-making between judge and jury.¹ The distinction has been traced to the middle of the sixteenth century;² it was a favorite theme of Coke, who categorically proclaimed that "the most usual trial of matters of fact is by twelve such men; for *ad quaestionem facti non respondent iudices* [judges do not answer a question of fact]; and matters in law the judges ought to decide and discuss; for *ad quaestionem juris non respondent juratores* [juries do not answer a question of law]."³ Many statutes in effect today echo Coke's dichotomy, utilizing the law and fact terminology to identify the respective provinces of the judge and the jurors in a civil case.⁴ None of these statutes, however, attempts

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¹ "The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); see, e.g., *Noll v. Lee*, 221 Cal. App. 2d 81, 87, 34 Cal. Rptr. 223, 227 (1963); *Fitzwater v. Spangler*, 147 S.E.2d 294, 296 (W. Va. 1966).

² Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 YALE L.J. 194, 198-99 (1932), referring to *Townsend's Case*, 1 Plowden 111, 114, 75 Eng. Rep. 173, 178-79 (K.B. 1554). See generally THAYER, A PRELIMINARY TREATISE ON EVIDENCE 183-89 (1898) [hereinafter cited as THAYER, EVIDENCE].

³ 3 COKE, COMMENTARY ON LITTLETON 460 (Thomas ed. 1818); see, e.g., *Altham's Case*, 8 Co. Rep. 150b, 155a, 77 Eng. Rep. 701, 709 (K.B. 1611).

⁴ See, e.g., CAL. EVID. CODE §§ 310(a), 312(a), superseding as of Jan. 1, 1967, CAL. CODE OF CIV. PROC. §§ 2102, 2101; CAL. CODE OF CIV. PROC. §§ 591, 592, 608. Other statutes are cited in 9 WIGMORE, EVIDENCE § 2549 n.2 (3d ed. 1940).

There was a period in American history when the right of the jury to determine the law as well as the facts in both criminal and civil cases received frequent judicial recognition. The rise and fall of this doctrine is traced in Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964). See also THAYER, EVIDENCE 253-57 (1898); Farley, *supra* note 2, at 202-03; Howe, *Juries as Judges of Criminal Law*, 52 HARV.

to define what is meant by a question of law or a question of fact.⁵ Nor have the courts shown any inclination to fashion definitions which can serve as useful guidelines. Indeed, when faced with a dispute as to whether a specific issue should be resolved by the judge or the jury, the typical appellate opinion today does no more than label the question as one of law or of fact, perhaps citing some authorities which are equally devoid of any more detailed consideration of the point.⁶ Thus, in many cases, Coke's maxim has become a tautology: A question of law or a question of fact is a mere synonym for a judge question or a jury question.⁷

A. Identifying a "Question of Law"

We can describe a question of law so as to include those issues which all courts would agree should be decided by the judge rather than by the

L. REV. 582 (1939); *Galloway v. United States*, 319 U.S. 372, 399 (1943) (dissenting opinion). In *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794), the Supreme Court empaneled a jury in a civil case within its original jurisdiction. Chief Justice Jay charged the jury that it had "a right . . . to determine the law as well as the fact in controversy," but further stated that "we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law." *Id.* at 4; see also the opinion of Justice Iredell in *Bingham v. Cabbot*, 3 U.S. (3 Dall.) 19, 33 (1795). *But cf.* *Hickman v. Jones*, 76 U.S. (9 Wall.) 197, 201 (1869) ("It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court and give it full effect.") The early recognized power of the court to grant new trials in civil cases was one method of preventing "the rendering of judgments on verdicts against the directions of the Court . . ." See Note, *Powers and Rights of Juries*, in QUINCY, REPORTS OF CASES IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY: 1761-1772, app. II at 567 (1865); citations to a number of early cases on the power of the jury to determine the law may be found in *id.* at 558-72. It is still true today that the jury has the power to determine the law in criminal cases, in the sense that if the jurors acquit the defendant through disregard of the judge's instructions as to the law, there can be no retrial.

In many jurisdictions today, the jury is specifically authorized to determine the law in criminal libel cases. See, e.g., CAL. CONST. art. I, § 9, interpreted in *People v. Seeley*, 139 Cal. 118, 72 Pac. 834 (1903); CAL. PENAL CODE, §§ 251, 1125. This anachronistic doctrine represents an excessive reaction to the eighteenth century refusal of English judges to permit the jury to return a general verdict in prosecutions for seditious libel. See DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 152-53 (1927); *People v. Seeley*, *supra*.

⁵ *But cf.* CAL. EVID. CODE § 310(a), stating that "questions of law" include, but are not limited to, "questions concerning the construction of statutes and other writings, the admissibility of evidence, and other rules of evidence."

⁶ *Cf.* Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753, 812 (1944) ("What is law to one Justice is fact to another, and perhaps vice versa when the next case comes along.").

⁷ "[B]y and large the terms 'law' and 'fact' are merely short terms for the respective functions of judge and jury." GREEN, JUDGE AND JURY 279 (1930); see also 4 DAVIS, ADMINISTRATIVE LAW § 30.02, at 196-98 (1958); THAYER, EVIDENCE 202-07 (1898); Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 4, 11-12 (1922).

jury.⁸ To take a simple example, assume that defendant has engaged in a course of conduct which has caused injury to plaintiff. Plaintiff claims that defendant is absolutely liable, whereas defendant contends that he is not liable unless he was at fault. It is safe to say that all our courts would classify this dispute as presenting a question of law to be resolved by the trial judge. The determination that the defendant is or is not absolutely liable will establish a principle which will have broad applicability to similar disputes.⁹ If the determination of the trial judge is approved by the state's highest appellate court, then, by virtue of stare decisis, the effect will be the same as if the state legislature had enacted a controlling law.

In a leading article, Professor Bohlen defined "law" as "a body of principles and rules which are capable of being predicated in advance and which are so predicated, awaiting proof of the facts necessary for their application."¹⁰ Bohlen appears to have over-emphasized the time sequence; in the case posed above, the judge could conceivably postpone resolution of the "question of law" until after the jury had returned a special verdict responsive to both theories of liability. Similarly, an appellate court could declare a new legal principle after the "facts" of the dispute in question were settled, either by the trier or by agreement of the parties. Nevertheless, that law involves the formulation in general terms of principles potentially applicable to many civil cases is undoubtedly its most significant aspect for present purposes.¹¹ In this sense the *Restatements* and the statute books set forth the law.

B. Identifying a "Question of Fact"

We can define a "question of fact" so as to delimit those issues which clearly fall within the province of the jury. When there is a dispute as

⁸ I approach with considerable diffidence this task of delineating questions of law and fact, keeping in mind the following warning by Dean Green: "No two terms of legal science have rendered better service than 'law' and 'fact.' . . . They readily accommodate themselves to any meaning we desire to give them. . . . What judge has not found refuge in them? The man who could succeed in defining them would be a public enemy." GREEN, JUDGE AND JURY 270 (1930).

⁹ Cf. THAYER, EVIDENCE 192-93 (1898). In a recent federal case, the court held that "the nature of the duty which an automobile manufacturer owes to users of its product . . . presents an issue of law for the Court." *Evans v. General Motors Corp.*, 359 F.2d 822, 824 (7th Cir. 1966). Such a question would indeed appear to be one "of law," as that term is used in the text.

¹⁰ Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 112 (1924).

¹¹ See HART & SACKS, *THE LEGAL PROCESS* 374-75, 376 (tentative ed. 1958); Fox, *Law and Fact*, 12 HARV. L. REV. 545 (1899); Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944). "[W]hether a particular question is to be treated as a question of law or a question of fact is not in itself a question of fact, but a highly artificial question of law." Isaacs, *supra* note 7, at 11-12.

to what acts or events have actually occurred, or what conditions have actually existed, the jury has the task of resolving the conflict.¹² Its role is to evaluate the evidence and to reconstruct what took place, as it would have appeared to an objective on-the-scene observer. Did a defendant motorist actually halt at the stop sign, and did he look both ways? What words did a defendant accused of fraud or breach of contract actually utter to the plaintiff? When there are no eye witnesses to relate the events which the jury must ascertain, then the jurors will have no choice but to draw inferences from circumstantial evidence. For example, if an insured was found dead from bullet wounds inflicted by his own rifle, and the evidence indicates that he might have committed suicide or that the gun might have discharged accidentally, the jury will have to determine what happened, even if no one actually observed the physical acts which culminated in the firing of the weapon.¹³ Assuming that the jury cannot decide whether death was accidental or intentional, deeming both explanations equally plausible, the case will be resolved against the party bearing the risk of non-persuasion.

Mental as well as physical events present issues for jury determination. What a person intended, knew or believed is a question of fact.¹⁴ Since only the person himself is in a position to give direct evidence of his subjective thought processes at a given moment, and since his testimony may be accorded only limited weight, the jury may have to draw inferences from what he said and did. There is agreement that such inference-drawing constitutes fact-finding.¹⁵

It is also generally stated that whether one acted with malice,¹⁶ or in

¹² See 2 HARPER & JAMES, TORTS § 15.2, at 872-73 (1956); JAMES, CIVIL PROCEDURE 266-67 (1965); cf. THAYER, EVIDENCE 190-91 (1898). Of course the trial judge will play a supervisory role with respect to the determination of the facts by the jury. He will pass upon admissibility of evidence, sufficiency of the evidence to show the existence of a fact, the applicability of presumptions, allocation of the burden of proof, and other procedural matters. See generally 2 HARPER & JAMES, TORTS § 15.2, at 873-80 (1956); JAMES, CIVIL PROCEDURE ch.7 (1965).

Courts will normally decide, without the assistance of the jury, factual disputes which arise in connection with pre-trial motions and the admissibility of evidence at the trial. See authorities cited in JAMES, CIVIL PROCEDURE 266-67 (1965).

¹³ Cf. *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959), observing that under local (North Dakota) law, a presumption of accidental death arises under these circumstances, which "continues throughout the trial and has the weight of affirmative evidence." *Id.* at 442-44.

¹⁴ See JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 548-49 (1965); THAYER, EVIDENCE 191 (1898); Bohlen, *supra* note 10, at 112.

¹⁵ See Stern, *supra* note 11, at 93.

¹⁶ E.g., *Huskie v. Griffin*, 75 N.H. 345, 74 Atl. 595 (1909); *Engelgau v. Walter*, 181 Ore. 481, 182 P.2d 987 (1947); *Hugee v. Pennsylvania R.R.*, 376 Pa. 286, 101 A.2d 740 (1954). See also note 215 *infra*.

good faith,¹⁷ is a question of fact for the jury, since it relates to a subjective state of mind. But here the issue is more complex. Clearly a concept like malice can mean one thing to *A* and another thing to *B*. To some extent this is potentially true of every term,¹⁸ but there are vast differences in degree. Thus a group of people would probably agree that a person who said or did a particular thing was angry. Yet, to pose the question in terms of whether such a person acted with "malice" presents a far greater danger of difference in understanding. The word in question has legal overtones and is not a part of the layman's working vocabulary. Nor is a judicial definition of the term, such as may be given in a typical instruction, likely to change the situation.¹⁹ Accordingly, in determining whether a person had a malicious state of mind, even jurors who conscientiously endeavor to follow the judge's instructions can be expected to diverge from inquiring into what mental condition actually existed, and to interpret the word according to their own value judgments regarding the reasonableness or fairness of the actor's conduct. Similarly, "good faith" connotes an objective standard as well as an actual state of mind.²⁰

C. *The Process of Law Application*

The typical case will present both questions of law and questions of fact, as described above; that is, the court will have to identify the broad principles by which the parties' conduct is to be judged, and the jury will have to decide what that conduct was. But resolution of these kinds of questions will not, by itself, usually dispose of the case. There will still remain the task of applying the general to the specific, of relating the law to the facts.²¹ For example, the judge may declare that a

¹⁷ E.g., *Hatfield v. Barnes*, 115 Colo. 30, 168 P.2d 552 (1946); *Svigum v. Phillips*, 217 Minn. 586, 15 N.W.2d 109 (1944); *Corduan v. McCloud*, 87 N.J.L. 143, 93 Atl. 724 (Ct. Err. & App. 1915).

¹⁸ Cf. JAFFE, *op. cit. supra* note 14, at 550.

¹⁹ "Malice does not submit readily to definition. In his instructions the trial judge usually recites many well worn expressions concerning malice, among which will be found the one that 'malice is the deliberate purpose to injure without just cause or excuse.'" GREEN, JUDGE AND JURY 347 (1930). Holmes defined malice as "a malevolent motive for action, without reference to any hope of a remoter benefit to oneself to be accomplished by the intended harm to another." HOLMES, COLLECTED LEGAL PAPERS 119 (1920).

²⁰ Cf. Farnsworth, *Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963).

²¹ See 1 AUSTIN, JURISPRUDENCE 236 (3d ed. 1869); HART & SACKS, THE LEGAL PROCESS 374-76 (tentative ed. 1958); Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080, 1103 (1956); Stern, *supra* note 11, at 94-98; cf. 4 DAVIS, ADMINISTRATIVE LAW § 30.01, at 189-90 (1958).

master is liable for a tort committed by a servant acting within the scope of his employment. The jury may reconstruct the servant's acts which culminated in the commission of the tort. But in addition to the resolution of these questions, the decision will have to be made whether such a tort was committed within the scope of the servant's employment.

1. *Law Application as a Judge or Jury Function*

With respect to the allocation of decision-making between judge and jury, this area of "law application"²² has given the courts constant difficulty. The problem is illustrated by *Loper v. Morrison*,²³ a California Supreme Court case which presented the question of an employer's vicarious liability under the *respondeat superior* doctrine. An employee of a milk company, driving his own car, went to collect a delinquent account from a customer to whom he had made deliveries. Finding no one in, he decided to return later in the evening. He then went to a tavern with a fellow employee, and afterwards drove the latter home. His car collided with plaintiff's while he was driving back to the customer's house, but before he had reached the boundaries of his milk route. Five members of the court held that the employee's "conduct in going elsewhere for some private purpose while waiting to perform his specific duties presented a question of fact as to whether he had entirely abandoned the business of his employer."²⁴ Accordingly, a jury verdict against the employer was upheld.

Justice Traynor, perhaps concerned that plaintiff would inevitably win a jury victory in a case of this nature, took a far different view:

I cannot agree that it is a question of fact whether . . . [the employee] was acting within the scope of his employment at the time of the accident. If the facts are undisputed it is a question of law whether liability arises from such facts. . . . As a general rule . . . the court determines the law and the jury the facts, unless it appears that the issue is one that the jury can determine better than the court. . . . In the present case the court can determine better than the jury the extent of the vicarious liability to which the . . . milk company should be subject. . . . It is my opinion that [the employee] was returning from a personal mission and had not resumed his employment at the time

²² The phrase is suggested in, e.g., HART & SACKS, *THE LEGAL PROCESS* 375 (tentative ed. 1958). An equivalent way of viewing this process of applying the law to the facts is the characterization of the facts in terms of the governing law. Professor James refers to "the evaluation or appraisal of simple facts in terms of their legal consequences." JAMES, *CIVIL PROCEDURE* 277 (1965); see also *id.* at 267, 270-71.

²³ 23 Cal. 2d 600, 145 P.2d 1 (1944).

²⁴ *Id.* at 607, 145 P.2d at 4. This was also the unanimous conclusion of the district court of appeal. See *Loper v. Morrison*, 134 P.2d 311 (Cal. App. 1943).

of the accident and was therefore not then acting within the scope of his employment.²⁵

What constituted a "question of fact" for the majority was not the recreation of the events which actually occurred on the day of the accident. Similarly, what was a "question of law" for the dissenters was not the determination of the governing *respondeat superior* rule. The point on which the court disagreed was simply whether the judge or jury should apply the rule to the historical facts. Since the issue is neither one of law nor one of fact, as these terms are defined above, it cannot be sensibly allocated to one decision-maker or the other on the basis of this terminology. Instead, the real inquiry should be the one to which Justice Traynor alluded; namely, to which decision-maker *should* the task of law application be entrusted, and why.

Recent federal cases provide other examples of judicial disagreement in this area. In *Harney v. William M. Moore Bldg. Corp.*,²⁶ the Second Circuit held that whether plaintiff was a "crewman," and therefore entitled to a recovery under the Jones Act,²⁷ was "a question of fact, or a mixed question of law and fact," and "even where the facts, as here, are not disputed, the matter is for the jury if conflicting inferences are pos-

²⁵ 23 Cal. 2d at 611-12, 145 P.2d at 6-7 (dissenting opinion). Justice Edmonds concurred with Justice Traynor. In a case decided less than one month after *Loper*, the California Supreme Court, stating that "the question of what acts are within the scope of the employment is one of law," unanimously held that no new trial could be granted for failure to submit this issue to the jury. *Adams v. American President Lines*, 23 Cal. 2d 681, 685, 146 P.2d 1, 3 (1944) (Emphasis added.). See Note, 33 CALIF. L. REV. 646 (1945). This curious decision, though never overruled, has not been followed. Subsequent California cases are consistent with the views of the majority in *Loper*. See, e.g., *Meyer v. Blackman*, 39 Cal. 2d 668, 381 P.2d 916, 31 Cal. Rptr. 36 (1963); *Atchison, T. & S.F. Ry. v. Superior Oil Co.*, 243 A.C.A. 292, 52 Cal. Rptr. 53 (1966); *Eye v. Kafer, Inc.*, 202 Cal. App. 2d 449, 20 Cal. Rptr. 841 (1962).

The division of the California Supreme Court in *Loper* is reflected in cases from other jurisdictions. E.g., compare *Lewis v. Accelerated Transp.-Pony Express, Inc.*, 219 Md. 252, 148 A.2d 783 (1959) ("undisputed and uncontroverted testimony" raised jury question whether employee acted within scope of employment), and *De Mariano v. St. Louis Pub. Serv. Co.*, 340 S.W.2d 735 (Mo. 1960) (question of fact for jury when reasonable men could draw different conclusions from undisputed facts), with *Fisher v. Hering*, 88 Ohio App. 107, 97 N.E.2d 553 (1948) (where facts undisputed, scope of employment question "one of law and should be determined by the court"), and *Lovett Motor Co. v. Walley*, 64 So. 2d 370 (Miss. 1953) (same). Also, compare *Conway v. Kansas City Pub. Serv. Co.*, 125 S.W.2d 935, 940 (Mo. Ct. App. 1938) ("The phrase 'acting within the scope of his authority' did not submit a question of law to the jury."), with *Baker Hotel v. Rogers*, 157 S.W.2d 940, 943 (Tex. Civ. App. 1941) (Asking the jury whether an employee "was acting within the scope of his employment" was "the submission simply of a legal question, requiring the jury to express its opinion on a question of law.").

²⁶ 359 F.2d 649 (2d Cir. 1966).

²⁷ See *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946), interpreting 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

sible."²⁸ In *Burris v. Texaco, Inc.*,²⁹ liability turned on whether a person was an "agent" of defendant or an "independent contractor." The Fourth Circuit held that "since there was no dispute as to the basic facts, there was no issue for the jury to resolve as to the relationship" and "under these circumstances it would have been reversible error to submit the question of agency to the jury."³⁰ Similarly, the Eighth Circuit has held that whether decedent was a guest in defendant's automobile should "be determined as a matter of law" in a jury case since the relevant facts were "undisputed," even though "admittedly the question may be close."³¹

2. Law Application as a Legal or Factual Question

In addition to judicial disagreement regarding the role of judge and jury, commentators have engaged in a prolonged debate over how we

²⁸ 359 F.2d at 654. *Accord*, *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370, 374 (1957); *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959); *Gahagan Const. Corp. v. Armao*, 165 F.2d 301 (1st Cir. 1948). *Cf.* *Producers Drilling Co. v. Gray*, 361 F.2d 432 (5th Cir. 1966), upholding a directed verdict on the issue of seaman status on the ground that reasonable men could draw only one conclusion from the evidence.

In *Quirk v. New York, C. & St. L. R.R.*, 189 F.2d 97, 98 (7th Cir.), *cert. denied*, 342 U.S. 871 (1951), the Seventh Circuit held that whether plaintiff was an "employee," and thus entitled to bring a Federal Employers Liability Act action, was a question "of law" where there was "no dispute as to any material fact." It is doubtful, however, that this decision is still good law, in view of *Ward v. Atlantic Coast Line R.R.*, 362 U.S. 396 (1960), and *Baker v. Texas & Pac. Ry.*, 359 U.S. 227 (1959). In *Schaub v. Calder Van & Storage Co.*, 308 F.2d 835 (7th Cir. 1962), the Seventh Circuit itself held that a question of employment status was for the jury, "even though there be no conflict in the evidence," since "the inferences which may be drawn therefrom reasonably admit of different conclusions." *Id.* at 837-38.

²⁹ 361 F.2d 169 (4th Cir. 1966).

³⁰ *Id.* at 174; *accord*, *Sullivan v. General Elec. Co.*, 226 F.2d 290, 291 (6th Cir. 1955) ("where the essential facts are not in dispute, the question of the relationship is one of law"); *De Bord v. Proctor & Gamble Distrib. Co.*, 58 F. Supp. 157 (N.D. Ga. 1943), *aff'd*, 146 F.2d 54 (5th Cir. 1944); *Hawk Ice Cream Co. v. Rush*, 198 Okla. 544, 180 P.2d 154 (1946); *Taylor v. Esparza*, 8 S.W.2d 288 (Tex. Civ. App. 1928); *cf.* *Plost v. Avondale Motor Car Co.*, 55 Ohio App. 22, 30-31, 8 N.E.2d 441, 445 (1935).

Other decisions have reached a different result. "As a general rule, where the evidence relating to an independent contractor or employee is conflicting, or if not conflicting, where more than one inference can be derived therefrom, the question is one of fact for jury determination . . ." *Spencer v. Travelers Ins. Co.*, 133 S.E.2d 735, 740 (W. Va. 1963), followed in *Levine v. Peoples Broadcasting Corp.*, 140 S.E.2d 438 (W. Va. 1965). *Accord*, e.g., *Hutcheson v. Clapp*, 216 Ark. 517, 226 S.W.2d 546 (1950); *Morain v. Lollis*, 371 P.2d 473 (Okla. 1962); *Wallowa Valley Stages, Inc. v. Oregonian Publishing Co.*, 235 Ore. 594, 386 P.2d 430 (1963); *RESTATEMENT (SECOND), AGENCY* § 220, comment c (1958); see also *Burlingham v. Gray*, 22 Cal. 2d 87, 100, 137 P.2d 9, 16 (1943) ("It is only where but one inference can reasonably be drawn from the evidence that the question of whether one is an employee or an independent contractor becomes one of law for the court."). *But cf.* *Perkins v. Blauth*, 163 Cal. 782, 127 Pac. 50 (1912).

³¹ *Carman v. Harrison*, 362 F.2d 694, 698, 701 (8th Cir. 1966).

should view this process of law application, wholly apart from the issue of whether it is a judge or jury function.³² Some say law application presents a question of fact.³³ Others call it a question of law,³⁴ although perhaps still a jury question.³⁵ Still others prefer the "mixed question of law and fact" phraseology.³⁶

That this dispute must produce a stalemate can be readily demonstrated. In one respect law application is similar to the determination of historical facts. Thus, in the performance of either of these functions, the conclusion of the jury will have no precedential value extending beyond the very case being adjudicated.³⁷ On the other hand, a jury can determine historical facts without any awareness of the governing legal principle.³⁸ For example, in a battery case, where defendant admits striking plaintiff, the jury could be asked to return a special verdict stating whether plaintiff raised a clenched fist, swore at defendant, and advanced toward him. However, if the jury is to proceed further and decide whether the privilege of self-defense justified defendant's conduct, it must be told what that privilege is, and when it will apply. In this respect, law application differs from the determination of historical facts.

³² "The controversy whether application of established legal standards to raw evidentiary material is a question of law or of fact is an old one." *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 590 (2d Cir. 1961) (Friendly, J.); see his opinion in *Ellerman Lines, Ltd. v. The President Harding*, 288 F.2d 288, 292 (2d Cir. 1961); note 255 *infra*. See also Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1314 (1942).

³³ See THAYER, EVIDENCE 228, 249-53 (1898); see also Thayer, "*Law and Fact*" in *Jury Trials*, 4 HARV. L. REV. 147, 169-70 (1890).

³⁴ This was the view of Justice Holmes; see notes 82, 138-44 *infra* and accompanying text. See also 4 DAVIS, ADMINISTRATIVE LAW § 30.01, at 190, § 30.02, at 193 and 195, § 30.14, at 268 (1958); notes 56-57 *infra* and accompanying text.

³⁵ "I follow Holmes in holding that the application of a rule to a particular case is not fact finding but law making, although I do not follow his view that it is, therefore, always within the power of the judge." JAFFE, *op. cit. supra* note 14, at 554.

³⁶ See Green, *Mixed Questions of Law and Fact*, 15 HARV. L. REV. 271 (1901). Further references to the use of the phrase may be found in 4 DAVIS, ADMINISTRATIVE LAW § 30.01, at 189-90 (1958); THAYER, EVIDENCE 224-25, 249-50 (1898); Bohlen, *supra* note 10, at 112. Bohlen found the phrase "unfortunate"; he preferred that law application be thought of as an "administrative" task. *Id.* at 112, 115.

One writer has noted that law application "represents, in effect, a coalescence of law and fact, and is 'mixed' in a very real sense, although this adjective easily produces confusion of thought." Paul, *supra* note 6, at 824.

³⁷ See HART & SACKS, THE LEGAL PROCESS 379, 384 (tentative ed. 1958); Bohlen, *supra* note 10, at 114, 116-17. If the judge rather than the jury performs the function of law application, his conclusion will have precedential value whenever there is a repetition of the historical facts on which that conclusion was based. See notes 284-86 *infra* and accompanying text.

³⁸ See JAFFE, *op. cit. supra* note 14, at 548-49; Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 901-02 (1943).

3. *Another View*

Clarity of thought is not advanced by debating whether law application is law-making or fact-finding, as commentators have done. Moreover, it is meaningless to assign the task in a specific case to judge or jury simply by use of the law and fact jargon, as courts have done. A far preferable solution would be to recognize a third category, and to deal with it as such, not on the basis of terminology, but on the basis of policy.³⁹ Among the policy factors to be considered should be the impact of federal and state constitutional provisions preserving the right of trial by jury in the civil suit. Other factors would be the relative competence of judge and jury with respect to a specific example of law application, and the sacrifice in uniformity and predictability which would result in a particular case from entrusting law application to jury rather than judge.

4. *Illustrating the Problem: The Criterion of Reasonableness*

Before further consideration is given to a possible new approach, it will be helpful to review those cases where the governing principle of law is phrased in terms of the reasonableness of human conduct. In such a situation, a decision must be made, after resolution of the historical facts, whether a person has behaved "reasonably." Such a flexible norm inevitably invests the decision-maker with considerable discretion to draw upon his own notions of how people should conduct themselves.⁴⁰ In determining whether that decision-maker should be the judge or the jury, the courts have become enmeshed in the "law" and "fact" terminology and have failed to give attention to the policy factors which should be controlling. The inconsistency and confusion which their approach has created can be demonstrated by comparing four of the major substantive contexts in which the question of reasonableness is presented: application of the "reasonable man" standard in negligence cases, the "reasonable time" standard in commercial cases, and the "reasonable cause" standard in malicious prosecution and false imprisonment cases.

II

REASONABLE MAN: THE NEGLIGENCE CASES

A. *Province of the Jury*

Even when the historical facts are undisputed, the jury rather than the judge will normally decide whether they will be characterized as

³⁹ Cf. HART & SACKS, *THE LEGAL PROCESS* 375-76 (tentative ed. 1958); Stern, *supra* note 11, at 97.

⁴⁰ Cf. Bohlen, *supra* note 10, at 113-14 ("The factor controlling the judgment of the defendant's conduct is not what is, but what ought to be."); see also DICKINSON, *op. cit. supra* note 4, at 128, 142-43, 215; POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 57-59 (rev. ed. 1954).

negligence.⁴¹ The courts of all American jurisdictions, with possibly one exception,⁴² adhere to this principle. The doctrine is usually phrased in more traditional terms; namely, that it is a question of fact for the jury, rather than a question of law for the judge, whether a party has acted as a reasonably prudent man would act under similar circumstances.⁴³ Thus, in an airplane accident case, "it was a question of fact for the jury to determine, and not a question of law, whether the pilot was guilty of negligence in abandoning the Saugus [radio] beam and flying on an average compass reading"⁴⁴ Similarly, in a case involving an accident at a railroad crossing, whether the engineer was negligent in driving the train at forty miles per hour when visibility was impaired by a snowstorm "was a question of fact for the jury and not for the court."⁴⁵ And whether a railroad had taken sufficient steps to protect plaintiff's tobacco from water damage was a "question . . . of fact and should be submitted to the jury, even though the testimony is undisputed."⁴⁶ The question raised by all these cases is not what events took place, but whether negligence should be inferred from the defendant's conduct.⁴⁷

Indeed, courts have become so accustomed to classifying as a question of fact whether a party's conduct complied with the standard of a reasonably prudent man, that the typical opinion cavalierly lumps this question together with other questions which are factual in a much different sense.⁴⁸ For example, as stated in one case:

[W]hether respondent looked in the direction from which appellant was approaching, whether the point from which observation was made was prudently selected, whether respondent should have seen appellant's car within a distance of sixty feet, whether respondent should have looked north and south, or north alone, and whether due vigilance was observed continuously, were disputable questions of fact . . . properly submitted to the jury.⁴⁹

⁴¹ For a discussion of cases where the jury will not be permitted to decide this question, see notes 67-87, 91-95 *infra* and accompanying text.

⁴² The possible exception is North Carolina. See notes 96-102 *infra* and accompanying text.

⁴³ There are literally hundreds of cases in which this concept has been asserted. For some typical California cases, see *Polk v. City of Los Angeles*, 26 Cal. 2d 519, 159 P.2d 931 (1945); *Mertes v. Atchison, T. & S.F. Ry.*, 206 Cal. App. 2d 64, 23 Cal. Rptr. 320 (1962); *Westcott v. Hamilton*, 202 Cal. App. 2d 261, 20 Cal. Rptr. 677 (1962).

⁴⁴ *Johnson v. Western Air Express Corp.*, 45 Cal. App. 2d 614, 627-28, 114 P.2d 688, 696 (1941).

⁴⁵ *Chicago, R.I. & P.R.R. v. Hugh Breeding, Inc.*, 232 F.2d 584, 589 (10th Cir. 1956); see also *Hopkins v. Pacific Elec. Ry.*, 118 P.2d 872 (Cal. App. 1941).

⁴⁶ *Chesapeake & O. Ry. v. J. Wix & Sons, Ltd.*, 87 F.2d 257, 259 (4th Cir. 1937).

⁴⁷ *Cf. Stern*, *supra* note 11, at 110.

⁴⁸ *Cf. Holmes, Law in Science and Science in Law*, 12 HARV. L. REV. 443, 457 (1899): "From saying that we will leave a question to the jury to saying that it is a question of fact is but a step, and the result is that at this day it has come to be a widespread doctrine that negligence not only is a question for the jury but is a question of fact."

⁴⁹ *Lavin v. Fereria*, 10 Cal. App. 2d 710, 712, 52 P.2d 518, 519 (1935). See, e.g.,

Surely the first question asked by the court entailed the determination of an historical fact, and did not belong in the same category as those which followed.

Other courts, however, have shown more sophistication in recognizing that the jury is being asked to decide two different kinds of questions in the typical negligence case, even though both kinds are classified as questions of fact. Thus, a 1956 federal case stated that "where, as here, not only the facts constituting the conduct of the parties, but also the standard of care which they should have exercised, are to be determined, the case is entirely one of fact and to be decided by the jury and not one of law for the court."⁵⁰

B. Some Terminological Dissents

Judicial pronouncements can also be found which cast doubt on the prevailing view that application of the standard of reasonable care presents only an issue of fact. Some California cases proclaim that "even in the absence of conflict in the evidence . . . negligence is a mixed question of law and fact which should be left to the jury."⁵¹ Other California cases disagree with this phraseology; negligence is said to present "*only* factual questions,"⁵² and "the general rule" is stated to be that "negligence is a question of fact for the jury."⁵³ Still another California opinion takes the position that "theoretically . . . negligence is a question of mixed fact and law, but it is ordinarily considered a question of

Burcham v. J. P. Stevens & Co., 209 F.2d 35, 38 (4th Cir. 1954) (rate of speed at which autos were traveling and whether drivers exercised due care both described as "pure questions of fact"); Lee v. Dawson, 44 Cal. App. 2d 362, 364, 112 P.2d 683, 685 (1941) (non-jury case); Imbrey v. Prudential Ins. Co., 286 N.Y. 434, 440, 36 N.E.2d 651, 654 (1941) ("The exercise of ordinary prudence and caution is peculiarly a question of fact.").

⁵⁰ Bryant v. Hall, 238 F.2d 783, 787 (5th Cir. 1956). See also Dashnow v. Myers, 121 Vt. 273, 282, 155 A.2d 859, 865 (1959) ("[I]t is the province of the jury to resolve the true facts, and relate the conduct of the parties to the standard of care required of reasonably prudent men under similar circumstances."); Heimer v. Salisbury, 108 Conn. 180, 142 Atl. 749 (1928); Bimberg v. Northern Pac. Ry., 217 Minn. 187, 14 N.W.2d 410 (1944); cf. McClure v. Price, 300 F.2d 538 (4th Cir. 1962).

⁵¹ Eastman v. Atchison, T. & S.F. Ry., 51 Cal. App. 2d 653, 663, 125 P.2d 564, 569 (1942); Robbins v. Southern Pac. Co., 102 Cal. App. 744, 754, 283 Pac. 850, 854 (1929). Many California decisions refer to negligence as "a question of mixed fact and law." See, e.g., Hudson v. Rainville, 46 Cal. 2d 474, 477, 297 P.2d 434, 436 (1956); Gray v. Brinkerhoff, 41 Cal. 2d 180, 183, 258 P.2d 834, 836 (1953); Hiner v. Hubbard, 240 A.C.A. 63, 69, 49 Cal. Rptr. 157, 161 (1966).

⁵² Florez v. Groom Dev. Co., 53 Cal. 2d 347, 354, 348 P.2d 200, 204 (1959). (Emphasis added.)

⁵³ Clinkscale v. Germershausen, 145 Cal. App. 2d 76, 82, 302 P.2d 23, 27 (1956); see also Miles v. Van Hagen, 53 Cal. App. 2d 750, 757, 128 P.2d 89, 92 (1942) ("normally questions of fact for the jury"); California cases cited note 43 *supra*.

fact. . . .'⁵⁴ One court has stated that "negligence is generally 'a mixed question of law for the court and fact for the jury.'"⁵⁵

As foreshadowed by his dissent in *Loper*, Justice Traynor has taken a different approach to this problem. He "cannot subscribe . . . to the view that when a jury determines standards of care in negligence cases it is simply finding facts."⁵⁶ Rather, "the determination of the standard of reasonable conduct by which a defendant's conduct is to be measured involves a question of law, a determination whether or not liability should be imposed. This question is nevertheless commonly left to the jury."⁵⁷ But surely this "question of law" is not the same kind of question as whether the actor's conduct should be judged by the standard of the reasonably prudent man, or by some other standard such as absolute liability. The jury's application of the standard of care to the facts it ascertains is strictly an *ad hoc* determination, based solely upon those facts and made only for purposes of the case before it. Taking as its starting point the general "reasonable man" principle, as the law furnishes no more specific guide, the jury appraises a particular case in terms of that principle.⁵⁸ Yet Justice Traynor is certainly correct in resisting the temptation to dispose of this application of the due care standard by classifying it as a run-of-the-mill question of fact.⁵⁹

⁵⁴ *Miller v. Western Pac. R.R.*, 207 Cal. App. 2d 581, 592, 24 Cal. Rptr. 785, 791 (1962); cf. *Davis v. Margolis*, 107 Conn. 417, 420, 140 Atl. 823, 824 (1928) (conclusion of negligence "often called one of fact; strictly speaking it is one of law and fact").

⁵⁵ *Hack v. New York, C. & St. L. R.R.*, 27 Ill. App. 2d 206, 218, 169 N.E.2d 372, 377 (1960); accord, *Southern Pac. R.R. v. Gonzales*, 48 Ariz. 260, 287, 61 P.2d 377, 388 (1936).

⁵⁶ *Toschi v. Christian*, 24 Cal. 2d 354, 364, 149 P.2d 848, 854 (1944) (concurring opinion). For Justice Traynor, "a question of fact relates to what acts or events have occurred or what conditions exist or have existed." *Ibid.* The majority of the court took the classic position that if there is "a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact rather than of law." *Id.* at 360, 149 P.2d at 852.

⁵⁷ *Mosley v. Arden Farms Co.*, 26 Cal. 2d 213, 223, 157 P.2d 372, 377 (1945) (concurring opinion). See also *Toschi v. Christian*, *supra* note 56 ("It is a question of law what the rule or standard of conduct should be for adjudging the actions of men as lawful or unlawful and for determining the consequences of those actions."). That Justice Traynor's views have not changed is suggested by his opinion for the court in *Laird v. T. W. Mather, Inc.*, 51 Cal. 2d 210, 215, 331 P.2d 617, 620 (1958), where he states that what constitutes ordinary care "is usually a question for the jury," but carefully refrains from calling it a question of fact. See Kalven, *Torts: The Quest for Appropriate Standards*, 53 CALIF. L. REV. 189, 198 (1965).

⁵⁸ "The rule usually propounded, to act as a reasonable and prudent man would act in the circumstances, still leaves open the question how such a man would act," *Farrell v. Waterbury Horse R.R.*, 60 Conn. 239, 248, 21 Atl. 675, 676-77 (1891).

⁵⁹ Another relevant and thoughtful opinion is that of Judge Torrance in *Farrell v. Waterbury Horse R.R.*, *supra* note 58. He notes that "the result of comparing the conduct with the standard is generally spoken of as 'negligence' or the 'finding of negligence.'"

Despite the controversy about the meaning of law and fact in the negligence context, the preceding cases agree that the jurors should decide both what actually happened (if in dispute), and also whether the conduct of the actors was in accord with that of a reasonable man. But the insistence that this latter jury determination be somehow fitted into the classic categories of law and fact by calling it one or the other, or a combination, has only engendered confusion.

Further examples of this confusion are readily available. A 1965 wrongful death case contains the dictum that "where the facts are clear and undisputed, it is a question of law for the court to determine the legal consequences of such facts."⁶⁰ With respect to a typical negligence suit, this assertion is simply incorrect. Equally erroneous is the dictum in another negligence case that "what a defendant's conduct was is a question of fact. What a defendant's conduct should have been is a question of law."⁶¹

C. *The Stout Case*

One of the American cases most frequently cited in support of the doctrine that the jury determines whether undisputed facts should be characterized as negligence is the 1873 Supreme Court decision in *Sioux City & Pac. R.R. v. Stout*.⁶² A six-year-old boy was injured while playing on a railroad turntable. The turntable, which was unguarded and unlocked, revolved easily on its axis. The latch which would have kept the turntable from rotating was broken at the time of the accident. The Supreme Court upheld the action of the trial judge in permitting the jury to decide whether defendant's conduct should be deemed negligent:

[I]t is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no

Negligence, in this last sense, is always a conclusion or inference, and never a fact in the ordinary sense of that word." *Id.* at 247, 21 Atl. at 676.

⁶⁰ *Premo v. Grigg*, 237 Cal. App. 2d 192, 199, 46 Cal. Rptr. 683, 688 (1965). *But see* *Detroit & M.R.R. v. Van Steinburg*, 17 Mich. 99, 122 (1868) ("It is a mistake . . . to say . . . that when the facts are undisputed the question of negligence is necessarily one of law."); *Farley v. Portland Gas & Coke Co.*, 203 Ore. 635, 280 P.2d 384 (1955).

⁶¹ *Hillis v. Home Owners' Loan Corp.*, 348 Mo. 601, 609, 154 S.W.2d 761, 764 (1941). Many other Missouri cases support the general rule that the jury should decide whether given conduct is to be characterized as negligent. See, e.g., *Swain v. Anders*, 349 Mo. 963, 163 S.W.2d 1045 (1942).

⁶² 84 U.S. (17 Wall.) 657 (1873). The decision is included in two of the leading procedure case books. See LOUISELL & HAZARD, *CASES ON PLEADING AND PROCEDURE—STATE AND FEDERAL* 993 (1962); FIELD & KAPLAN, *MATERIALS ON CIVIL PROCEDURE* 611 (1953).

negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. . . . We find, accordingly, . . . that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.⁶³

It is submitted that a most significant feature of this opinion is its refusal to say that the issue should be submitted to the jury because it is one of fact, or conversely that the issue is one of fact because it should be submitted to the jury. Instead, the Court simply concluded that the jury was better qualified than the judge to apply the standard of "proper care" to the undisputed facts. Unfortunately, later decisions did not follow the implication of *Stout* that consideration of the jury's role in negligence cases should proceed unadorned, and unobscured, by the law-fact terminology. Twenty years after *Stout*, the Supreme Court itself fell into the trap which *Stout* appears to have carefully avoided.⁶⁴ In *Richmond & D.R.R. v. Powers*, the Court, citing *Stout*, proclaimed:

It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, *the question is not one of law, but of fact*, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fairminded men will honestly draw different conclusions from them.⁶⁵

⁶³ 84 U.S. (17 Wall.) at 663-64.

⁶⁴ The trap was also avoided in *Grand Trunk Ry. v. Ives*, 144 U.S. 408, 417 (1892).

⁶⁵ 149 U.S. 43, 45 (1893). (Emphasis added.) The *Powers* "question of fact" terminology was reaffirmed by the Supreme Court in *Northern Pac. R.R. v. Everett*, 152 U.S. 107, 113 (1894); *Patton v. Texas & Pac. Ry.*, 179 U.S. 658, 660 (1901); *McDermott v. Severe*, 202 U.S. 600, 604 (1906); *Davidson S.S. Co. v. United States*, 205 U.S. 187, 192 (1907); *Texas & Pac. Ry. v. Harvey*, 228 U.S. 319, 324 (1913); *Gunning v. Cooley*, 281 U.S. 90, 94 (1930). More recently, in the context of FELA cases, the Court has vigorously upheld the right of the jury to determine, along with other "disputed questions of fact" regularly submitted to it, "whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances." *Wilkerson v. McCarthy*, 336 U.S. 53, 61-62 (1949); see *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957); *Stone v. New York, C. & St. L. R.R.*, 344 U.S. 407 (1953); *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29 (1944); *Bailey v. Central Vt. Ry.*, 319 U.S. 350 (1943); *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54 (1943).

The next noteworthy Supreme Court development in this area occurred in 1934, when the Court, although dealing with a negligence case, phrased the *Powers* doctrine in a way not limited to such a case: "Where uncertainty arises either from a conflict of testimony or because, the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."⁶⁶ The significance of the breadth of this statement will be readily apparent after a consideration of cases involving the reasonableness of human conduct in contexts other than negligence.

D. Limitations on the Jury's Province

1. Can Reasonable Men Differ?

There are certain recognized qualifications to the doctrine that the jury rather than the judge is to decide what constitutes reasonable care. The courts say that the question is to be submitted to the jury only if the answer to it is one upon which "reasonable"⁶⁷ or "fair-minded"⁶⁸ or "sensible"⁶⁹ men can differ. In other words, the judge must first decide whether or not there has been negligence "as a matter of law."⁷⁰ What this really entails is a preliminary determination on the part of the judge whether the conduct in question was negligent.⁷¹ If the judge feels that it obviously was or was not, he will direct a verdict. Under these circumstances, the opinion of the jury is unnecessary and perhaps even harmful, since it may contradict what the court thinks the conclusion has to be. Alternatively, if the issue has been submitted to the jury, a verdict characterizing the conduct in a manner conflicting with the judge's firmly held opinion will be set aside. This action will be justified on the ground that twelve theoretically reasonable men have in fact been unreasonable.⁷²

Appellate courts have provided different guidelines for determining

⁶⁶ *Best v. District of Columbia*, 291 U.S. 411, 415 (1934).

⁶⁷ *E.g.*, *Westcott v. Hamilton*, 202 Cal. App. 2d 261, 269-71, 20 Cal. Rptr. 677, 682-84 (1962); *Hopkins v. Pacific Elec. Ry.*, 118 P.2d 872, 875 (Cal. App. 1941).

⁶⁸ *E.g.*, *United States v. Douglas Aircraft Co.*, 169 F.2d 755, 757 (9th Cir. 1948); *Johnson v. Nicholson*, 159 Cal. App. 2d 395, 409, 324 P.2d 307, 315 (1958).

⁶⁹ *E.g.*, *Jacobson v. Oakland Meat & Packing Co.*, 161 Cal. 425, 429, 119 Pac. 653, 654 (1911); *Emery v. Pacific Tel. & Tel. Co.*, 43 Cal. App. 2d 402, 408, 110 P.2d 1079, 1083 (1941).

⁷⁰ See, *e.g.*, cases cited note 51 *supra*.

⁷¹ "In dealing with these issues of negligence . . . the trial judge has to make a preliminary decision whether the issues are such that reasonable men might differ on the inferences to be drawn. This preliminary decision is said to be a question of law, for it is one which the court has to decide, but it is nevertheless necessarily the exercise of a judgment on the facts . . ." *Marshall v. Nugent*, 222 F.2d 604, 611 (1st Cir. 1955) (Magruder, C.J.).

⁷² *Cf. LOUISELL & HAZARD, CASES ON PLEADING AND PROCEDURE—STATE AND FEDERAL* 1017 (1962).

when the question of negligence should be decided by the trial judge rather than by the jury. Some decisions proclaim that it is only "in the clearest cases" that the issue of what constitutes reasonable care under the circumstances should be deemed one "of law."⁷³ Other courts say that instances when jury exclusion is justified will be "rare"⁷⁴ or "infrequent"⁷⁵ or "relatively rare"⁷⁶ or "very seldom."⁷⁷ In still other cases, the appellate courts appear to afford the trial judge greater leeway to take the issue from the jury; the verdict of the jurors is said to be needed "in close or doubtful cases"⁷⁸ which arise in the "twilight zone"⁷⁹ where reasonable men may differ. Even when there is agreement among appellate judges as to the phraseology of the applicable test, there may still be disagreement in a particular case over whether the trial judge should have permitted jury participation in the formulation of a standard of reasonable care. There are several explanations for this difference of opinion: differing attitudes of judges toward the jury as an institution, varying judicial reaction to the peculiar equities of the case, and differences in belief as to the obviousness of negligence under the "reasonable man" test.⁸⁰

2. *Judicial Declarations of Reasonable Conduct*

The jury will also be prevented from deciding whether given conduct is negligent if appellate case law establishes how a reasonably prudent man would act under the very circumstances in question.⁸¹ An appellate court may decide, as Mr. Justice Holmes once did for a unanimous Supreme Court, that before a driver crosses a railroad track he must stop and look, and must also "get out of his vehicle" if he "cannot be sure

⁷³ *Commercial Carriers, Inc. v. Driscoll Truck Lines, Inc.*, 408 P.2d 445, 447 (Colo. 1965); *Boley v. Larson*, 62 Wash. 2d 959, 963, 385 P.2d 326, 329 (1963).

⁷⁴ *Beck v. Kessler*, 235 Cal. App. 2d 331, 336, 45 Cal. Rptr. 237, 240 (1965); *Beard v. David*, 179 Cal. App. 2d 175, 177, 3 Cal. Rptr. 651, 653 (1960).

⁷⁵ *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 510 (1957).

⁷⁶ *Gard v. Sherwood Constr. Co.*, 194 Kan. 541, 549, 400 P.2d 995, 1002 (1965).

⁷⁷ *Chr. Heurich Brewing Co. v. McGavin*, 16 F.2d 334, 336 (D.C. Cir. 1926).

⁷⁸ *Robelen Piano Co. v. Di Fonzo*, 53 Del. 346, 355, 169 A.2d 240, 245 (1961).

⁷⁹ *Pfisterer v. Key*, 218 Ind. 521, 531, 33 N.E.2d 330, 334 (1941).

⁸⁰ In this connection, a cautious note is sounded in *Herbert v. Southern Pac. Co.*, 121 Cal. 227, 229, 53 Pac. 651 (1898) ("Our ideas as to what would be proper care vary according to temperament, knowledge, and experience. A party should not be held to the peculiar notions of the judge as to what would be ordinary care."). See *Detroit & M.R.R. v. Van Steinburg*, 17 Mich. 99, 120 (1868).

Arizona and Oklahoma have both adopted constitutional provisions which have the effect of forbidding a trial judge in a jury case from making the determination that the plaintiff was guilty of contributory negligence. See ARIZ. CONST. art. 18, § 5, *Campbell v. English*, 56 Ariz. 549, 110 P.2d 219 (1941); OKLA. CONST. art. XXIII, § 6.

⁸¹ See *Lotta v. City of Oakland*, 67 Cal. App. 2d 411, 154 P.2d 25 (1944); RESTATEMENT (SECOND), TORTS § 285 (1965).

otherwise whether a train is dangerously near."⁸² Holmes thus created a new rule of law as a sub-category of the reasonable man concept, thereby eliminating the necessity of making an *ad hoc* application of the broader standard to a particular state of facts.⁸³ Accordingly, in future cases involving accidents at railroad crossings, a trial judge who was bound by Holmes' declaration would state "as a matter of law" how the party should have acted. The judge would have neither the need nor the discretion to submit the issue to the jury. That the question is deemed one of law means only that the appellate court has such strong views on the subject that it will not permit a jury to state what conduct shall be considered due care; instead, the court elects in the particular kind of case to appropriate this function for itself.⁸⁴

As courts have become increasingly unwilling to take the issue of due care away from the jury, it has inevitably followed that they have adopted a wary attitude toward promulgation of general rules of reasonably prudent conduct.⁸⁵ Not surprisingly, a unanimous Supreme Court repudiated the Holmes maxim seven years after its adoption (and two years after Holmes' retirement), when it held in a railroad crossing case that "the question . . . was for the jury whether reasonable caution forbade [the driver's] going forward in reliance on the sense of hearing, unaided by that of sight."⁸⁶ The Court also noted "the need for caution in framing standards of behavior that amount to rules of law."⁸⁷

Courts have been unwilling to lay down such rules of law on the basis of a unanimity of opinion among successive juries. Thus, five juries

⁸² *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66, 70 (1927). Noting that "the question of due care very generally is left to the jury," Justice Holmes nevertheless stated that "we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the courts." *Ibid.* The decision in effect overruled the earlier Supreme Court case of *Flannery v. Delaware & H. Co.*, 225 U.S. 597 (1912). For another Holmes opinion consistent with his approach in *Goodman*, see *Lorenzo v. Wirth*, 170 Mass. 596, 49 N.E. 1010 (1898).

⁸³ *Cf. Morris, Law and Fact*, 55 HARV. L. REV. 1303, 1327 n.47 (1942).

⁸⁴ This appropriation by the court is justified by pronouncements such as the following, from *Ambrose v. Cyphers*, 29 N.J. 138, 145, 148 A.2d 465, 469 (1959): "But where human experience uniformly suggests the amount of care a reasonable man should exercise in a given set of circumstances, the courts may properly fix the amount of required care as a matter of law, thus taking from the jury the factual inquiry ordinarily left with it as to the amount of hazard and care."

⁸⁵ See FLEMING, TORTS 271 (3d ed. 1965); 2 HARPER & JAMES, TORTS § 15.3, at 883, § 16.10, at 937, § 17.1, at 970, § 17.2 (1956); PROSSER, TORTS 209-12 (3d ed. 1964); *cf. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* 145-48 (1927).

⁸⁶ *Pokora v. Wabash Ry.*, 292 U.S. 98, 101 (1934).

⁸⁷ *Id.* at 105; see *Anello v. Southern Pac. Co.*, 174 Cal. App. 2d 317, 344 P.2d 843 (1959); *Hughes v. Wabash R.R.*, 342 Ill. App. 159, 95 N.E.2d 735 (1950); PROSSER, TORTS 210-11 (3d ed. 1964). For a judicial view contrary to the modern trend, see Justice Traynor's concurring opinion in *Startup v. Pacific Elec. Ry.*, 29 Cal. 2d 866, 872, 180 P.2d 896, 899 (1947).

could declare in five different cases in the same jurisdiction that certain recurring conduct should be characterized as negligence. Yet this consistency in result would not by itself establish a general proposition which would govern future cases.⁸⁸ Giving such weight to the prior conclusions of juries would presumably violate the accepted maxim that a jury verdict should not have precedential value in a different action involving different parties.⁸⁹ Confining the repercussions of a jury verdict to a single case may be justified by referring to the unique non-rational factors which may have dictated the jury's reaction in the particular instance.⁹⁰ Yet individual prejudices as to what constitutes reasonable conduct undoubtedly sway judges in those now relatively rare cases where uniform rules of conduct are judicially laid down, to be automatically applied in future disputes. Perhaps there are more pragmatic reasons for the difference between judge-declared and jury-declared generalizations. Since jury verdicts, and the evidence on which they are based, are normally not reported, it is rather difficult to ascertain that a multiplicity of juries have in the past decided the identical question consistently. Moreover, if a jury has returned a general verdict in a case where the historical facts were in dispute, it may not be clear exactly what facts were characterized in which way, and thus the precedential weight to be given the verdict would be uncertain.

3. *Legislative Declarations*

In contrast to the modern cautious attitude toward judicial formulation of uniform rules of conduct, courts have been far less reluctant to exclude the jury from the formulation of a standard of reasonable care when a legislative pronouncement, usually in the form of a penal statute, is adjudged to have established such a standard for purposes of the case in question.⁹¹ Since the legislature, as the representative of the community, has "generalized a standard from the experience of the community,"⁹² the jury will not be permitted to contradict the legislators' views. One may question why the courts should so readily defer to legislative pronouncements which by their terms are not made applicable to

⁸⁸ Cf. Fox, *Law and Fact*, 12 HARV. L. REV. 545, 550-51 (1899).

⁸⁹ Cf. HART & SACKS, *THE LEGAL PROCESS* 379 (tentative ed. 1958); Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 116-17 (1924).

⁹⁰ Cf. Morris, *supra* note 83, at 1323.

⁹¹ See generally FLEMING, *TORTS* 126-34 (3d ed. 1965); 2 HARPER & JAMES, *TORTS* § 17.6 (1956); PROSSER, *TORTS* § 35 (3d ed. 1964); *RESTATEMENT (SECOND), TORTS* § 285 (1965).

⁹² Traynor, J., in *Clinkscales v. Carver*, 22 Cal. 2d 72, 75, 136 P.2d 777, 778 (1943); see also his concurring opinion in *Saterlee v. Orange Glenn School Dist.*, 29 Cal. 2d 581, 593, 177 P.2d 279, 286 (1947); Malone, *Contrasting Images of Torts—The Judicial Personality of Justice Traynor*, 13 STAN. L. REV. 779, 783-88 (1961).

cases involving private wrongs. It may be argued that the present uneasiness of courts with respect to judicial declaration of uniform standards of behavior⁹³ should dictate an equally wary approach to legislative generalization. Accordingly, criminal statutes would not be imported into civil cases, a result which the courts could justify on the ground that the legislature had not expressly so provided. Dean Prosser has aptly suggested that "the statutory standard of conduct is simply adopted voluntarily, out of deference and respect for the legislature."⁹⁴ And presumably courts deem it incongruous that one could act criminally, and yet still be said to have behaved like a reasonable man.⁹⁵

E. North Carolina: A Possible Minority View

The supreme court of one state, North Carolina, has repeatedly declared that "the principle prevails in this State that what is negligence is a question of law, and when the facts are admitted or established, the court must say whether it does or does not exist."⁹⁶ Taken at face value, this "principle" constitutes a striking deviation from the law of other jurisdictions. It appears to give the trial judge blanket authorization to pass upon the reasonableness of a party's conduct, even in the absence of a governing legislative enactment or appellate ruling. However, despite the sweeping language of the North Carolina decisions, it is not clear that its law is really different from that of any other state. The cases in which the principle has been asserted may also be explained by the court's belief that only one inference could reasonably be drawn from the evidence. Exclusion of the jury from application of the reasonable care standard was therefore warranted.⁹⁷ Indeed, when the quoted principle

⁹³ *E.g.*, *Hughes v. Wabash R.R.*, 342 Ill. App. 159, 167-68, 95 N.E.2d 735, 740 (1950) ("[S]tandards of behavior should not be set down as matters of law, but should be questions for juries.").

⁹⁴ PROSSER, *TORTS* 193 (3d ed. 1964).

⁹⁵ See *id.* at 192; 2 HARPER & JAMES, *TORTS* § 17.6, at 997-98 (1956).

⁹⁶ *Hudson v. Petroleum Transit Co.*, 250 N.C. 435, 444, 108 S.E.2d 900, 907 (1959); *accord*, *Hedrick v. Akers*, 244 N.C. 274, 276-77, 93 S.E.2d 160, 162 (1956); *Garner v. Pittman*, 237 N.C. 328, 334, 75 S.E.2d 111, 116 (1953); *Godwin v. Nixon*, 236 N.C. 632, 641, 74 S.E.2d 24, 30 (1953); *Mintz v. Town of Murphy*, 235 N.C. 304, 312, 69 S.E.2d 849, 856 (1952); *Baker v. Atlantic Coast Line R.R.*, 232 N.C. 523, 529, 61 S.E.2d 621, 624-25 (1950); *Reeves v. Staley*, 220 N.C. 573, 582, 18 S.E.2d 239, 245 (1942); *Godwin v. Atlantic Coast Line R.R.*, 220 N.C. 281, 285, 17 S.E.2d 137, 140 (1941); *Pearson v. National Mfg. & Stores Corp.*, 219 N.C. 717, 721, 14 S.E.2d 811, 813-14 (1941); see also *Rogers v. Green*, 252 N.C. 214, 219, 113 S.E.2d 364, 368 (1960).

⁹⁷ Many of the cases cited in note 96 *supra* make some reference to *Lineberry v. North Carolina Ry.*, 187 N.C. 786, 123 S.E. 1 (1924); and *Russell v. Carolina Cent. R.R.*, 118 N.C. 1098, 24 S.E. 512 (1896), stating that a court will act without jury assistance in a negligence case where the facts are undisputed, and but a single inference can be drawn from them.

was initially declared in 1940,⁹⁸ it was based upon the misinterpretation of a 1905 North Carolina case which stated: "It is the law in this state that where, on the facts admitted or established, the question of the existence or absence of actionable negligence is clear, *so that there can be no two opinions among fair-minded men in regard to it*, then the court must say whether it does or does not exist. . . ."⁹⁹

Other early North Carolina cases had held that "it is the province of the jury to say whether the party whose conduct was in question has met the test rule of the prudent man,"¹⁰⁰ and had described negligence as "a question of fact for the jury."¹⁰¹ Moreover, some recent decisions have ignored the quoted principle and have baldly stated that "the degree of care required under the particular circumstances to measure up to the standard is for the jury to decide."¹⁰²

This confused state of the North Carolina case law is attributable to the failure of its courts to meet head-on the basic question of when a trial judge is justified in denying jury determination of the issue of reasonableness. The categorical classification of negligence as a question of law in one case and a question of fact in another simply obscures any meaningful discussion of the relative role of judge and jury. Whether negligence shall be inferred from established facts is not an issue to be allocated to judge or jury because it is inherently "legal" or "factual."

F. Policy Justifications for the Jury's Role

In the vast majority of cases none of the limitations on the jury's province discussed above will be applicable, and the jury rather than the judge will apply the reasonably prudent man standard to the established facts. Some courts have commendably defended this result on grounds other than mere labels. Many decisions agree with the Supreme

⁹⁸ *Murray v. Atlantic Coast Line R.R.*, 218 N.C. 392, 398, 11 S.E.2d 326, 330 (1940).

⁹⁹ *Hicks v. Naomi Falls Mfg. Co.*, 138 N.C. 319, 324, 50 S.E. 703, 705 (1905). (Emphasis added.)

¹⁰⁰ *Turner v. Goldsboro Lumber Co.*, 119 N.C. 387, 400, 26 S.E. 23, 25 (1896). Indeed, shortly before the *Turner* decision, the North Carolina Supreme Court had expressly overruled a prior decision holding that "it is not the province of the jury to ascertain and determine what is negligence, or what is reasonable diligence." *Russell v. Carolina Cent. R.R.*, 118 N.C. 1098, 24 S.E. 512 (1896), overruling *Emry v. Raleigh & G.R.R.*, 109 N.C. 589, 590, 14 S.E. 352 (1891); see also *Hinshaw v. Raleigh & A.A.L.R.R.*, 118 N.C. 1047, 24 S.E. 426 (1896).

¹⁰¹ *Ruffin v. Atlantic & N.C.R.R.*, 142 N.C. 120, 127, 55 S.E. 86, 89 (1906). To complete the combination, North Carolina courts have also called negligence "a mixed question of law and fact." *McCrowell v. Southern Ry.*, 221 N.C. 366, 374, 20 S.E.2d 352, 357 (1942).

¹⁰² *Rea v. Simowitz*, 225 N.C. 575, 580, 35 S.E.2d 871, 875 (1945); followed in *Jackson v. Stancil*, 253 N.C. 291, 116 S.E.2d 817 (1960); *Sparks v. Phipps*, 255 N.C. 657, 122 S.E.2d 496 (1961); *Pinyan v. Settle*, 263 N.C. 578, 139 S.E.2d 863 (1965); *Nance v. Parks*, 266 N.C. 206, 146 S.E.2d 24 (1966).

Court's conclusion in the *Stout* case¹⁰³ that the jury is simply more competent than the judge to decide whether given conduct should be deemed negligent. The courts have reiterated the theme of *Stout* that the jury represents a cross-section of the community¹⁰⁴ which can apply its lay expertise¹⁰⁵ and "the earthy viewpoint of the common man"¹⁰⁶ to the issue to be decided. Presumably, twelve men, drawing on their individual experience and "uncorrupted" by formal training in law, will, by the exercise of their collective judgment, be better able to decide how a reasonable man would have acted in a given situation.¹⁰⁷ It is precisely because notions of what is "reasonable" are so variable and subject to change with the passing of time, that twelve heads are considered better than one.¹⁰⁸ The jurors are said to be more in touch with community sentiment;¹⁰⁹ "by reason of their environment judges on the bench are one step further removed from contact with these questions than the jurors themselves."¹¹⁰

A related argument supporting jury determination of negligence em-

¹⁰³ See notes 62-63 *supra* and accompanying text.

¹⁰⁴ *Dobbertin v. Johnson*, 95 Ariz. 356, 359, 390 P.2d 849, 851 (1964); *Toschi v. Christian*, 24 Cal. 2d 354, 365, 149 P.2d 848, 854 (1944) (concurring opinion); *Robelen Piano Co. v. Di Fonzo*, 54 Del. 346, 355, 169 A.2d 240, 245 (1961); 2 HARPER & JAMES, TORTS § 16.10, at 936 (1956); cf. PROSSER, TORTS 208 (3d ed. 1964).

¹⁰⁵ *Jines v. General Elec. Co.*, 303 F.2d 76, 79 (9th Cir. 1962) (dictum).

¹⁰⁶ *Marshall v. Nugent*, 222 F.2d 604, 611 (1st Cir. 1955); cf. FLEMING, TORTS 270 (3d ed. 1965).

¹⁰⁷ *Pease v. Sinclair Ref. Co.*, 104 F.2d 183, 187 (2d Cir. 1939); *Herbert v. Southern Pac. Co.*, 121 Cal. 227, 229, 53 Pac. 651 (1898); *Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 647, 38 N.E.2d 257, 262 (1941); *Niles v. Phillips Express Co.*, 118 N.J.L. 455, 458-59, 193 Atl. 183, 186 (Ct. Err. & App. 1937); Bohlen, *supra* note 89, at 116; McKenzie, *What Is Truth? A Defense of the Jury System*, 44 A.B.A.J. 51, 54 (1958).

¹⁰⁸ *Grand Trunk Ry. v. Ives*, 144 U.S. 408, 417 (1892); *Prickett v. Sulzberger & Sons Co.*, 57 Okla. 567, 590-95, 157 Pac. 356, 363-65 (1916); see cases cited note 107 *supra*. Cf. *Evans v. Stewart*, 17 Utah 2d 308, 311, 410 P.2d 999, 1001 (1966) ("[T]here is some lack of precision in the word, 'reasonable.'").

¹⁰⁹ *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940); *Schaublin v. Leber*, 50 N.J. Super. 506, 510, 142 A.2d 910, 912 (App. Div. 1958); *Powell v. Moore*, 228 Ore. 255, 262, 364 P.2d 1094, 1097 (1961); cf. *De Weese v. J. C. Penney Co.*, 5 Utah 2d 116, 121, 297 P.2d 898, 901 (1956).

¹¹⁰ *Prickett v. Sulzberger & Sons Co.*, 57 Okla. 567, 595, 157 Pac. 356, 365 (1916).

The preceding observations on the qualifications of the jury to determine the negligence issue side-step the contention that "only the most confirmed optimist would dare to hope that they [the jurors] would judge the defendant's conduct by what that ideal creature, the 'reasonable man,' would do. After all, the most that can be expected of a jury is that they shall judge the defendant's conduct by what the jurymen would themselves do in a similar situation. But even this they rarely do. The concept . . . that an injury should be paid for by him who causes it, irrespective of the moral or social quality of his conduct, . . . dominates the opinion of the sort of men who form the average jury." Bohlen, *supra* note 89, at 118. But cf. *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949) ("Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function.").

phasizes that each case in which the issue arises usually presents a unique set of facts.¹¹¹ Consequently, it is difficult for the courts to lay down general rules that will serve to translate the reasonably prudent man standard into more specific guidelines, which can then be applied in future cases.¹¹² Implicit in this position is the assumption that it is not really worth the effort for judges to struggle with the difficult task of providing concrete meanings for the reasonable man rule. Since their determinations will have limited, if any, precedential value, one of the main benefits obtained by the formal expression of judicial opinion will be lacking. Accordingly, the courts may perhaps be said to engage in a form of "buck-passing," leaving it to the jury to wrestle with the slippery and elusive concept of how the hypothetical, prudent man would have acted.¹¹³

G. Constitutional Factors

There is also authority suggesting that the constitutional right to a jury trial would be violated were the courts to take away from juries the issue of what constitutes reasonable care.¹¹⁴ Indeed, this argument may explain why many courts have so readily classified the determination of negligence as a question of fact. For once the issue is thus described, the constitutional point is easy to make. All that is needed is a reference to federal or state constitutional provisions preserving the right of trial by jury, and a recital of the axiom that it is the traditional province of the jury to decide the facts.

An illustration of this technique is provided by the Fourth Circuit's opinion in *Burcham v. J. P. Stevens & Co.*¹¹⁵ In a suit arising from personal injuries sustained by the plaintiff in an automobile collision, the jury returned a 7,500-dollar verdict, but the trial judge granted defendants' motion for judgment n.o.v. The appellate court reversed and

¹¹¹ *Detroit & M.R.R. v. Van Steinburg*, 17 Mich. 99, 120-21 (1868); *Sadowski v. Long Island R.R.*, 292 N.Y. 448, 455, 55 N.E.2d 497, 500 (1944).

¹¹² *Grand Trunk Ry. v. Ives*, 144 U.S. 408, 417 (1892); *McClure v. Price*, 300 F.2d 538, 544 (4th Cir. 1962); *Medlin v. Spazier*, 23 Cal. App. 242, 244, 137 Pac. 1078, 1079 (1913); *Farrell v. Waterbury Horse R.R.*, 60 Conn. 239, 250, 21 Atl. 675, 677 (1891); *Howell v. Kroger Grocery & Baking Co.*, 178 S.W.2d 101, 104-05 (Mo. Ct. App. 1944).

¹¹³ "The trouble with many cases of negligence is . . . that the elements are so complex that courts are glad to leave the whole matter in a lump for the jury's determination." HOLMES, *THE COMMON LAW* 129 (1881); see also Green, *Juries and Justice—The Jury's Role in Personal Injury Cases*, 1962 U. ILL. L.F. 152, 156.

¹¹⁴ *Wilkerson v. McCarthy*, 336 U.S. 53, 61-63 (1949) ("We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such [negligence] questions as these as well as others."); *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29, 35 (1944); *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 67-68 (1943); *Jones v. East Tennessee, Va. & Ga. R.R.*, 128 U.S. 443, 445-46 (1888); negligence cases cited note 267 *infra*.

¹¹⁵ 209 F.2d 35 (4th Cir. 1954).

directed that the jury verdict be reinstated. It held that "the questions involved in this case are *pure questions of fact*," and then referred to "the rates of speed at which the respective motor vehicles were traveling, whether plaintiff exercised due care," and whether defendants' driver was engaged "in the exercise of ordinary care."¹¹⁶ The court then asserted that "the case was clearly one in which jury trial was required by express provision of the Seventh Amendment to the Constitution."¹¹⁷ If jury verdicts like these are not allowed to stand, then "the courts are substituting their judgment for that of the jury on fact questions in violation of the constitutional requirement."¹¹⁸

Adopting an historical interpretation of the seventh amendment, the Supreme Court has held that "the right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted" in 1791.¹¹⁹ This interpretation would have required the Fourth Circuit to ascertain if an English common law judge in 1791 would have submitted to the jury the issue of whether a party's conduct complied with that of a reasonable man.¹²⁰ Apparently no American court has ever made such an inquiry.

Significantly, it was not until the nineteenth century that the concept of negligence began to be recognized by English judges as an independent basis of tort liability.¹²¹ Prior to that time, any thinking about conduct which we would today call negligent was done in a rather imprecise manner in the context of the amorphous action of trespass on the case.¹²²

¹¹⁶ *Id.* at 38. (Emphasis added.)

¹¹⁷ *Ibid.* The constitutional amendment referred to by the court provides as follows: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

The court also held that, in the diversity case before it, "whether a question is one for the decision of the court or of the jury is a question of federal practice as to which we are governed by federal and not by state decisions." 209 F.2d at 40.

¹¹⁸ *Id.* at 38. See also *DePinto v. Provident Security Life Ins. Co.*, 323 F.2d 826, 835 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964).

¹¹⁹ *Baltimore & C. Line v. Redman*, 295 U.S. 654, 657 (1935). See *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935) ("[R]esort must be had to the appropriate rules of the common law established . . . in 1791."); *LOUISELL & HAZARD, CASES ON PLEADING AND PROCEDURE—STATE AND FEDERAL* 909-12 (1962), and cases there cited; *JAMES, CIVIL PROCEDURE* 337-48 (1965).

¹²⁰ "[T]he jury trial protected by the 7th Amendment goes only to those issues in an action at law which historically were triable to a jury in England prior to 1791." *Martin v. Detroit Marine Terminals, Inc.*, 189 F. Supp. 579, 582 (E.D. Mich. 1960). See also *Monroe Auto Equip. Co. v. Heckethorn Mfg. & Supply Co.*, 214 F. Supp. 704, 706 (W.D. Tenn. 1963), *aff'd*, 332 F.2d 406 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964).

¹²¹ *FLEMING, TORTS* 107-08 (3d ed. 1965); *PROSSER, TORTS* 142 (3d ed. 1964); *Winfield, The History of Negligence in the Law of Torts*, 42 L.Q.R. 184 (1926).

¹²² See authorities cited note 121 *supra*; 2 *HARPER & JAMES, TORTS* § 12.3, at 749 (1956).

In such a common law action, there would be a jury trial of a damage claim based upon injury to person or property.¹²³ In 1837 the objective standard of "a prudent man" as the measure of required conduct received extended consideration in *Vaughan v. Menlove*.¹²⁴ The court stated that "it was proper to leave it to the jury whether with reference to the caution which would have been observed by a man of ordinary prudence, the defendant had not been guilty of gross negligence."¹²⁵ In the 1840's English judges reiterated the principle that the jury should determine whether ordinary care had been exercised.¹²⁶ However, because of the lack of authority for this view in 1791,¹²⁷ the conclusion that must be drawn from a strict historical test is that there is no federal constitutional right to have a jury apply the reasonable man standard.¹²⁸ As to other questions of reasonableness in the pre-1791 common law to which this

¹²³ See 5 MOORE, FEDERAL PRACTICE ¶ 38.11[5], at 112-14 (2d ed. 1964); cf. JAMES, CIVIL PROCEDURE 352 (1965).

¹²⁴ 3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (C.P. 1837). See 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 450 (1926); POLLOCK, TORTS 351 (Landon ed. 1939).

¹²⁵ 3 Bing. (N.C.) at 476-77, 132 Eng. Rep. at 494 (Park, J.). Significantly, another judge remarked, without citation of authority, that "the conduct of a prudent man has always been the criterion for the jury in such cases." *Id.* at 477, 132 Eng. Rep. at 494 (Vaughan, J.). (Emphasis added.)

¹²⁶ *Marriott v. Stanley*, 1 Man. & G. 568, 575-76, 133 Eng. Rep. 458, 461-62 (C.P. 1840) ("a question entirely for the jury"); *Lynch v. Nurdin*, 1 Q.B. 29, 37-39, 113 Eng. Rep. 1041, 1044 (1841) ("a matter strictly within the province of a jury"); *Aldridge v. The Great Western Ry.*, 3 Man. & G. 515, 523-24, 133 Eng. Rep. 1246, 1250 (C.P. 1841) ("the case should be submitted to a jury"); *Tobin v. Murison*, 5 Moore 108, 126, 13 Eng. Rep. 431, 438 (P.C. 1845).

¹²⁷ Other relevant decisions prior to 1837, but after 1791, are *Jones v. Bird*, 5 B. & Ald. 837, 845-46, 106 Eng. Rep. 1397, 1400 (K.B. 1822) ("[T]he question was most properly left to the jury to say whether the defendants had done all that any skilful person could reasonably be required to do in such a case."); *Jones v. Boyce*, 1 Stark. 492, 495, 171 Eng. Rep. 540, 541 (K.B. 1816) (jury question "whether the plaintiff's act was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent mind would have adopted"); *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926, 927 (K.B. 1809) (jurors instructed to find a verdict for defendant "if they were satisfied that the plaintiff was riding . . . without ordinary care"); cf. *Stephens v. Foster*, 1 C.M. & R. 849, 149 Eng. Rep. 1324 (Ex. 1835); *Aston v. Heaven*, 2 Esp. 533, 170 Eng. Rep. 445 (C.P. 1797) (jury question whether stage coach mishap caused by driving with loose reins or as a result of "unforeseen accident or misfortune"; court refers to "whether there was any negligence in the driver").

¹²⁸ Authority for this strict approach is provided by the cases denying the right to jury trial on the simple ground that the proceeding was "unknown" to the common law. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937); *McCraw v. United Ass'n of Journeymen*, 341 F.2d 705, 709 (6th Cir. 1965); *Brady v. Trans World Airlines, Inc.*, 196 F. Supp. 504, 507-08 (D. Del. 1961); cf. *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935). See also note 120 *supra*. Since negligence as a basis of recovery was "unknown" in 1791 (see notes 121-22 *supra* and accompanying text), it is arguable that the seventh amendment does not even guarantee that a dispute over historical facts must be resolved by a jury in a modern federal negligence case. No court has ever so held, undoubtedly because of the ancient history of damage awards for injury to person or property. See note 129 *infra*. For a case in which the point was raised, see *Bouis v. Aetna Cas. & Sur. Co.*, 98 F. Supp. 176 (W.D. La. 1951).

negligence issue "could be analogized,"¹²⁹ it should be noted that such questions were at that time generally deemed to be for the court rather than for the jury.¹³⁰

Ascertainment of the requirements of the federal constitution thus presents a far more complex question than the Fourth Circuit and other courts have recognized. The issue cannot be disposed of by the simple classification of due care as a question of fact; it must also be demonstrated that the 1791 English common law made the same classification, and submitted the issue to the jury on that basis.¹³¹

Although the seventh amendment is not applicable to the states,¹³² nearly all state constitutions contain a similar guaranty of right to jury trial in civil actions.¹³³ In interpreting the relevant California constitutional provision,¹³⁴ the California Supreme Court, like the federal courts, has adopted an "historical" approach. In any given case "it is necessary . . . to ascertain what was the rule of the English common law upon this subject in 1850," when California was admitted to the Union.¹³⁵ Since by 1850 the English common law had firmly declared that application of the reasonable man standard was a question for the jury,¹³⁶ a

¹²⁹ *Martin v. Detroit Marine Terminals, Inc.*, 189 F. Supp. 579, 583 (E.D. Mich. 1960). In contrast to the cases cited in note 128 *supra*, other federal decisions have favored a more flexible application of the historical test, upholding the right of trial by jury in causes of action which have arisen since adoption of the constitutional guaranty, but for which some historical counterpart was found to exist. See JAMES, CIVIL PROCEDURE 338-39 (1965); 5 MOORE, FEDERAL PRACTICE ¶ 38.11[7] (2d ed. 1964), and cases there cited.

¹³⁰ See Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 458 (1899), reprinted in HOLMES, COLLECTED LEGAL PAPERS 210, 236 (1920); notes 205-07, 240-41 *infra* and accompanying text.

Holmes once argued that the famous case of *Weaver v. Ward*, Hob. 135, 80 Eng. Rep. 284 (K.B. 1617), supported the doctrine that the court itself should decide whether a defendant had been negligent. Holmes, *supra* at 458-59. In that case, reference is made to whether "it . . . appeared to the court that [defendant's act] had been inevitable, and that the defendant had committed no negligence to give rise to the burt." (Emphasis added.)

¹³¹ An 1845 English case did speak in these terms: "[I]n the present instance, the action being for negligence, the special verdict finds facts, and leaves the court to say whether negligence has, or not, been proved. *Negligence is a question of fact, not of law*, and should have been disposed of by the jury." *Tobin v. Murison*, 5 Moore 108, 126, 13 Eng. Rep. 431, 438 (P.C. 1845) (Emphasis added.); see also *Aldridge v. The Great Western Ry.*, 3 Man. & G., 515, 519, 133 Eng. Rep. 1246, 1248 (C.P. 1841).

¹³² LOUISELL & HAZARD, CASES ON PLEADING AND PROCEDURE—STATE AND FEDERAL 910 (1962), and authorities there cited.

¹³³ JAMES, CIVIL PROCEDURE 337 (1965).

¹³⁴ CAL. CONST. art. I, § 7; see also CAL. CODE OF CIV. PROC. § 592, providing that "an issue of fact must be tried by a jury" in damage actions, but not defining such an issue.

¹³⁵ *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 287, 231 P.2d 832, 835 (1951). The court specifically stated that "what that right [to trial by jury] is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact." *Ibid.* Cf. CAL. CIV. CODE § 22.2.

¹³⁶ See cases cited notes 124-27 *supra*.

contrary holding by a modern California court would appear to be constitutionally prohibited.¹³⁷

H. The Holmesian View

Ignoring the constitutional problems, Justice Holmes forcefully presented the position that the judge, rather than the jury, should resolve the negligence issue.¹³⁸ With respect to the relative competence of the two decision-makers, Holmes declared that "a judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community far better than an average jury."¹³⁹ The implicit distinction made by Holmes between experienced and inexperienced judges would seem to lead to difficulties. Surely it would be a most impractical rule to say that a judge who has been on the bench for a short time is compelled to submit the reasonable care issue to the jury, whereas a judge who has sat for "x" years can decide the question himself.

With respect to fact situations that "are likely to be repeated,"¹⁴⁰ Holmes felt that the question of whether due care had been exercised should be permanently settled.¹⁴¹ If successive juries reached the same result, there was no reason to ask still additional juries for their opinion; on the other hand, if successive juries reached inconsistent results, the court should see "the necessity of making up its mind for itself."¹⁴² Finally, he argued that "it is very desirable to know as nearly as we can the standard by which we shall be judged at a given moment, and, moreover, the standards for a very large part of human conduct do not vary from century to century."¹⁴³ Not surprisingly, Holmes contended that the issue of due care was one of *law*, just as vigorously as proponents of the jury application of the due care standard have asserted that it is one of *fact*.¹⁴⁴

¹³⁷ Other states besides California have interpreted their constitutional guaranty of jury trial to "preserve the right . . . as it existed in English history . . . at the date of the first state constitution." JAMES, CIVIL PROCEDURE 337 (1965); see, e.g., *Colacurcio Contracting Corp. v. Weiss*, 20 N.J. 258, 119 A.2d 449 (1955); *Byers v. Commonwealth*, 42 Pa. 89 (1862). The analysis in the text of the California guaranty of the right to jury trial is equally applicable to those states which adopted their initial constitutions after 1837 (see notes 124-25 *supra*) or perhaps after 1809 (see note 127 *supra*).

¹³⁸ See 2 HARPER & JAMES, TORTS § 17.2, at 971-72 (1956).

¹³⁹ HOLMES, THE COMMON LAW 124 (1881); see also his opinion in *Southern Pac. Co. v. Berkshire*, 254 U.S. 415 (1921).

¹⁴⁰ *Lorenzo v. Wirth*, 170 Mass. 596, 600, 49 N.E. 1010, 1011 (1898).

¹⁴¹ See *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66 (1927), discussed at note 82 *supra* and accompanying text; note 297 *infra*.

¹⁴² HOLMES, THE COMMON LAW 123 (1881).

¹⁴³ *Id.* at 126.

¹⁴⁴ "[E]very time that a judge declines to rule whether certain conduct is negligent

With regard to one kind of negligence case, a claim against a lawyer for malpractice, the Holmesian position appears to be particularly cogent, in view of the relative competence of the decision-makers. The contention would be that the judge, as a lawyer, is far better qualified than "a jury of lay persons"¹⁴⁵ to decide whether another lawyer has failed to exercise reasonable skill and diligence in the discharge of his professional duties. Although there is some judicial authority indicating that "when the facts are ascertained, the question of negligence or want of skill is a question of law for the court,"¹⁴⁶ the prevailing view is that the issue should be treated as in any other negligence case.¹⁴⁷ This is probably the wiser position;¹⁴⁸ despite the Holmesian reasoning, it seems rather anomalous to carve out one small area of the law of negligence for unique treatment respecting allocation of decision-making between judge and jury. Moreover, leaving the issue to the judge might lead to the accusation that he was favoring a fellow member of the bar, if the defendant were exonerated.

With respect to Holmes' overall approach to negligence, one may disagree on many grounds: 1) The estimate of the number of negligence cases presenting a factual pattern so similar to that in a prior case that the earlier result can in fairness be deemed fully applicable; 2) the relative importance of reaching consistent results in similar cases; 3) the extent to which ideas of reasonable conduct undergo mutation in an ever-changing world. The Holmesian critics would also challenge his assessment that "I have not found juries specially inspired for the discovery of truth."¹⁴⁹ Yet at least Holmes, in contending that policy factors dictated that the judge rather than the jury apply the standard of reasonable care, was focusing on the arena where the conflict *should* be fought.

or not he avows his inability to state the law . . ." Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 457 (1899); see also *id.* at 457-59.

¹⁴⁵ *Gimbel v. Waldman*, 193 Misc. 758, 760, 84 N.Y.S.2d 888, 891 (Sup. Ct. 1948).

¹⁴⁶ *Gambert v. Hart*, 44 Cal. 542, 552 (1872); see also *Gimbel v. Waldman*, *supra* note 145.

¹⁴⁷ See *O'Neill v. Gray*, 30 F.2d 776, 780 (2d Cir. 1929) ("We think it was properly left to the jury to say whether the conduct of the litigation was reasonably skillful."); cases cited in Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 766 (1959). The holding of *Gambert v. Hart*, *supra* note 146, was questioned in *Floro v. Lawton*, 187 Cal. App. 2d 657, 674-76, 10 Cal. Rptr. 98, 108-09 (1960), and specifically not followed in *Ishmael v. Millington*, 241 A.C.A. 634, 639-40, 50 Cal. Rptr. 592, 595 (1966).

¹⁴⁸ It might be constitutionally required. See notes 132-37 *supra* and accompanying text.

¹⁴⁹ Holmes, *supra* note 144, at 459. Holmes did recognize that the jurors "will introduce into their verdict a certain amount . . . of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community." *Id.* at 460.

III

REASONABLE TIME: THE COMMERCIAL CASES

The broad field of commercial law offers many examples where a statute or common law principle requires one to act "within a reasonable time" to obtain enforceable rights against others. Unless the offeror otherwise specifies, an offer to enter into a contract may be accepted only within a reasonable time.¹⁵⁰ Unless a contract itself otherwise specifies, performance thereunder is to take place within a reasonable time;¹⁵¹ frequently, as in the case of insurance contracts, the parties themselves will expressly adopt this standard to govern when certain action must be taken.¹⁵² A buyer of goods must notify the seller of a breach of warranty claim within a reasonable time after he discovers or should have discovered such a breach.¹⁵³ If a buyer wishes to revoke his acceptance of goods because of a breach of warranty, he must act within a reasonable time.¹⁵⁴ In the case of negotiable instruments, the standard of a reasonable time governs the timeliness of presentment for payment of checks and other specified kinds of commercial paper.¹⁵⁵

A. The Test to Be Applied

In elaborating what is meant by a reasonable time, the courts have borrowed from the negligence cases the technique of using a fictitious person as the yardstick of required conduct. "What is a reasonable time is what a reasonable, prudent man would do under given time and circumstances."¹⁵⁶ Indeed, courts have made many of the same observations with respect to the concept of reasonableness in this context as they have

¹⁵⁰ CAL. CIV. CODE § 1587(2); RESTATEMENT, CONTRACTS § 40(1) (1932); *cf.* UNIFORM COMMERCIAL CODE §§ 2-206(2), 2-207(1).

¹⁵¹ CAL. CIV. CODE § 1657; UNIFORM COMMERCIAL CODE § 2-309(1); UNIFORM SALES ACT §§ 43(2), 51, 61(1); RESTATEMENT, CONTRACTS § 32, illustration 4 (1932).

¹⁵² Insurance policies frequently provide that the insured shall give notice to the insurer of a specified event relating to the coverage "within a reasonable time," *Andrews v. Dirigo Mut. Fire Ins. Co.*, 112 Me. 258, 91 Atl. 978 (1914), or "as soon as practicable," which has been interpreted to mean within a reasonable time, *London Guar. & Acc. Co. v. Shafer*, 35 F. Supp. 647 (S.D. Ohio 1940).

¹⁵³ UNIFORM COMMERCIAL CODE § 2-607(3); UNIFORM SALES ACT § 49; RESTATEMENT, CONTRACTS § 412 (1932).

¹⁵⁴ UNIFORM COMMERCIAL CODE § 2-608(2); UNIFORM SALES ACT § 69(3); *cf.* RESTATEMENT, CONTRACTS § 483(1) (1932).

¹⁵⁵ UNIFORM COMMERCIAL CODE §§ 3-502, 3-503; UNIFORM NEGOTIABLE INSTRUMENTS LAW §§ 71, 144, 186.

¹⁵⁶ *Tinius Olsen Testing Mach. Co. v. Wolf Co.*, 297 Pa. 153, 157, 146 Atl. 541, 542 (1929); see, *e.g.*, *Carhartt Holding Co. v. Mitchell*, 261 Ky. 297, 87 S.W.2d 360 (1935); *Hesse v. Gude Bros.-Kieffer Co.*, 170 N.Y. Supp. 211, 213 (Sup. Ct. 1918) ("Reasonable time means what under the circumstances a reasonable, prudent man would do"); *Commercial Sec. Bank v. Johnson*, 110 Utah 342, 173 P.2d 277 (1946).

in the negligence sphere. It has been emphasized that a reasonable time is a relative concept, which cannot be defined by any prescribed rule. It depends upon the facts and circumstances of the particular case, prior decisions having limited precedential value.¹⁵⁷ It has also been pointed out that reasonable time is an "ordinary" term which is presumed to be understood by men of average intelligence.¹⁵⁸

These pronouncements suggest that the reasoning of the negligence cases would be followed in allocating the decision whether the taking of action at a given time is to be characterized as reasonable. Specifically, one would expect it to be settled that whether a party acted within a reasonable time is a question of fact for the jury, unless fair-minded men cannot differ.

B. Judicial Disagreement as to Province of Judge and Jury

In sharp contrast to the negligence cases, however, judicial authority is badly divided concerning the role of judge and jury in applying the reasonable time standard.¹⁵⁹ As a general rule, it may be said that a majority of American jurisdictions today will permit the jury to play the same role it does in negligence cases.¹⁶⁰ When the facts are undisputed, there are some jurisdictions which have generally adhered to the doctrine that the determination of a reasonable time is a question of law for the court.¹⁶¹ In still other jurisdictions, cases can be found which categorically

¹⁵⁷ *E.g.*, *Columbia Axle Co. v. American Auto. Ins. Co.*, 63 F.2d 206 (6th Cir. 1933); *In re Sternberg*, 300 Fed. 881 (D. Conn. 1924); *World Sav. & Loan Ass'n v. Kurtz Co.*, 183 Cal. App. 2d 319, 325-26, 6 Cal. Rptr. 665, 669 (1960) ("What would be a reasonable time under one set of circumstances might be wholly unreasonable under other circumstances."); *Hogan v. Tucker*, 116 Ky. 918, 77 S.W. 197 (1903); *North Ave. Land Co. v. Mayor & City Council*, 102 Md. 475, 483, 63 Atl. 115, 118 (1906) ("A delay of a month under some circumstances might be unreasonable, whilst under others that of a year or more would not be so regarded."); *Virginia Ass'n of Ins. Agents v. Commonwealth ex rel. Virginia Ins. Rating Bureau*, 187 Va. 574, 47 S.E.2d 401 (1948).

¹⁵⁸ *Dunning v. Badger*, 74 S.W.2d 151 (Tex. Civ. App. 1934); *cf. Houston & T. Cent. R.R. v. Roberts*, 50 Tex. Civ. App. 69, 109 S.W. 982 (1908).

¹⁵⁹ See Annot., 17 Am. Dec. 544 (1880); *cf. Isaacs, The Law and the Facts*, 22 COLUM. L. REV. 1, 5 (1922).

¹⁶⁰ See, *e.g.*, *Louisiana Oil Ref. Corp. v. Haltom*, 188 Ark. 117, 64 S.W.2d 98 (1933); *Wolf v. Arant*, 88 Ga. App. 568, 77 S.E.2d 116 (1953); *Krause v. Union Match Co.*, 142 Minn. 24, 27, 170 N.W. 848, 849 (1919); *Wemple v. B. F. Goodrich Co.*, 126 N.J.L. 465, 19 A.2d 692 (Ct. Err. & App. 1941); *Webb v. Moran*, 186 Okla. 140, 96 P.2d 308 (1939). For some California cases, see notes 178-79 *infra*. Additional cases are cited in notes 166, 168, 172, 174-76 *infra*.

¹⁶¹ Maine and Massachusetts can be placed in this category. As to Maine, see, *e.g.*, *Franklin Paint Co. v. Flaherty*, 139 Me. 330, 331, 29 A.2d 651, 652 (1943) ("[W]hat constitutes reasonable time, on undisputed facts, is not for the jury, but is a question of law."); *Getchell v. Kirkby*, 113 Me. 91, 92 Atl. 1007 (1915) (same); *Andrews v. Dirigo Mut. Fire Ins. Co.*, 112 Me. 258, 91 Atl. 978 (1914) (same); *cf. Giles v. Putnam*, 150 Me. 104, 104 A.2d 534 (1954); *Colbath v. H. B. Stebbins Lumber Co.*, 127 Me. 406, 144 Atl. 1 (1929).

declare that the issue is one of law when there is no dispute regarding the facts. Yet there are also comparable cases from the same jurisdictions holding that the issue is one of fact.¹⁶² Moreover, in virtually

For the Massachusetts rule, see, *e.g.*, *Powers, Inc. v. Wayside, Inc.*, 343 Mass. 686, 180 N.E.2d 677 (1962) (question of law; non-jury case); *Segal v. Aetna Cas. & Sur. Co.*, 337 Mass. 185, 148 N.E.2d 659 (1958) (question of law; jury case); *Markus v. Boston Edison Co.*, 317 Mass. 1, 56 N.E.2d 910 (1944) (same); *Bruns v. Jordan Marsh Co.*, 305 Mass. 437, 26 N.E.2d 368 (1940) (same); *Palumbo v. Olympia Theatres, Inc.*, 276 Mass. 84, 176 N.E. 815 (1931) (same); *Mowles v. Boston Ins. Co.*, 226 Mass. 426, 115 N.E. 666 (1917) (same); *Starkweather v. Gleason*, 221 Mass. 552, 109 N.E. 635 (1915) (same); *Lewis v. Worrell*, 185 Mass. 572, 71 N.E. 73 (1904) (same). *But see* *Johnson v. Kanavos*, 296 Mass. 373, 6 N.E.2d 434 (1937) (question of fact; non-jury case). One Massachusetts case attempts to explain the rule in that state by asserting that "the facts are of course in dispute, within the meaning of the rule . . . when, . . . because they do not upon their face require as matter of law an answer one way or the other . . . , this question must be decided by drawing an inference of fact from the primary facts shown." *Smith v. Scottish Union & Nat'l Ins. Co.*, 200 Mass. 50, 53, 85 N.E. 841, 842 (1908), quoted in *Depot Cafe Inc. v. Century Indem. Co.*, 321 Mass. 220, 224, 72 N.E.2d 533, 535 (1947). However, the Massachusetts cases cited cannot be explained on this basis; the reasonable time issue was *not* held to be one for the court because fair-minded men could not differ. See, *e.g.*, *Lewis v. Worrell*, *supra* ("The question how long a time would be reasonable, when the facts are undisputed, is a question of law.").

¹⁶² *Federal: Compare* *Earnshaw v. United States*, 146 U.S. 60, 67 (1892) ("The facts being undisputed, the reasonableness of the notice with respect to time was a question of law for the court, and was properly withdrawn from the consideration of the jury."); *In re B. & R. Glove Corp.*, 279 Fed. 372, 379 (2d Cir. 1922) ("The question of what is a reasonable time within which an act can be done is generally a question of law for the court . . . and is to be decided according to the circumstances of the case."); *First Nat'l Bank v. Pipe & Contractors' Supply Co.*, 273 Fed. 105 (2d Cir. 1921) (question of law; non-jury case); *and* *Long-Bell Lumber Co. v. Stump*, 86 Fed. 574 (8th Cir. 1898) (question of law; jury case), *with* *Zelinger v. Uvalde Rock Asphalt Co.*, 316 F.2d 47, 53 (10th Cir. 1963) ("a question of fact to be determined by the jury under a standard of reasonableness"); *and* *Lucas v. Swan*, 67 F.2d 106, 110 (4th Cir. 1933) ("[O]rdinarily it is for the jury to say whether demand was made within a reasonable time."); *and* *American Concrete Steel Co. v. Hart*, 285 Fed. 322 (2d Cir. 1922) (question of fact to be determined from "surrounding circumstances"; non-jury case). *Alabama: Compare* *McKee v. Club-View Heights, Inc.*, 230 Ala. 652, 162 So. 671 (1935) (question of law; non-jury case); *and* *McFadden & Bros. v. Henderson*, 128 Ala. 221, 29 So. 640 (1901) (question of law; jury case), *with* *Equitable Life Assur. Soc'y v. Brandt*, 240 Ala. 260, 198 So. 595 (1940) (question of fact; jury case); *and* *Gorman-Gainmil Seed & Dairy Supply Co. v. Carlisle*, 220 Ala. 116, 124 So. 288 (1929) (question for jury). *Colorado: Compare* *Colorado Woman's College v. Bradford-Robinson Printing Co.*, 114 Colo. 237, 157 P.2d 612 (1945) (question of law; non-jury case); *and* *Denver & R.G.R.R. v. Doyle*, 58 Colo. 327, 145 Pac. 688 (1915) (question of law; jury case), *with* *Hannan v. Anderson*, 15 Colo. App. 433, 62 Pac. 961 (1900) (question of fact; non-jury case). *Illinois: Compare* *Loeb v. Stern*, 198 Ill. 371, 64 N.E. 1043 (1902) (question for court; jury case), *with* *Mayflower Sales Co. v. Frazier & Wooters*, 325 Ill. App. 314, 318, 60 N.E.2d 123, 125 (1945) ("question of fact for the jury"). *Indiana: Compare* *Prudential Ins. Co. v. Robbins*, 110 Ind. App. 172, 38 N.E.2d 274 (1941) (question of law for court; jury case), *with* *Albright v. Hughes*, 107 Ind. App. 651, 655, 26 N.E.2d 576, 578 (1940) ("question of fact for the jury"). *Missouri: Compare* *Turner v. Snyder*, 139 Mo. App. 656, 662, 123 S.W. 1050, 1051-52 (1909) ("What is a reasonable time in a given case, is, when there is no dispute as to the facts, a question of law, and in that case, it is the duty of the court to instruct whether or

none of these cases do the courts indicate that they are aware of, or perturbed by, the conflict in the decisions.¹⁶³ Some of these judicial declarations that the issue is one of law are attributable to the misconstruing of other cases from the same jurisdiction which hold that, where the facts are undisputed *and reasonable men cannot draw different inferences therefrom*, the reasonable time question is for the court.¹⁶⁴ Finally, in the negotiable instruments area, authority is evenly divided as

not the time was reasonable; but if there is conflicting testimony as to what the facts are, then the court should give hypothetical instructions, and, by them, tell the jury what facts it would be necessary for them to find in order to find that the time was reasonable."), *with* *Carroll v. Wiggains*, 199 S.W. 280 (Mo. Ct. App. 1917) (reasonable time question sent *in toto* to jury). *Nebraska: Compare* *Kiser v. Denney*, 99 Neb. 3, 5, 154 N.W. 835 (1915) ("[T]here was nothing to submit to the jury. The facts not being in dispute, the question of reasonable time was purely a question of law."), *with* *McGuire v. Thompson*, 152 Neb. 28, 37, 40 N.W.2d 237, 243-44 (1949) ("[T]he question is one of fact for the jury . . . even though the facts are conceded or undisputed, if different inferences may reasonably be drawn from them."). *Ohio: Compare* *Rudolph Wurlitzer Co. v. Strand Enterprises, Inc.*, 32 N.E.2d 62 (Ohio App. 1936) (question of law; jury case), *with* *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954) (question of fact; non-jury case) (dictum). *Oregon: Compare* *Maki v. Nikula*, 224 Ore. 180, 355 P.2d 770 (1960) (question of law; jury case); *De Vol v. Citizens' Bank*, 113 Ore. 595, 233 Pac. 1008 (1925) (same); *and* *Goltra v. Penland*, 45 Ore. 254, 77 Pac. 129 (1904) (same), *with* *Eivers v. Peard*, 100 Ore. 197, 197 Pac. 264 (1921) (question of fact; jury case); *Abbot v. Oregon R.R.*, 46 Ore. 549, 563, 80 Pac. 1012, 1015-16 (1905) (same); *and* *Elder v. Rourke*, 27 Ore. 363, 41 Pac. 6 (1895) (same). *Texas: Compare* *Ridglea Interests, Inc. v. General Lumber Co.*, 343 S.W.2d 490, 493 (Tex. Civ. App. 1961) ("[W]ith no disputed facts, what was a reasonable time for performance was a question of law for the court."); *Housing Authority v. Newton*, 235 S.W.2d 197 (Tex. Civ. App. 1950) (question of law; jury case); *and* *McGary v. Campbell*, 245 S.W. 106, 115 (Tex. Civ. App. 1922) (same), *with* *Fisch v. Transcontinental Ins. Co.*, 356 S.W.2d 186 (Tex. Civ. App. 1962) (question of fact; jury case); *Shields v. Dunlap*, 174 S.W.2d 642 (Tex. Civ. App. 1943) (same); *and* *Dallas Opera House Ass'n v. Dallas Enterprises, Inc.*, 288 S.W. 656, 660 (Tex. Civ. App. 1926), *aff'd*, 298 S.W. 397 (Tex. Com. App. 1927) ("Ordinarily, what is a reasonable time within which an act should be done, like negligence, is a question for the jury."). *Vermont: Compare* *Emerson v. Hughes*, 117 Vt. 270, 90 A.2d 910 (1952) (question of law; non-jury case), *with* *Brainard v. Van Dyke*, 71 Vt. 359, 45 Atl. 758 (1899) (question of fact; jury case). *Washington: Compare* *Normile v. Northern Pac. Ry.*, 36 Wash. 21, 77 Pac. 1087 (1904) (question of law; non-jury case), *with* *Horsfall v. Pacific Mut. Life Ins. Co.*, 32 Wash. 132, 72 Pac. 1028 (1903) (question for jury).

¹⁶³ An exception is *Hesse v. Gude Bros.-Kieffer Co.*, 170 N.Y. Supp. 211, 213 (Sup. Ct. 1918). For cases specifically rejecting the rule that the issue is one of law when the facts are undisputed, even though different inferences can reasonably be drawn, see *Williamson Heater Co. v. Whitmer*, 191 Iowa 1115, 1119, 183 N.W. 404, 405 (1921); *J. P. Bauman & Sons v. McManus Bros.*, 79 Kan. 766, 101 Pac. 478 (1909); *Tinius Olsen Testing Mach. Co. v. Wolf Co.*, 297 Pa. 153, 146 Atl. 541 (1929).

¹⁶⁴ See *National Container Corp. v. Regal Corrugated Box Co.*, 383 Pa. 499, 505, 119 A.2d 270, 273 (1956), mis-citing *United States Gypsum Co. v. Birdsboro Steel Foundry & Mach. Co.*, 160 Pa. Super. 548, 559, 52 A.2d 344, 350 (1947); *Frantz Equip. Co. v. Leo Butler Co.*, 370 Pa. 459, 467, 88 A.2d 702, 707 (1952), mis-citing *Truscon Steel Co. v. Fuhrmann & Schmidt Brewing Co.*, 327 Pa. 10, 13, 192 Atl. 679, 680 (1937).

to whether determination of a reasonable time is "a question of law" or "a question of fact."¹⁶⁵

The prevailing state of judicial disagreement on reasonable time can be readily illustrated by cases which have arisen in those various commercial contexts listed above. Whether an offer has been accepted within a reasonable time has been called a question of fact for the jury by an Iowa and a Pennsylvania court,¹⁶⁶ but a question of law for the trial judge by a New Hampshire and a Massachusetts court.¹⁶⁷ Whether a contractual obligation has been performed within a reasonable time has been called a jury question by some courts,¹⁶⁸ but a question of law by others.¹⁶⁹ Whether an insured has reported an event to his insurer within a reasonable time has been classified as both a question of fact for the jury¹⁷⁰ and a question of law for the court.¹⁷¹ Whether notice of a breach of warranty claim has been given within a reasonable time has been called both a question of fact for the jury¹⁷² and a question of law.¹⁷³ Whether a party has taken sufficiently prompt action to rescind a contract has received the same dual classification in the cases.¹⁷⁴ This is

¹⁶⁵ See notes 175-76 *infra* and accompanying text.

¹⁶⁶ *Lucas v. Western Union Tel. Co.*, 131 Iowa 669, 109 N.W. 191 (1906); *Robeson v. Pels*, 202 Pa. 399, 51 Atl. 1028 (1902). The *Restatement* takes the position that what is a reasonable time to accept an offer is a question of fact. *RESTATEMENT, CONTRACTS* § 40(2) (1932); see *Milliken-Tomlinson Co. v. American Sugar Ref. Co.*, 9 F.2d 809 (1st Cir. 1925).

¹⁶⁷ *Morse v. Bellows*, 7 N.H. 549, 564-66 (1835); *Loring v. City of Boston*, 48 Mass. (7 Met.) 409 (1844).

¹⁶⁸ *E.g.*, *Albright v. Hughes*, 107 Ind. App. 651, 26 N.E.2d 576 (1940); *Wemple v. B. F. Goodrich Co.*, 126 N.J.L. 465, 19 A.2d 692 (Ct. Err. & App. 1941); *Handler v. Thompson*, 199 Okla. 52, 182 P.2d 756 (1947).

¹⁶⁹ *E.g.*, *Quinn v. Olsen*, 298 Fed. 704 (8th Cir. 1924); *Kiser v. Denney*, 99 Neb. 3, 154 N.W. 835 (1915); *De Vol v. Citizens' Bank*, 113 Ore. 595, 233 Pac. 1008 (1925).

¹⁷⁰ *E.g.*, *Utica Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 280 F.2d 469 (4th Cir. 1960); *Brookville Elec. Co. v. Utilities Ins. Co.*, 142 S.W.2d 803 (Mo. Ct. App. 1940); *Employers' Liab. Assur. Corp. v. Roehm*, 99 Ohio St. 343, 124 N.E. 223 (1919), overruling *Travelers' Ins. Co. v. Myers & Co.*, 62 Ohio St. 529, 57 N.E. 458 (1900). This would appear to be the majority rule. See *Annotts.*, 18 A.L.R.2d 443, 504 (1951); 123 A.L.R. 950, 961 (1939); 76 A.L.R. 23, 61 (1932); 7 A.L.R. 186 (1920).

¹⁷¹ *E.g.*, *Prudential Ins. Co. v. Robbins*, 110 Ind. App. 172, 38 N.E.2d 274 (1941); *Southern Sur. Co. v. Heyburn*, 234 Ky. 739, 29 S.W.2d 6 (1930); *Oakland Motor Co. v. American Fid. Co.*, 190 Mich. 74, 155 N.W. 729 (1916); *Hagstrom v. American Fid. Co.*, 137 Minn. 391, 163 N.W. 670 (1917); *cf. Jeannette Glass Co. v. Indemnity Ins. Co.*, 370 Pa. 409, 88 A.2d 407 (1952).

¹⁷² *E.g.*, *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961); *Webster v. Klassen*, 109 Cal. App. 2d 583, 241 P.2d 302 (1952); *Baum v. Murray*, 23 Wash. 2d 890, 162 P.2d 801 (1945); see also *WILLISTON, SALES* § 484a (rev. ed. 1948). This is clearly the majority view.

¹⁷³ *Bruns v. Jordan Marsh Co.*, 305 Mass. 437, 26 N.E.2d 368 (1940); *Hazelton v. First Nat'l Stores, Inc.*, 88 N.H. 409, 190 Atl. 280 (1937); *Wright v. General Carbonic Co.*, 271 Pa. 332, 114 Atl. 517 (1921); *cf. National Container Corp. v. Regal Corrugated Box Co.*, 383 Pa. 499, 119 A.2d 270 (1956).

¹⁷⁴ *Question of fact: E.g.*, *Hunt Truck Sales & Serv., Inc. v. Omaha Standard*, 187 F.

also true of negotiable instrument cases presenting the issue of whether a check was cashed,¹⁷⁵ or a demand instrument presented for payment, within a reasonable time.

It must be emphasized that these cases holding the reasonable time issue to be one of law did *not* do so on the ground that reasonable men could draw only one conclusion from the evidence.¹⁷⁷ It is possible,

Supp. 796 (S.D. Iowa 1960); McGuire v. Thompson, 152 Neb. 28, 40 N.W.2d 237 (1949); Union Paint & Varnish Co. v. Dean, 48 R.I. 288, 137 Atl. 469 (1927). *Question of law*: Knoshaug v. Pollman, 245 F.2d 271 (8th Cir. 1957); Grand Lodge of the Bhd. of R. Trainmen v. Clark, 189 Ind. 373, 127 N.E. 280 (1920); Rudolph Wurlitzer Co. v. Stra Enterprises, Inc., 32 N.E.2d 62 (Ohio App. 1936); Sanders v. Farmers' & Merchants Nat'l Bank, 61 S.D. 261, 248 N.W. 250 (1933); cf. Frantz Equip. Co. v. Leo Butler Co., 3 Pa. 459, 88 A.2d 702 (1952) (non-jury case).

¹⁷⁵ *Question of fact*: E.g., Petty v. Ozark Grocery Co., 187 Ark. 595, 61 S.W.2d (1933); Russell v. Buxton, 181 Minn. 104, 231 N.W. 789 (1930); First Nat'l Bank Sussex County Airport, Inc., 137 N.J.L. 662, 61 A.2d 206 (Ct. Err. & App. 1948); L. v. Broad Fin. Corp., 111 N.J.L. 362, 363, 168 Atl. 438, 439 (Ct. Err. & App. 1927) ("reasons for the delay . . . not in dispute"); Gatlin v. Farmers Mut. Ins. Ass'n, 181 S. 496, 188 S.E. 253 (1936). *Question of law*: E.g., Campbell v. Shark, 46 Idaho 278, 2 Pac. 458 (1928); Anderson v. Elem, 111 Kan. 713, 208 Pac. 573 (1922); First Nat'l Bank v. Korn, 179 S.W. 721 (Mo. Ct. App. 1915); Knickerbocker Trust Co. v. Miller, 149 App. Div. 685, 133 N.Y. Supp. 989 (1912); Nuzum v. Sheppard, 87 W. Va. 243, 104 S.E. 1 (1920); see also the following non-jury cases: Knauss v. Aleck, 202 Iowa 91, 209 N.W. 4 (1926); Viles v. S. D. Warren Co., 132 Me. 277, 170 Atl. 501 (1934); Farm & Home S. & Loan Ass'n v. Stubbs, 231 Mo. App. 87, 98 S.W.2d 320 (1936); cf. Himmelman Hoteling, 40 Cal. 111 (1870).

¹⁷⁶ *Question of fact*: E.g., Lucas v. Swan, 67 F.2d 106 (4th Cir. 1933); Murray Third Nat'l Bank, 234 Fed. 481 (6th Cir. 1916); Bredow v. Woll, 108 Conn. 489, 143 A. 849 (1928); Lynes v. Holt-Taylor Mercantile Co., 268 S.W. 702 (Mo. Ct. App. 1925); First Nat'l Bank v. Osborne, 104 N.J.L. 112, 139 Atl. 25 (Ct. Err. & App. 1927); Da Nat'l Bank v. Kight, 86 W. Va. 319, 103 S.E. 482 (1920). *Question of law*: Yates v. Gocwin, 96 Me. 90, 51 Atl. 804 (1901); Hawkins v. Shields, 100 Miss. 739, 57 So. 4 (1912); Klemann v. Collins, 223 App. Div. 161, 227 N.Y. Supp. 589 (1928); Turner v. Iron Ch Mining Co., 74 Wis. 355, 43 N.W. 149 (1889); see also the following non-jury cases: McNee v. Ring, 159 Misc. 698, 287 N.Y. Supp. 653 (Sup. Ct. 1936); Cuddy v. Sarendr, 52 R.I. 465, 161 Atl. 297 (1932); cf. Paine v. Central Vt. R.R., 118 U.S. 152 (1886).

Citations to relevant nineteenth century American cases may be found in Annot., Am. Dec. 544 (1880); see also 3 R.C.L. *Bills & Notes* § 415 (1914).

Britton's statement that "whether a demand note has been presented for payment within a reasonable time after issue is normally a question of fact for the jury" does not adequately reflect the conflict in the decisions. BRITTON, *BILLS AND NOTES* 537 (2d ed. 1961).

¹⁷⁷ Assuming that a court feels that the reasonable time issue is one of law when there is no dispute concerning the facts, it may be asked what procedure such a court would endorse in a case where the facts are disputed. Authorities suggest that under these circumstances, the trial judge should instruct the jury as to what facts it must find in order to conclude that the time was reasonable. See, e.g., Turner v. Snyder, 139 Mo. App. 61, 123 S.W. 1050 (1910); Knickerbocker Trust Co. v. Miller, 149 App. Div. 685, 133 N.Y. Supp. 989 (1912). But cf. the commentary quoted in Colwell v. Colwell, 92 Ore. 11, 106-07, 179 Pac. 916, 917 (1919), approving the rule that where the facts are undisputed the question is one of law for the court, but stating that "the great difficulty is that the

course, that in some of the cases flatly stating that the issue is for the judge, the courts would have been willing to say that reasonable minds could not differ had they been following the opposite rule. In this event the result, if not the reasoning, would be the same under either approach.

California typifies the chaos which the reasonable time issue has created, even within one jurisdiction. There are several California cases which state that what is a reasonable time is a question of fact,¹⁷⁸ and others which go so far as to say that it is "always" a factual question.¹⁷⁹ California decisions can also be found asserting with equal assurance, and an equal lack of discussion, that "where the facts are not disputed, the question is one of law."¹⁸⁰

The adoption throughout the country of the Uniform Commercial Code can be expected to intensify the problem. In the sales and com-

question is generally found so complicated with the peculiar facts of each case that it is often impossible to separate it, and so, from necessity, the whole matter is left to the jury."

¹⁷⁸ See, e.g., *Lyon v. Goss*, 19 Cal. 2d 659, 673, 123 P.2d 11, 19 (1942) (non-jury); *Palmquist v. Palmquist*, 212 Cal. App. 2d 322, 331, 27 Cal. Rptr. 744, 751 (1963) (non-jury); *Square Deal Mach. Co. v. Garrett Corp.*, 128 Cal. App. 2d 286, 293-94, 275 P.2d 46, 52 (1954) (jury); *Shimmon v. Moore*, 104 Cal. App. 2d 554, 557, 232 P.2d 22, 25 (1951) (jury); *United Bank & Trust Co. v. Hunt*, 18 Cal. App. 2d 112, 116, 62 P.2d 1391, 1393 (1936) (jury).

¹⁷⁹ See *Marshall & Co. v. Weisel*, 242 A.C.A. 190, 194, 51 Cal. Rptr. 183, 186 (1966); *Pico Citizens Bank v. Tafco Inc.*, 201 Cal. App. 2d 131, 137, 19 Cal. Rptr. 905, 909 (1962); *Stark v. Shaw*, 155 Cal. App. 2d 171, 177, 317 P.2d 182, 185 (1957); *Leiter v. Handelsman*, 125 Cal. App. 2d 243, 251, 270 P.2d 563, 568 (1954) (all non-jury).

¹⁸⁰ *Alpern v. Mayfair Markets*, 118 Cal. App. 2d 541, 547, 258 P.2d 7, 10 (1953) (non-jury); *accord*, *C. O. Bashaw Co. v. A. U. Pinkham Co.*, 77 Cal. App. 591, 594, 246 Pac. 1064, 1065 (1926) (non-jury); *Whitfield v. Jessup*, 183 P.2d 133, 136 (Cal. App. 1947) (jury). In the *Whitfield* case, the supreme court granted a hearing and reached a different result from the district court of appeal. *Whitfield v. Jessup*, 31 Cal. 2d 826, 193 P.2d 1 (1948). It did not, however, specifically repudiate the holding of the lower court that "the question as to whether the time is reasonable is one of law." An old supreme court case, *Greenberg v. California Bituminous Rock Co.*, 107 Cal. 667, 671, 40 Pac. 1053, 1054 (1895) (non-jury), stated that "what is a reasonable time is a question of law"; see also *Lepori v. Hilson*, 109 Cal. App. 295, 297, 293 Pac. 86, 88 (1930) ("Whether if true such circumstances amount to an unreasonable length of time is a question of law for the court.") (non-jury); *Spaeth v. Ocean Park Realty Mining & Inv. Co.*, 16 Cal. App. 329, 116 Pac. 980 (1911) (jury). *But cf.* *Luckhart v. Ogden*, 30 Cal. 547 (1866) (jury).

Reference should also be made to a line of California cases which hold, without stating any reasons, that a reasonable time within which one must object to an account rendered, to prevent it from becoming an account stated, is a question "of law for the court." *Crane v. Stansbury*, 173 Cal. 631, 637, 161 Pac. 7, 9 (1916) (jury). See *Parsons v. Segno*, 187 Cal. 260, 265, 201 Pac. 580, 582 (1921) (non-jury); *Lacy Mfg. Co. v. Gold Crown Mining Co.*, 52 Cal. App. 2d 568, 577, 126 P.2d 644, 649 (1942) (non-jury); *Wright v. Stroheck*, 139 Cal. App. 552, 562, 34 P.2d 781, 785-86 (1934) (non-jury); 1 CAL. JUR. 2D *Accounts and Accounting* § 53 (1952). *But see* *Adler v. Granelli*, 112 Cal. App. 688, 297 Pac. 592 (1931) (non-jury); *cf.* *Hemenover v. Lynip*, 107 Cal. App. 356, 290 Pac. 1089 (1930) (jury).

mercial paper articles, the Code repeatedly uses the "reasonable time" criterion.¹⁸¹ Yet nowhere does it state whether judge or jury is to apply that criterion.¹⁸²

C. *The Inadequacies of the Decisions*

The most disappointing aspect of the case law is the universal failure of the courts to consider why judge or jury was selected to apply the reasonable time standard. Those courts which select the judge have also made no attempt to reconcile their choice with the negligence cases holding that the jury should apply the reasonable man standard. Instead, the courts have generally been content to attach the law or fact label without any further discussion; the typical opinion devotes one sentence to the problem, in which it is stated that the issue is one of law or one of fact.¹⁸³ This affords another contrast to the negligence cases, where some courts have discussed why the jury should be the decision-maker with respect to the characterization of given conduct.¹⁸⁴

¹⁸¹ In addition to the sections of the Code cited in notes 150-51, 153-54 *supra*, the following sections of article 2 define the period within which specified action shall be taken as a "reasonable time": §§ 2-201(2), 2-205, 2-207(2)(c), 2-309(2), 2-328(3), 2-402(2), 2-503(4)(b), 2-508(2), 2-510(3), 2-602(1), 2-604, 2-609(4), 2-610(a), 2-616(2), 2-709(1)(a), 2-723(2). With respect to article 3, see, in addition to the sections cited in note 155 *supra*, §§ 3-304(3)(c) and 3-505(2). Section 1-204(2) of the Code provides the not very helpful criterion that "what is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action."

Article 2 of the Code also makes frequent use of the concept of action being taken "seasonably"; see §§ 2-206(1)(b), 2-311(3), 2-319(3), 2-325(1), 2-327(1)(b), 2-327(2)(a), 2-503(4)(b), 2-508, 2-602(1), 2-605(1)(a), 2-607(2), 2-608(1)(a), 2-612(3), 2-615(c). Section 1-204(3) provides that "an action is taken 'seasonably' when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time."

¹⁸² Articles 2 (sales) and 3 (commercial paper) of the Code pay but limited attention to the allocation of decision-making between judge and jury; the terms "jury" and "question of fact" do not appear in either of these articles. Occasionally, "the court" is specifically directed to make a decision; one notable example is § 2-302(1), which refers to a finding by "the court as a matter of law" that a contract or any clause thereof was "unconscionable at the time it was made." See UNIFORM COMMERCIAL CODE §§ 1-201(10), 1-205(2), 2-202(b); *cf.* §§ 1-205(6), 2-716(2), 2-723(3), 3-804.

Section 2-302 was not adopted in California; see 37 CALIF. S.B.J. 135-36 (1962). However, California did include § 2-719(3), providing that "consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." In view of the omission of § 2-302, a puzzling question arises in California whether judge or jury should decide unconscionability under § 2-719(3). The same issue is presented by § 2-309(3), providing that "an agreement dispensing with notification [of termination of a contract] is invalid if its operation would be unconscionable."

¹⁸³ A New Jersey case analyzed the problem more perceptively, the court commenting that "whether a reasonable time had intervened . . . was in our opinion one of those questions of fact which, because they are for the court and not for the jury, are sometimes, though inaccurately, called questions of law." *Timlan v. Dilworth*, 76 N.J.L. 568, 572, 71 Atl. 33, 35 (Ct. Err. & App. 1908).

¹⁸⁴ See notes 103-13 *supra* and accompanying text.

This lack of judicial thought about the reasonable time issue is illustrated by *Previews, Inc. v. Everets*, a 1950 Massachusetts decision involving a breach of contract claim.¹⁸⁵ Reversing the directed verdict which the trial judge had granted the plaintiff, the court held that whether plaintiff had performed its contractual obligations "in a reasonably diligent, skillful, workmanlike and adequate manner" was a "question of fact" for the jury, "even if the evidence as to what was done is undisputed."¹⁸⁶ The court noted that "in general, where two conflicting inferences from established facts are possible, there is a question for the jury."¹⁸⁷ It went on to say: "[T]his case is to be distinguished from cases where the question is whether some act has been performed within a reasonable time. In such cases, if the facts are undisputed, what constitutes a reasonable time is commonly a question of law for the court."¹⁸⁸ The court gave no indication that it was at all troubled by its own inconsistency in treating the reasonableness of plaintiff's established conduct as a "question of fact," while favorably citing the well-settled Massachusetts doctrine¹⁸⁹ that the reasonableness of the established conduct of one accused of acting tardily is a "question of law."

D. The Negotiable Instrument Cases

Courts have been more willing in the negotiable instruments field than in other areas to allocate the application of the reasonable time standard to the judge as a "question of law," even though there is considerable judicial dissent from this point of view.¹⁹⁰ Most of the decisions

¹⁸⁵ 326 Mass. 333, 94 N.E.2d 267 (1950).

¹⁸⁶ *Id.* at 335-36, 94 N.E.2d at 268.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Id.* at 336, 94 N.E.2d at 269.

¹⁸⁹ See note 161 *supra*.

¹⁹⁰ See notes 175-76 *supra* and accompanying text.

It should also be noted that the same jurisdictions have treated this issue inconsistently in the negotiable instrument context. *Compare* *Nuzum v. Sheppard*, 87 W. Va. 243, 247, 104 S.E. 587, 588 (1920) ("[W]hat is a reasonable time is a question of law for the court, and not a question to be determined by the jury."), *with* *Davis Nat'l Bank v. Kight*, 86 W. Va. 319, 321, 103 S.E. 482, 483 (1920) ("The reasonableness of the time is a question of fact for the jury."). See *Weaver v. Harrell*, 115 W. Va. 409, 413, 176 S.E. 608, 610 (1934), recognizing that "the courts generally have not been entirely consistent on this question." *Compare* *Knauss v. Aleck*, 202 Iowa 91, 93, 209 N.W. 444, 445 (1926) ("[W]hether or not appellee presented the check within a reasonable time . . . , where the facts are undisputed, . . . becomes a question of law."), *with* *Citizens' Bank v. First Nat'l Bank*, 135 Iowa 605, 611, 113 N.W. 481, 483-84 (1907) (question whether check presented within reasonable time for jury, "even where the facts shown in evidence are without dispute"); and *compare* *Maronde v. Vollenweider*, 279 S.W. 774, 776 (Mo. Ct. App. 1926) ("Whether a given state of facts constitutes due diligence in the presentation of [a] check to the drawee bank is a question of law."), *with* *Lynes v. Holt-Taylor Mercantile Co.*, 268 S.W. 702, 705 (Mo. Ct. App. 1925) ("[W]hether this presentation was made

which have asserted that the issue is one of law have made no attempt to justify this classification, or to reconcile it with other cases holding that the determination of a reasonable time presents a factual question. An 1834 New York case, however, commented upon the problem in the following terms:

Most of the difficulties on this subject have arisen from a laudable anxiety on the part of the courts to adopt, in commercial cases, as far as practicable, fixed and certain rules as to what shall be considered reasonable diligence, so that the holders of commercial paper, and those who are contingently responsible for its payment, may be able to understand their several rights and duties in each particular case which may arise. For this purpose, they have endeavored to settle, as a question of law, what from its very nature must in most cases be a mere question of fact.¹⁹¹

A few other decisions have echoed this theme of the need for uniformity and certainty.¹⁹²

It is submitted that this reasoning is unsound as a justification for treating the reasonable time issue in the negotiable instruments context as one for the trial judge. In the first place, under the Negotiable Instruments Law and the Uniform Commercial Code the legislature has itself provided the "reasonable time" criterion. If this standard is deemed too vague to suit the needs of modern commerce, then the legislature should adopt more specific guidelines,¹⁹³ as the UCC has done with respect to presentment of checks.¹⁹⁴ The courts should not take it upon themselves

within a reasonable time after the execution of the note [eight years before] was for the jury to determine.").

¹⁹¹ *Mohawk Bank v. Broderick & Powell*, 13 Wend. 133, 137 (N.Y. Sup. Ct. 1834).

¹⁹² See *Anderson v. Elem*, 111 Kan. 713, 716, 208 Pac. 573, 574 (1922) ("It is essential to uniformity that the court itself should determine questions of this character."); *Aymar v. Beers*, 7 Cow. 705, 709-11 (N.Y. Sup. Ct. 1827) ("It is scarcely necessary to remark on the importance of certainty to the commercial world, in all questions relating to bills or notes: and it is equally obvious, that if the jury are to decide on this question, conclusions may be expected to vary on substantially the same state of facts."); *Colwell v. Colwell*, 92 Ore. 103, 110, 179 Pac. 916, 918 (1919) ("It is important that the law of commercial paper, affecting so strongly, as it does, the business of the country, should be as certain as possible."); cf. *Howe v. Huntington*, 15 Me. 350 (1839). See JAMES, *CIVIL PROCEDURE* 271 (1965), suggesting that the inarticulated premise of cases holding the question to be one of law is "a felt need for precision in commercial affairs."

¹⁹³ Cf. *Goodwin v. Davenport*, 47 Me. 112, 118 (1860), suggesting that such "legislative action, in this state, would relieve the courts from a class of questions, which, under the conflicting authorities, presents much embarrassment, and would also be of much practical benefit to the business community."

¹⁹⁴ Section 3-503(2) of the Code provides that, in the case of uncertified checks, "the following are presumed to be reasonable periods within which to present for payment or to initiate bank collection:

"(a) with respect to the liability of the drawer, thirty days after date or issue, whichever is later; and

to convert a deliberately flexible legislative standard into something more concrete by preventing juries from determining the reasonableness of human conduct, when this issue is willingly left to them in other contexts. It is true that in the negligence cases, courts have sometimes (but with decreasing frequency) laid down uniform rules of conduct.¹⁹⁵ These rules have been justified on the ground that reasonable men must necessarily conclude that the required standard of behavior could be no less than was judicially imposed. Courts which have, as a general rule, taken the reasonable time issue away from juries in negotiable instrument cases have made no attempt to justify this result in terms of how a reasonable jury must decide. Rather, they have been influenced only by the desire to obtain "fixed and certain rules."

Moreover, judges have not had much success in achieving this professed goal of uniformity, despite their appropriation of the reasonable time issue. The cases have recognized that what is a reasonable time with respect to presentment for payment of a negotiable instrument depends upon the facts and circumstances of the particular case, even though the issue is considered to be one of law.¹⁹⁶ Indeed, provisions of the governing statutes seem to compel this result.¹⁹⁷ Accordingly, despite the rationale of uniformity used to justify the exclusion of the jury from the application of the reasonable time standard, courts have usually not laid down general rules which will automatically be applicable in determining reasonableness in future cases.¹⁹⁸ The one general rule which was

"(b) with respect to the liability of an endorser, seven days after his endorsement."

Under § 1-201(31) of the Code (omitted in California; see 37 CALIF. S.B.J. 131-32 (1962)), the presumption is a rebuttable one, so the issue is not conclusively settled by the statute even if the check is presented for payment within the specified times.

The Code has occasionally supplemented a "reasonable time" criterion by specifically providing a maximum period; see UNIFORM COMMERCIAL CODE §§ 2-205, 2-609(4).

¹⁹⁵ See notes 81-87 *supra* and accompanying text.

¹⁹⁶ "[T]he precise number of days, weeks or months even, which will constitute a 'reasonable time,' has never been, although a question of law, judicially determined, but is made to depend upon *circumstances* as variable and uncertain as are the transactions and characters of men; and finally to be determined by the discretion, not to say, caprice of the Court." *Goodwin v. Davenport*, 47 Me. 112, 117-18 (1860). (Emphasis in original.) See *Seaver v. Lincoln*, 38 Mass. (21 Pick.) 267, 268-69 (1838) (Though a question of law, "one decision goes but little way in establishing a precedent for another."); *Commercial Nat'l Bank v. Zimmerman*, 185 N.Y. 210, 217, 77 N.E. 1020, 1021 (1906) ("[W]hat constitutes reasonableness of time for . . . presentment cannot be determined by any fixed rules.").

¹⁹⁷ Thus, both the UCC and the Negotiable Instruments Law provide that, *inter alia*, "the facts of the particular case" must be considered in determining a "reasonable time" for presentment. UNIFORM COMMERCIAL CODE § 3-503(2); UNIFORM NEGOTIABLE INSTRUMENTS LAW § 193.

¹⁹⁸ Cf. *Aymar v. Beers*, 7 Cow. 705, 710 (N.Y. Sup. Ct. 1827) ("[A] rule limiting the demand, in all cases, to a certain number of days . . . would be arbitrary, and incon-

adopted by many courts, that a "reasonable time" for presentment of a check was one day after receipt,¹⁹⁹ was hardly a success; it was specifically rejected by the UCC as "unreasonable, and . . . not in accord with the practices of reasonable people."²⁰⁰

Finally, courts which have generally submitted the reasonable time issue to the jury, but have treated negotiable instrument cases differently, must face the question of whether the need for uniformity is any greater in one case than in the other. For example, is it more important to have a uniform rule stating when checks must be cashed than it is to have such a rule stating when breach of warranty claims must be asserted? In terms of modern business practice, checks are normally cashed promptly. Even if they are not, interim bank failures are unlikely, so any delay in cashing a check will be immaterial. On the other hand, breach of warranty claims are an everyday occurrence and frequently present the issue of timely notice. Moreover, a drawer will normally make no response to a failure to cash a check promptly, so the doctrine requiring promptness serves only a risk distribution function. In contrast, a seller who does not receive a timely notification of a breach of warranty claim may have lost the opportunity to take appropriate remedial action.

E. The Questions That Should Be Answered

Courts have for too long a period dodged the consideration of policy by hiding behind the question of law façade. Once the issue is thus classified, any further thinking on the problem is likely to be stifled.²⁰¹ But whether a party's action was reasonably prompt requires facts to be characterized in the light of a governing legal standard. As such, the issue should be allotted to judge or jury by deciding who should properly make the characterization. In this context, the reasoning of the negligence cases cannot be ignored. As Judge Charles Clark once observed, "As the experience of one man usually differs from that of another, our law wisely says that what is 'reasonable' is to be determined by the jury—that is, it is to be the resultant of the, to a certain extent varying, opinions of twelve different persons.'"²⁰² Although the statement was

sistent with a consideration of the question of due diligence, which implies the exercise of some discretion, varying according to the features of each particular case.").

¹⁹⁹ See cases cited in BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* 1296-97 (Beutel, 7th ed. 1948).

²⁰⁰ Leary, *Commercial Paper: Some Aspects of Article 3 of the Uniform Commercial Code*, 48 KY. L.J. 198, 228 (1960). Leary was Assistant Reporter for article 3. See *UNIFORM COMMERCIAL CODE* comment to § 3-503.

²⁰¹ "It is doubtless true that the phrase 'question of law' often disguises matters which with equal propriety might have been called questions of fact." *First Nat'l Bank v. Pipe & Contractors' Supply Co.*, 273 Fed. 105, 107 (2d Cir. 1921).

²⁰² *Pease v. Sinclair Ref. Co.*, 104 F.2d 183, 187 (2d Cir. 1939). *But see* another Second

made in a negligence setting, it is equally pertinent to the commercial problems which have been considered.

It may be contended that although a jury is competent to say how a reasonable man would act in a negligence case, it lacks the sophistication to conclude how a reasonable businessman would act in a commercial case. The readiness of many courts to permit the jury to decide the commercial question suggests that a modern jury is equally equipped to handle both kinds of decision-making.²⁰³ In any event, if a court feels that the negligence cases can be distinguished on this basis, should it not attempt to justify its conclusion in these terms, instead of mechanically asserting that the issue is one of law for the judge?

F. Constitutional Factors

Although the cases have not discussed the point, a final question may be raised whether the constitutional guaranty of trial by jury requires that the jurors determine whether a given action was timely. As already noted, in determining the effect of the seventh amendment with respect to federal cases, reference must be made to the English common law as it existed in 1791.²⁰⁴ *Tindal v. Brown*,²⁰⁵ decided in 1786, concerned the timeliness of a notice of dishonor. Lord Mansfield and two of his colleagues agreed that "it is of dangerous consequence to lay it down as a general rule, that the jury should judge of the reasonableness of time," and that "it ought to be settled as a question of law."²⁰⁶ The

Circuit opinion, *Edwards Mfg. Co. v. Bradford Co.*, 294 Fed. 176, 184 (2d Cir. 1923), claiming that "what is reasonable is . . . in most cases a question of law." A Pennsylvania case adds a third point of view: "What is reasonable is sometimes a question of law, and at other times, a question of fact." *Hannum v. Gruber*, 346 Pa. 417, 423, 31 A.2d 99, 102 (1943).

²⁰³ As to the relative competence of judge and jury in the commercial sphere, one court has commented that "it was not necessary to define 'reasonable time' as used in the instruction, for the reason that the meaning of that term could be arrived at as well by the jury as by the court." *Kurth v. Morgan*, 277 S.W. 50, 53 (Mo. Ct. App. 1925). See also notes 275-83 *infra* and accompanying text; text accompanying notes 327-28 *infra*.

²⁰⁴ See note 119 *supra* and accompanying text.

²⁰⁵ 1 T.R. 167, 99 Eng. Rep. 1033 (K.B. 1786), *aff'd*, 2 T.R. 186, 100 Eng. Rep. 101 (Ex. Ch. 1787).

²⁰⁶ The quotation is from the opinion of Ashhurst, J., *id.* at 169, 99 Eng. Rep. at 1034. The exact question confronting the court was whether the holder of a promissory note had, within a reasonable time, given notice to an endorser that the note had been dishonored by the maker. Lord Mansfield, Ch. J., asserted that "certainty and diligence are of the utmost importance in mercantile transactions," and that "wherever a rule can be laid down with respect to this reasonableness, that should be decided by the Court, and adhered to by everyone for the sake of certainty." *Id.* at 168, 99 Eng. Rep. at 1034. Ashhurst, J., believed that "the next day at the most is as long as is necessary in a case circumstanced like this," where all the parties lived within twenty minutes' walk of each other. *Id.* at 169, 99 Eng. Rep. at 1034. Buller, J., observed that "whether the post goes out this or that day, at what time, etc., are matters of fact: but when those facts are

English cases prior to 1786 are generally, but not unanimously, in accord.²⁰⁷ Since the weight of authority strongly suggests that an English judge in 1791 would not have submitted the issue to a jury, there is no seventh amendment violation if a modern federal judge follows the same course. However, since the Supreme Court has indicated that there is no constitutional right to a *non-jury* trial,²⁰⁸ a federal judge can permit the jury to apply the reasonable time standard without infringing upon the constitutional rights of a party who wishes the judge himself to determine that issue.

The state constitutional question presents a different picture. In cases subsequent to 1791, English judges, either expressly or by implication, rejected the broad doctrine of *Tindal*. They flatly held with reference to a variety of situations that the jury should determine whether a given act was performed within a reasonable time.²⁰⁹ It is clear that by

established, it then becomes a question of law on those facts, what notice shall be reasonable." *Id.* at 169, 99 Eng. Rep. at 1035.

It should be noted, with respect to the specific problem before the court, that the UCC and the NIL both provide exact time limits by which notice of dishonor must be given to persons who may be liable on the instrument. UNIFORM COMMERCIAL CODE § 3-508(2); UNIFORM NEGOTIABLE INSTRUMENTS LAW §§ 103, 104. The legislatures that enact these provisions can be presumed to agree with Lord Mansfield on the desirability of a definite rule for notice of dishonor, in the interest of certainty. *Cf.* *Jones v. Carolina Nat'l Bank*, 114 S.C. 11, 20, 103 S.E. 27, 30 (1920). As already noted, the problem is a far different one when the legislature has concluded, with respect to a specific negotiable instruments time problem, that a uniform rule is unnecessary, and has instead provided the elastic "reasonable time" standard. Under these circumstances, courts should not take the reasonable time issue away from juries in an effort to substitute precision for the flexible approach which the legislature itself has deemed to be advisable.

²⁰⁷ *Appleton v. Sweetapple*, 3 Dougl. 137, 99 Eng. Rep. 579 (K.B. 1782), and *Medcalf v. Hall*, 3 Dougl. 113, 99 Eng. Rep. 566 (K.B. 1782), appear to be consistent with *Tindal v. Brown*. See also *Bell v. Wardell*, Willes 202, 204, 125 Eng. Rep. 1131, 1133 (C.P. 1740), stating, in defining "seasonable" time, that "the Court were the proper judges, as in the case of a reasonable time . . . For what is contrary to reason cannot be consonant to law, which is founded on reason" Lord Coke had come to a similar conclusion: "This reasonable time shall be adjudged by the discretion of the justices before whom the cause dependeth; . . . for reasonableness in these cases belongeth to the knowledge of the law, and therefore to be decided by the justices. . . . And this being said of time, the like may be said of things uncertain, which ought to be reasonable; for nothing, that is contrary to reason, is consonant to law." 1 COKE, COMMENTARY ON LITTLETON 644 (Thomas ed. 1818). See also pre-1791 cases cited in Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 458 nn.3-7 (1899). *But cf.* note (a) to *Butler v. Plan*, 1 Mod. 27, 86 Eng. Rep. 706 (K.B. 1796), stating that prior to *Tindal v. Brown*, which "settled" the matter, what was a reasonable time for giving notice of dishonor "was considered as a question of fact for the determination of the jury"; *Hankey v. Trotman*, 1 Black. W. 1, 96 Eng. Rep. 1 (K.B. 1746); *Eaton v. Southby*, Willes 131, 125 Eng. Rep. 1094 (C.P. 1738).

²⁰⁸ See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959), citing *Hurwitz v. Hurwitz*, 136 F.2d 796, 798-99 (D.C. Cir. 1943); Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176 (1961).

²⁰⁹ In *Muilman v. D'Eguino*, 2 H. Bl. 565, 569, 126 Eng. Rep. 705, 708 (C.P. 1795),

1850 *Tindal* could no longer be said to represent the English common law on this general subject, even with respect to problems involving commercial paper.²¹⁰ Since the scope of the right to a jury trial in California is determined by the common law in 1850,²¹¹ jury determination of a reasonable time question on which fair-minded men can differ would appear to be a California litigant's constitutional right.²¹² This may also

it was held, with respect to presentment of a bill for acceptance, that "what is reasonable time must depend on the particular circumstances of the case; and it must always be for the jury to determine . . ." In a 1796 case, *Hilton v. Shepard*, and a 1799 case, *Hopes v. Adler*, both of which concerned the timeliness of a notice of dishonor, Lord Kenyon expressed his disapproval of *Tindal v. Brown*, stating that no precise rule for the giving of notice should be laid down, and that the question should be one for the jury, which must consider "the circumstances of the case." See note (a)² to *Darbishire v. Parker*, 6 East 3, 14-16, 102 Eng. Rep. 1184, 1188-90 (K.B. 1805). In *Darbishire*, which also concerned the timeliness of a notice of dishonor, the opinions of two judges lend support to the position that what is a reasonable time under the circumstances is a question for the jury, but two judges expressed a contrary view, referring to *Tindal v. Brown*.

Subsequent relevant cases are *Fry v. Hill*, 7 Taunt. 397, 129 Eng. Rep. 158 (C.P. 1817) (whether bill presented for acceptance in reasonable time; jury question); *Pitt v. Shew*, 4 B. & Ald. 208, 106 Eng. Rep. 914 (K.B. 1821) (whether goods distrained by landlord sold within reasonable time; jury question); *Parker v. Palmer*, 4 B. & Ald. 387, 395, 106 Eng. Rep. 978, 981-82 (1821) (whether buyer who accepted goods acted with sufficient promptness to rescind contract; jury question); *Facey v. Hurdom*, 3 B. & C. 213, 107 Eng. Rep. 713 (K.B. 1824) (whether crop left on ground for reasonable time; jury question); *Shute v. Robins*, 3 Car. & P. 80, 172 Eng. Rep. 332 (K.B. 1828) (whether unreasonable delay in presenting bill for acceptance; jury question); *Mellish v. Rawdon*, 9 Bing. 416, 131 Eng. Rep. 672 (C.P. 1832) (whether bill forwarded for acceptance within reasonable time; jury question); *Ellis v. Thompson*, 3 M. & W. 445, 456, 150 Eng. Rep. 1219, 1224 (Ex. 1838) (Alderson, B.) (whether contractual obligation performed within reasonable time; jury question); *Serle v. Norton*, 2 M. & Rob. 401, 174 Eng. Rep. 331 (Ex. 1841) (whether check presented for payment within reasonable time; jury question); *Nelson v. Patrick*, 2 Car. & K. 641, 175 Eng. Rep. 269 (C.P. 1846) (whether request to take back merchandise made within reasonable time; jury question).

On the narrow issue of timeliness of a notice of dishonor, the following cases appear to be in accord with *Tindal v. Brown*: *Parker v. Gordon*, 7 East 385, 103 Eng. Rep. 149 (K.B. 1806); *Stevens v. Aldridge*, 5 Price 334, 351, 146 Eng. Rep. 625, 630 (Ex. 1818) (dictum); cf. *Bateman v. Joseph*, 12 East 433, 104 Eng. Rep. 169 (K.B. 1810). See also *Davis v. Capper*, 4 Car. & P. 134, 172 Eng. Rep. 640 (K.B. 1829).

²¹⁰ See note 209 *supra*. As there indicated, *Tindal v. Brown* was adhered to, and not universally, only with respect to timeliness of a notice of dishonor, a matter now specifically regulated by statute. See note 206 *supra*.

²¹¹ See notes 134-35 *supra* and accompanying text.

²¹² There are some California decisions which appear to impinge upon this right. See note 180 *supra*.

As already noted, in interpreting the scope of the state constitutional protection of the right to jury trial, the California Supreme Court has held that "it is necessary . . . to ascertain what was the rule of the *English* common law upon this subject in 1850." *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 287, 231 P.2d 832, 835 (1951). (Emphasis added.) See note 136 *supra* and accompanying text. Despite this statement, the court might be willing to permit reference to the 1850 common law of *other states* upon the subject in question. With respect to the determination of reasonable time, the American decisions as of 1850 already reflect the inconsistency that characterizes the later cases.

be the case with respect to other states whose constitutions preserve an historical right to jury trial, depending upon the development of the common law as of the date on which the state constitution was first adopted.²¹³

IV

REASONABLE CAUSE: THE MALICIOUS PROSECUTION CASES

To prevail in a malicious prosecution action, a plaintiff must prove that the defendant lacked reasonable cause or, as it is more commonly called, probable cause²¹⁴ to initiate criminal proceedings against plaintiff.²¹⁵ In defining the vague criterion of probable cause, the courts have once again adopted the familiar device of referring to an imaginary person. Thus, plaintiff must show that the civil defendant who instituted the prosecution either did not actually believe that plaintiff had committed a crime, or did not act in a manner comporting with that of the reasonably prudent man.²¹⁶

A. Province of the Judge

Even though probable cause "resembles very closely the reasonable conduct under the circumstances which is the fundamental issue in

Compare Attwood v. Clark, 2 Me. 229 (1823) (question of law) with Wallace v. Agry, 29 Fed. Cas. 67 (No. 17096) (C.C.D. Me. 1827) (question of fact for jury) (Story, J.). See generally Annot., 17 Am. Dec. 544 (1880). Under these circumstances, even a California court willing to concede the relevancy of the American cases would be expected to pay considerable deference to the relatively settled state of the English common law, pursuant to which the reasonable time issue was a jury question.

²¹³ See, e.g., Corcoran v. City of Chicago, 373 Ill. 567, 27 N.E.2d 451 (1940) (interpreting Illinois constitution, initially adopted in 1818); State v. Superior Court, 82 Wash. 284, 144 Pac. 32 (1914) (interpreting Washington constitution, adopted in 1889).

An interesting *Erie* question is presented as to whether a federal district judge in a diversity case should submit a reasonable time issue to the jury, pursuant to the constitutional mandate of the state in which the district court is held, even though this result is not required by the federal constitution. *Cf.* Byrd v. Blue Ridge Elec. Co-op., Inc., 356 U.S. 525 (1958); Herron v. Southern Pac. Co., 283 U.S. 91 (1931); Diederich v. American News Co., 128 F.2d 144 (10th Cir. 1942).

²¹⁴ "Probable cause [in a malicious prosecution suit] is synonymous with reasonable cause." Masterson v. Pig'n Whistle Corp., 161 Cal. App. 2d 323, 335, 326 P.2d 918, 926 (1958); see, e.g., Higgins v. Knickmeyer-Fleer Realty & Inv. Co., 335 Mo. 1010, 1026, 74 S.W.2d 805, 812-13 (1934); Johnston v. Meagher, 14 Utah 426, 438, 47 Pac. 861, 864 (1897).

²¹⁵ 1 HARPER & JAMES, TORTS § 4.5 (1956); PROSSER, TORTS 859 (3d. ed. 1964). Plaintiff must also show that the proceeding terminated in his favor and that it was maliciously instituted by defendant. See PROSSER, TORTS § 113 (3d ed. 1964). The former question is one for the court, if there is no conflict in the evidence, and the latter is for the jury, if there is any evidence to support the charge of malice. GREEN, JUDGE AND JURY 347 (1930).

²¹⁶ E.g., Overson v. Lynch, 83 Ariz. 158, 161-62, 317 P.2d 948, 950 (1957); McAfee v. Los Angeles Gas & Elec. Corp., 215 Cal. 219, 223, 9 P.2d 212, 214 (1932); Westerfield v. Prudential Ins. Co., 264 Ky. 448, 454, 94 S.W.2d 986, 990 (1936). See generally RESTATEMENT, TORTS § 662 (1938).

negligence cases,²¹⁷ the courts have, with few exceptions, taken a diametrically opposed position with respect to allocation of decision-making between judge and jury. The overwhelmingly prevalent view today is that it is a question of law for the court whether a given set of circumstances shall be deemed to constitute probable cause or, to phrase the same inquiry differently, "whether, upon the appearances presented to the defendant, a reasonable man would have instituted the proceeding."²¹⁸

If the historical facts bearing upon this issue are not in dispute, then the probable cause issue is for the court *in toto*.²¹⁹ On the other hand, if there is a conflict in the evidence regarding the information on which the defendant acted, or what action he took, this facet of the dispute must be resolved by the jury.²²⁰ Under these circumstances, the trial judge may use the special verdict device to determine the factual controversy, and then, on the basis of the jury's findings, decide whether these facts establish probable cause.²²¹ The more common procedure, however, is for the judge to ask the jury to return a general verdict, but to state hypothetically in his instructions what facts will, and will not, constitute probable cause.²²² Of course, if the latter procedure is followed, the jury, by either disregarding or not understanding the judge's instructions, can still make the decision whether a given set of circumstances shall be deemed to show probable cause. The jury's deliberative process will be shielded from judicial analysis by the inscrutable general verdict.²²³

²¹⁷ PROSSER, TORTS 860 (3d ed. 1964); see also GREEN, JUDGE & JURY 341-42 (1930); THAYER, EVIDENCE 225-26 (1898).

²¹⁸ PROSSER, TORTS 866 (3d ed. 1964); see also FLEMING, TORTS 587 (3d ed. 1965); 1 HARPER & JAMES, TORTS § 4.5, at 319 (1956); NEWELL, MALICIOUS PROSECUTION 14, 276-82 (1892); RESTATEMENT, TORTS § 673 (1938).

The plethora of cases which have held that probable cause in malicious prosecution is a question of law for the court are collected in two excellent annotations at 87 A.L.R.2d 183 (1963), and 1915D L.R.A. 1.

²¹⁹ See cases cited at Annot., 87 A.L.R.2d 183, 188-92 (1963); Annot., 1915D L.R.A. 1, 58-65.

²²⁰ PROSSER, TORTS 866 (3d ed. 1964).

²²¹ See cases cited at Annot., 87 A.L.R.2d 183, 203-04 (1963); Annot., 1915D L.R.A. 1, 47-48. This has been described as the "surer," though less common, method. *Murphy v. Russell*, 40 Ariz. 109, 113, 9 P.2d 1020, 1021-22 (1932).

²²² GREEN, JUDGE AND JURY 342 (1930); 1 HARPER & JAMES, TORTS § 4.5, at 319 (1956); see cases cited at Annot., 87 A.L.R.2d 183, 202-03 (1963); Annot., 1915D L.R.A. 1, 48-53. It has been held erroneous for a trial judge to submit the probable cause question to the jury, without specifically instructing as to what set of facts shall be deemed to constitute probable cause. *Sarwark Motor Sales, Inc. v. Woolridge*, 88 Ariz. 173, 354 P.2d 34 (1960); *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937 (1892); *Kuhnhausen v. Stadelman*, 174 Ore. 290, 310-11, 148 P.2d 239, 247 (1944); cases cited at Annot., 87 A.L.R.2d 183, 207-11 (1963); Annot., 1915D L.R.A. 1, 53-58.

²²³ Cf. FLEMING, TORTS 587-89 (3d ed. 1965); GREEN, JUDGE & JURY 342-43 (1930); PROSSER, TORTS 866 (3d ed. 1964).

In view of this function of the jury in determining the historical facts bearing on the probable cause issue, many courts refer to probable cause as "a mixed question of law and fact."²²⁴ It is significant that this same worn-out phrase has been used to describe negligence,²²⁵ despite the far different and more extensive role which the jury plays in a typical negligence case.²²⁶

B. Some Dissenting Views

Ohio and South Carolina have balked at the majority rule requiring the judge to apply the standard of probable cause. These two states have concluded that this issue of reasonableness should be treated in the same manner as in the run-of-the-mill negligence suit.²²⁷ In New York, the cases are in conflict.²²⁸ In still other jurisdictions, the law appears to be

²²⁴ See GREEN, JUDGE & JURY 342 (1930); cases cited at Annot., 87 A.L.R.2d 183, 194-95 (1963); Annot., 1915D L.R.A. 1, 43-47.

²²⁵ See note 51 *supra* and accompanying text.

²²⁶ Cf. THAYER, EVIDENCE 225 (1898).

²²⁷ *Ohio*: Edgington v. Glassmeyer, 110 Ohio Op. 2d 439, 168 N.E.2d 425 (Ct. App. 1959); Burke v. Kearney, 51 Ohio App. 287, 200 N.E. 649 (1935), and cases there cited; see also Miller v. Stacy, 6 Ohio L. Abs. 61, 145 N.E.2d 312 (Ct. App. 1956). *South Carolina*: Parrott v. Plowden Motor Co., 246 S.C. 318, 323, 143 S.E.2d 607, 609 (1965) (dictum); Margolis v. Tellech, 239 S.C. 232, 239, 122 S.E.2d 417, 420 (1961); Elletson v. Dixie Home Stores, 231 S.C. 565, 572, 99 S.E.2d 384, 387 (1957); Brown v. Bailey, 215 S.C. 175, 184, 54 S.E.2d 769, 773 (1949) (dictum); Jennings v. Clearwater Mfg. Co., 171 S.C. 498, 505, 172 S.E. 870, 872 (1934); Caldwell v. Bennett, 22 S.C. 1, 9 (1884) (rule "in analogy with the rule in cases of negligence").

²²⁸ New York cases have unambiguously held that the probable cause question is for the jury "upon a doubtful state of facts, or upon facts from which different men would draw different conclusions. . . . Such is the rule in all questions of the like character, and there is no reason why this class of cases should form an exception to the rule." Heyne v. Blair, 62 N.Y. 19, 22-23 (1875) (Emphasis added.); accord, e.g., Hyman v. New York Cent. R.R., 240 N.Y. 137, 147 N.E. 613 (1925); Dean v. Kochendorfer, 237 N.Y. 384, 143 N.E. 229 (1924). However, it has also been held in New York that "when facts and circumstances are undisputed, probable cause is a question of law for the court which it is error to submit to the jury." Freedman v. New York Soc'y for Suppression of Vice, 248 App. Div. 517, 520, 290 N.Y. Supp. 753, 757 (1936), *aff'd mem.*, 274 N.Y. 559, 10 N.E.2d 550 (1937); accord, Babor v. Goldberg, 258 App. Div. 230, 16 N.Y.S.2d 197 (1939), *aff'd mem.*, 283 N.Y. 729, 28 N.E.2d 963 (1940); Macauley v. Theodore B. Starr, Inc., 194 App. Div. 643, 656, 186 N.Y. Supp. 197, 206-07 (1921), *aff'd mem.*, 233 N.Y. 601, 135 N.E. 935 (1922) ("Public policy has made the question of probable cause a question for the court, and not for the jury . . ."); Day v. Levine, 181 App. Div. 261, 168 N.Y. Supp. 334 (1917), *aff'd mem.*, 228 N.Y. 588, 127 N.E. 911 (1920); Peters v. State, 6 Misc. 2d 779, 165 N.Y.S.2d 171 (Ct. Cl. 1957). Cf. PROSSER, TORTS 866 (3d ed. 1964), stating that New York has "rejected the rule that probable cause is for the court," and has "held that where more than one conclusion may be drawn as to the reasonableness of the defendant's conduct, the question is for the jury."

For an example of conflicting holdings in another jurisdiction, compare Wilson v. Thurlow, 156 Iowa 656, 137 N.W. 956 (1912) (jury correctly decided "whether there was or was not probable cause"), with Weisz v. Moore, 222 Iowa 503, 269 N.W. 443 (1936) (if special verdict procedure is not followed, court should give jury instructions as to what facts will constitute probable cause).

that if the facts are undisputed, the judge decides whether there was probable cause; but if the facts are disputed, the question should be submitted to the jury for a general verdict, pursuant to general instructions, as in a negligence case.²²⁹ The cases make no attempt to justify the logic of this last position. Perhaps it simply represents an uneasy compromise between the traditional practice in malicious prosecution cases and that in most other kinds of cases dealing with the reasonableness of human action. Or perhaps the courts feel that, where the facts are in dispute, hypothetical instructions are incomprehensible to the jury.

C. Justifications for the Judge's Role

That the probable cause issue is to be decided by the courts is by now so well established in most jurisdictions that virtually every relevant opinion in recent years has simply repeated the maxim that the question is one of law, without making any further analysis. The relatively few courts that have considered why the jury should be excluded have emphasized that the malicious prosecution action "is not favored in the law, since public policy encourages the exposure of crime, which a recovery against one initiating the proceeding obviously tends to discourage."²³⁰ Accordingly, when a defendant is accused of having acted without probable cause, "the court, as in every other case involving considerations of public policy, must itself determine the question as a matter of law, and not leave it to the arbitrament of a jury."²³¹ A West Virginia court has significantly noted that "these practical considerations" against discouraging the prosecution of suspected criminals "seem to have prevailed over the theoretical objections against invading the province of the jury and withdrawing from them what is essentially an

²²⁹ See *Miller v. Schnitzer*, 78 Nev. 301, 313, 371 P.2d 824, 830 (1962); *Evans v. New Jersey Cent. Power & Light Co.*, 119 N.J.L. 88, 194 Atl. 144 (Ct. Err. & App. 1937). Compare *Gladfelter v. Doemel*, 2 Wis. 2d 635, 87 N.W.2d 490 (1958) (interrogatory to jury asking, where facts were disputed, whether defendant acted "without probable cause" upheld), with *Elmer v. Chicago & N.W. Ry.*, 257 Wis. 228, 232, 43 N.W.2d 244, 247 (1950) ("Where the facts are in dispute, the jury determines the facts under proper instruction of the trial court, and the court determines the question of probable cause from such facts.")

²³⁰ *Shoemaker v. Shoemaker*, 11 N.J. Super. 471, 475, 78 A.2d 605, 607 (App. Div. 1951) (Brennan, J.). The same thought is expressed in 18 R.C.L. *Malicious Prosecution* § 2 (1917), and cases there cited; NEWELL, *MALICIOUS PROSECUTION* 21-22 (1892).

²³¹ *Ball v. Rawles*, 93 Cal. 222, 229, 28 Pac. 937, 938 (1892); see *Sandell v. Sherman*, 107 Cal. 391, 40 Pac. 493 (1895); *Rogers v. Olds*, 117 Mich. 368, 75 N.W. 933 (1898); *Vladar v. Klopman*, 89 N.J.L. 575, 99 Atl. 330 (Ct. Err. & App. 1916); JAMES, *CIVIL PROCEDURE* 271 (1965); THAYER, *EVIDENCE* 230 (1898). One court has reasoned that, "as the authority to institute a criminal prosecution, and the extent of such authority, are derived from the law, the law must judge as to what will constitute probable cause therefor." *Hess v. Oregon German Banking Co.*, 31 Ore. 503, 513, 49 Pac. 803, 806 (1897); see also *Turner v. O'Brien*, 5 Neb. 542 (1877).

inference of fact rather than of law; namely, whether defendant acted as a reasonably prudent man would have acted under the circumstances."²³²

This justification for taking away from the jury the application of the reasonable cause standard is unsound. One may grant the basic premise that the law has some interest in ensuring that a private citizen is not too readily deterred from bringing information of possible criminal conduct to the attention of public authorities. Yet it does not necessarily follow that for this reason the judge, rather than the jury, should *always* make the determination whether the defendant in the malicious prosecution suit acted reasonably. Surely the advantages of having twelve laymen decide what is reasonable are present here as much as in the negligence cases.²³³ Accordingly, the court should handle malicious prosecution in the same way as negligence; it should submit the ultimate issue of defendant's liability to the jury pursuant to general instructions, whether or not the underlying facts bearing on the probable cause question are in dispute. If the judge feels, after the return of the verdict, that the jury has been unduly influenced by the plight of the vindicated criminal defendant²³⁴ and has reached a result which is an obvious injustice to the accuser, the readily available remedy is a judgment n.o.v. or

²³² *Staley v. Rife*, 109 W. Va. 701, 705, 156 S.E. 113, 115 (1930); see *Burton v. St. Paul, M. & M. Ry.*, 33 Minn. 189, 192, 22 N.W. 300, 301 (1885) ("[W]hile the question, what facts make out probable cause, is for the court, it is ordinarily, if not always, really a question of fact to be determined upon the facts and circumstances of the particular case."); *THAYER, EVIDENCE* 230 (1898).

²³³ *Cf. Lister v. Perryman*, L.R. 4 H.L. 521 (1870), where the law lords recognized "that what is reasonable and probable cause . . . is to be determined by the judge," but expressed regret that this was the case. Lord Chelmsford observed that "no definite rule can be laid down for the exercise of the judge's judgment. Each case must depend upon its own circumstances . . ." Lord Westbury noted: "The existence of reasonable and probable cause is an inference of fact. It must be derived from all the circumstances of the case. I regret, therefore, to find the law to be, that it is an inference to be drawn by the judge, and not by the jury. I think it ought to be the other way." Lord Colonsay pointed out that in Scotland, the issue was left to the jury, because "it is thought that twelve reasonable and discreet men (as jurors are supposed to be) can judge of that matter for themselves, and that lawyers are not the only class of persons competent to determine whether the information was such as a reasonable and discreet man would have acted upon. For what is it that a judge would have to determine? He would have to determine whether the circumstances warranted a reasonable and discreet man to deal with the matter, that is to say, not what impression the circumstances would have made upon his own mind, he being a lawyer, but what impression they ought to have made on the mind of another person, probably not a lawyer." See also *Caldwell v. Bennett*, 22 S.C. 1 (1884); *Rowlands v. Samuel*, 11 Q.B. 39, 41, 116 Eng. Rep. 389, 390 (1847).

²³⁴ *Cf. Meyer v. Louisville, St. L. & T. Ry.* 98 Ky. 365, 369, 33 S.W. 98 (1895); *Sandoz v. Veazie*, 106 La. 202, 216, 30 So. 767, 773-74 (1901); *Macauley v. Theodore B. Starr, Inc.*, 194 App. Div. 643, 656, 186 N.Y. Supp. 197, 206-07 (1921), *aff'd mem.*, 233 N.Y. 601, 135 N.E. 935 (1922); *Abrath v. North Eastern Ry.*, [1886] 11 App. Cas. 247, 252 (H.L.).

a new trial. Alternatively, the judge could direct a verdict in a case where he would set aside any jury award to the accused. But certainly there are many cases where the probable cause question is sufficiently close that the judge will feel the jury verdict is a palatable one, regardless of who wins. Moreover, if a judge adopts the suggested procedure, he could also inform the jury, in connection with his instructions on probable cause, that the law should not be too quick to discourage the prosecution of criminal proceedings.²³⁵

It must be remembered that the negligence case, like the malicious prosecution claim, also presents the danger of jury sympathy for an unfortunate plaintiff. In both situations courts can control those jury verdicts which they feel to be unjustified by setting them aside, on the ground that reasonable men could not have reached the verdict in question. Moreover, in the malicious prosecution field, the courts could still preserve the almost universally recognized doctrine that probable cause shall be deemed established if the prosecution was actually instituted on the advice of counsel, to whom the accuser made full disclosure of what he knew.²³⁶ In view of the layman's ignorance of the law, and the lawyer's expertise, it can be said that under these circumstances reasonable men could not find an absence of probable cause. Thus, a directed verdict or a judgment n.o.v. for the defendant would be permissible.

There are two other relevant points. First, it is significant that the judicial attitude regarding jury exclusion from the application of the probable cause standard has nowhere been sufficiently strong to make the special verdict procedure mandatory. Thus, in many cases arising in states which say the question is for the judge, the jury really decides whether a given state of facts shall be said to constitute probable cause.²³⁷ Second, we may wonder whether enforcement of the criminal law as a result of private complaint is more lax in Ohio and South Carolina, which have rejected the prevailing view, than it is in other states. An Ohio or South Carolina layman who has not consulted counsel will undoubtedly not know that, if he is sued for malicious prosecution the reasonableness of his conduct will be passed upon by a jury rather than a judge. Accordingly, this treatment of the probable cause issue will not deter him from going to the authorities. If such a layman does consult counsel, the latter

²³⁵ Cf. *Jennings v. Clearwater Mfg. Co.*, 171 S.C. 498, 503, 172 S.E. 870, 872 (1934), asserting that "the public interests demand that courts shall not frown upon honest efforts made in attempts to bring the guilty to justice, and the juries, who try actions for malicious prosecutions, should ever keep these principles in mind." South Carolina, it may be recalled, permits a jury to decide the probable cause issue. See note 227 *supra* and accompanying text.

²³⁶ See, e.g., PROSSER, TORTS 861-64 (3d ed. 1964).

²³⁷ See notes 222-23 *supra* and accompanying text.

might discourage the initiation of criminal proceedings, because of the risk presented by jury determination of probable cause in a possible malicious prosecution suit. It seems more likely, however, that this factor would not concern the lawyer. For he should know that his advice to proceed, given after full disclosure of all known facts, will by itself protect his client from liability.²³⁸

D. Constitutional Factors

As in the "reasonable time" area, the courts have not considered whether the constitutional right of trial by jury is abridged by treating probable cause in malicious prosecution as a question of law for the court.²³⁹ In a famous 1786 case, based upon the wrongful institution of a court-martial, Lords Mansfield and Loughborough declared that "the question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable, or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law . . ."²⁴⁰ Later English decisions have reached the same result.²⁴¹ In view of this state of the English common law, there is clearly no constitutional violation when a judge, rather than a jury, decides whether probable cause shall be inferred from established facts.²⁴² On the other hand, there would also be no constitutional violation if the judge decided to submit the issue to the jury, contrary to the English practice.²⁴³

²³⁸ See *Conant v. Johnson*, 1 Ohio App. 2d 133, 204 N.E.2d 100 (1964); *Prosser v. Parsons*, 245 S.C. 493, 141 S.E.2d 342 (1965). See also note 304 *infra*.

²³⁹ *But cf. Jennings v. Clearwater Mfg. Co.*, 171 S.C. 498, 503, 172 S.E. 870, 872 (1934) (South Carolina rule that jury shall apply probable cause standard justified by reference to state constitutional provision as to trial by jury); *De Vries v. Dye*, 222 Wis. 501, 507-08, 269 N.W. 270, 273 (1936) (no denial of trial by jury because "facts relating to probable cause" were not in dispute, and "question of probable cause" was one "of law").

²⁴⁰ *Johnstone v. Sutton*, 1 T.R. 510, 545, 99 Eng. Rep. 1225, 1243-44 (Ex. 1786), *aff'd*, 1 T.R. 784, 99 Eng. Rep. 1377 (H.L. 1787). As interpreted in *Leibo v. Buckman, Ltd.*, [1952] 2 All E.R. 1057, 1062 (C.A.), the judges in *Pain v. Rochester, Cro. Eliz.* 871, 78 Eng. Rep. 1096 (K.B. 1602), noted that it was not safe to send the general issue to the "lay gents," as they described the jury, because of the jurors' sympathy for the unfortunate plaintiff. See also *Candell v. London* (1785), referred to at 1 T.R. 520, 99 Eng. Rep. 1230.

²⁴¹ Other relevant cases subsequent to 1791 and prior to 1850 include *Hill v. Yates*, 8 Taunt. 182, 129 Eng. Rep. 353 (C.P. 1818); *Davis v. Hardy*, 6 B. & C. 225, 108 Eng. Rep. 436 (K.B. 1827); *Blachford v. Dod*, 2 B. & Ad. 179, 109 Eng. Rep. 1110 (K.B. 1831); *Mitchell v. Jenkins*, 5 B. & Ad. 588, 594, 110 Eng. Rep. 908, 910 (K.B. 1833); *Panton v. Williams*, 2 Q.B. 169, 114 Eng. Rep. 66 (1841); *Turner v. Ambler*, 10 Q.B. 252, 116 Eng. Rep. 98 (1847). *But see Beckwith v. Philby*, 6 B. & C. 635, 108 Eng. Rep. 585 (K.B. 1837). A modern English case is *Leibo v. Buckman, Ltd.*, *supra* note 240.

²⁴² See notes 119, 134-35 *supra* and accompanying text.

²⁴³ See note 208 *supra* and accompanying text. "[N]o case has been found in which

V

REASONABLE CAUSE: THE FALSE IMPRISONMENT CASES

The probable cause issue also arises in false imprisonment suits, which frequently raise the question whether a private person had probable cause for arresting or detaining one suspected of committing a crime. The decisions are in conflict over the role of judge and jury in applying this standard in false imprisonment cases. Some courts, obviously indebted to the malicious prosecution decisions, have held the issue to be for the court.²⁴⁴ A 1952 federal decision expressly asserted, without further discussion, that "there is no material distinction in principle between the issue of reasonable grounds for detention in false imprisonment and the issue of probable cause in malicious prosecution," and concluded that the procedure should be the same with respect to both torts.²⁴⁵ There are other false imprisonment decisions, however, which permit the jury to determine whether the defendant had probable cause for his actions.²⁴⁶ Some courts appear to take a third position: If the facts are undisputed, the court shall state whether they show probable cause, but if the facts are disputed, the jury shall both resolve the factual conflict and also conclude whether probable cause existed.²⁴⁷

a state constitutional provision providing for jury trial in cases at common law has been construed to declare by implication the existence of a constitutional right to a nonjury trial." Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176, 1179 (1961). This source also observes: "A few state courts have construed constitutional provisions vesting the judicial power in the courts to prevent the legislature from eliminating the trial of equitable issues by the court. . . . Nevertheless, many, if not most, courts have found the constitutional provisions conferring judicial power no barrier to the statutory extension of jury trial." *Id.* at 1178-79; see also Van Hecke, *Trial by Jury in Equity Cases*, 31 N.C.L. REV. 157, 171-72 (1953).

Query whether the few states (not including California) which hold that the facts in an equity case must be tried to the court would also hold that an issue in an action *at law* must be constitutionally tried to the court because of the historical pattern.

²⁴⁴ This is the approach taken by the California courts, which have repeatedly stated in false imprisonment cases that "the presence or absence of probable cause is to be determined by the court as a matter of law and not by the jury as a question of fact." *Gibson v. J. C. Penney Co.*, 165 Cal. App. 2d 640, 644, 331 P.2d 1057, 1061 (1958); *accord*, *Collyer v. S. H. Kress Co.*, 5 Cal. 2d 175, 54 P.2d 20 (1936); *King v. Andersen*, 242 A.C.A. 706, 51 Cal. Rptr. 561 (1966); *Aitken v. White*, 93 Cal. App. 2d 134, 208 P.2d 788 (1949). See *Delp v. Zapp's Drug & Variety Stores*, 238 Ore. 538, 542, 395 P.2d 137, 139 (1964), which notes that "this is also the rule followed in deciding the question of 'probable cause' in malicious prosecution actions"; FLEMING, *TORTS* 104 (3d ed. 1965).

²⁴⁵ *Montgomery Ward & Co. v. Freeman*, 199 F.2d 720, 724 (4th Cir. 1952).

²⁴⁶ *E.g.*, *J. C. Penney Co. v. O'Daniell*, 263 F.2d 849 (10th Cir. 1959); *Ferrell v. Livingston*, 344 Ill. App. 488, 101 N.E.2d 599 (1951); *Swafford v. Vermillion*, 261 P.2d 187 (Okla. 1953). In *Bank of Cottonwood v. Hood*, 227 Ala. 237, 241, 149 So. 676, 679 (1933), the court stated that "the principle that the question of probable cause is a question of law for the court . . . is limited to suits for malicious prosecution, and is not applicable to actions for false imprisonment."

²⁴⁷ *E.g.*, *Rothstein v. Jackson's of Coral Gables, Inc.*, 133 So. 2d 331 (Fla. App. 1961);

Once again the courts have been content to speak in conclusory terms about questions of law and questions of fact, without considering whether the reasoning of the malicious prosecution cases is equally applicable to false imprisonment suits. In contrast to malicious prosecution, a false imprisonment claim cannot be called a disfavored action.²⁴⁸ Thus, a plaintiff in a false imprisonment case does not have to establish that the defendant acted maliciously.²⁴⁹ Moreover, the defendant bears the burden of proving probable cause, while in malicious prosecution plaintiff has the burden of showing lack of probable cause.²⁵⁰ Indeed, in a case based upon an alleged false arrest, a private defendant will be liable even if he had probable cause for believing that the plaintiff committed a felony, provided that no felony was in fact committed by anyone.²⁵¹ These burdens on the defendant have been explained in terms of "the interest of society in the freedom of its individual citizens from summary detention and restraint"²⁵² as a result of a private decision by a fellow citizen.

In view of the differing judicial attitudes toward the two kinds of cases, it is hard to understand why, in false imprisonment suits, some courts have insisted upon following the practice in malicious prosecution, and have taken from the jury the determination of probable cause. In any event, it would be far more meaningful for the courts to address themselves to the issues raised above, rather than simply to resort to the law and fact tags.²⁵³

VI

A NEW APPROACH

The preceding review of the case law suggests that the courts have not sufficiently probed the issues presented by allocation of decision-making in the civil jury trial. A fresh approach is clearly warranted. As the initial step in such an approach, the courts should recognize that the

Leisure v. Hicks, 336 Mich. 148, 57 N.W.2d 473 (1953) (dictum); *Parrish v. Herron*, 240 Mo. App. 1156, 225 S.W.2d 391 (1949); *Harrer v. Montgomery Ward & Co.*, 124 Mont. 295, 221 P.2d 428 (1950).

²⁴⁸ See note 230 *supra* and accompanying text; *cf.* 1 HARPER & JAMES, TORTS § 4.11, at 340 (1956).

²⁴⁹ 1 HARPER & JAMES, TORTS § 3.7, at 228 (1956); PROSSER, TORTS 61 (3d ed. 1964).

²⁵⁰ *Freedman v. New York Soc'y for Suppression of Vice*, 248 App. Div. 517, 290 N.Y. Supp. 753 (1936), *aff'd mem.*, 274 N.Y. 599, 10 N.E.2d 550 (1937); *see, e.g., Carr v. National Discount Corp.*, 172 F.2d 899 (6th Cir. 1949); *McDermott v. W. T. Grant Co.*, 313 Mass. 736, 49 N.E.2d 115 (1943); FLEMING, TORTS 104 (3d ed. 1965).

²⁵¹ PROSSER, TORTS 135 (3d ed. 1964) (The authority of the private person "depends upon the fact of the crime, and he must take the full risk that none has been committed."); *see* FLEMING, TORTS 103 (3d ed. 1965); 1 HARPER & JAMES, TORTS § 3.18, at 276 (1956).

²⁵² 1 HARPER & JAMES, TORTS § 3.18, at 275 (1956); *see also id.* § 4.11, at 342.

²⁵³ The malicious prosecution discussion of constitutional factors would appear equally applicable to false imprisonment. *See* notes 239-43 *supra* and accompanying text.

categories of law and fact are inadequate for classifying every question which must be decided in the typical case. Indeed, it is the exclusive dependence on these terms that has been responsible for much of the confusion and inconsistency which are the most notable attributes of the relevant appellate opinions.²⁵⁴ Clearly a third category, law application, would be a useful analytical tool.²⁵⁵

In view of the well entrenched law-fact dichotomy, however, it may be necessary to let the courts say that when law application is for the jury, it is a question of fact, and when it is for the judge, it is a question of law.²⁵⁶ This procedure will serve no purpose whatever except to gain the practical advantages of fitting the new category within the established terminology.

A. *The Jury as Law Applier*

As a working rule, the task of law application should be entrusted to the jury, unless there are compelling reasons in a given case why the court should perform this function. The rationale for such an approach is the frequently expressed policy in favor of trial by jury, springing from constitutional guaranties. As the Supreme Court once stated, "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."²⁵⁷

²⁵⁴ Although courts have at times spoken of "a mixed question of law and fact," this term has been used so loosely and so inconsistently that the result has been to enhance rather than solve the basic problem. See notes 36, 51-55, 224-26 *supra* and accompanying text.

²⁵⁵ In this connection, Judge Friendly's recent remarks in *In re Hygrade Envelope Corp.*, 366 F.2d 584, 588 (2d Cir. 1966), are most pertinent: "Whether application of a legal standard to facts that are undisputed or have been found without clear error is a question of law or of fact is . . . 'an area over which "law" and "fact" have battled for a century.' . . . Perhaps clarity of thought would be promoted by recognizing that it is not exactly one or the other." (Emphasis added.) See also his opinion in *Artvale, Inc. v. Rugby Fabrics Corp.*, 363 F.2d 1002, 1005 (2d Cir. 1966), noting that "the common approach seeking to dichotomize all decisions as either 'law' or 'fact' is too simplistic . . ."

²⁵⁶ See 4 DAVIS, ADMINISTRATIVE LAW § 30.02, at 194 & n.3 (1958).

²⁵⁷ *Jacob v. City of New York*, 315 U.S. 752-53 (1942); see, e.g., *Simler v. Conner*, 372 U.S. 221, 222 (1963) ("The federal policy favoring jury trials is of historic and continuing strength."); *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). Although many commentators have strongly urged that the right of trial by jury should be abolished in civil cases, or at least some kinds of civil cases, this position has been vigorously opposed by others, and we are a long way from taking any such drastic action. For a collection of the voluminous literature debating the pros and cons of jury trial, see Green, *Juries and Justice—The Jury's Rule in Personal Injury Cases*, 1962 U. ILL. L.F. 152, 167-71. For a discussion of the English experience, see Note, 78 HARV. L. REV. 676 (1965).

Similarly, in the leading case of *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*,²⁵⁸ the Supreme Court referred to "the influence—if not the command—of the Seventh Amendment,"²⁵⁹ and held that "the federal policy favoring jury decisions of disputed fact questions"²⁶⁰ required submittal of an issue to the jury in a diversity case, despite the contrary state practice. Significantly, what the Court called a "fact question"²⁶¹ was not only the reconstruction of the historical facts,²⁶² but also the application of the law to those facts. The latter task required a determination whether plaintiff should be deemed an "employee" within the meaning of the local Workmen's Compensation Act.²⁶³ A subsequent Supreme Court case²⁶⁴ is in accord; it classified this same status question as a "factual" one which federal policy dictated the jurors should determine.²⁶⁵

One of the harshest critics of trial by jury, Judge Jerome Frank, has observed: "As long as jury trials are guaranteed by constitutional or statutory provisions, it is the obligation of every judge, no matter what he thinks of such trials, to see that . . . the jury's province is not invaded." *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 666 (2d Cir. 1946) (dissenting opinion).

²⁵⁸ 356 U.S. 525 (1958).

²⁵⁹ *Id.* at 537. The Court specifically reserved decision on the seventh amendment question. *Id.* at 537 n.10.

²⁶⁰ *Id.* at 538.

²⁶¹ *Id.* at 531-32.

²⁶² These were in dispute. See *id.* at 526-32.

²⁶³ *Id.* at 527. At one point, the Court referred to this status question as an "ultimate fact" on which "the jury on the entire record . . . might reasonably reach an opposite conclusion" from that of the appellate court. *Id.* at 532.

With respect to the theme of *Byrd*, see *Hardware Mut. Cas. Co. v. Jones*, 363 F.2d 627, 633 (4th Cir. 1966) ("It is the Seventh Amendment that fashions the federal policy favoring jury decisions of disputed fact questions.").

²⁶⁴ *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273 (1959).

²⁶⁵ *Id.* at 278. Cf. the interpretation of *Byrd* and *Magenau* in *Walker v. United States Gypsum Co.*, 270 F.2d 857 (4th Cir. 1959), *cert. denied*, 363 U.S. 805 (1960).

Dissenting in *Magenau*, as he had in *Byrd*, Mr. Justice Frankfurter took the following position: "[N]o prior federal case would justify a ruling that in the federal courts application of law to fact is a jury function. Nor does historical analysis support the assumption that such was the case at the time of the adoption of the Seventh Amendment. Whether a given set of facts constitutes an employment relationship is a pure question of law and as such not within a jury's province." *Magenau v. Aetna Freight Lines, Inc.*, *supra* note 264, at 282 (dissenting opinion). The Justice appears to have overlooked, *inter alia*, the Court's FELA decisions indicating that, in compliance with the constitutional mandate of the seventh amendment, the jury is "to apply" the legal standard of reasonable care "to the facts of these personal injuries." *Bailey v. Central Vt. Ry.*, 319 U.S. 350, 354 (1943); see also notes 65, 114 *supra*. For a discussion of the practices of English common law judges with respect to jury application of standards of reasonableness and the present relevance of such practices, see notes 119-37, 204-13, 239-43 *supra* and accompanying text.

On the question reserved by *Byrd* and alluded to by Mr. Justice Frankfurter, namely, the "command" of the seventh amendment with respect to law application in general, the answer is debatable. Assuming that a particular example of law application can be shown to have been a jury function in 1791, then the historical interpretation of the seventh amend-

These Supreme Court decisions provide firm support for the suggested approach to the jury's role, at least in federal cases. This approach is also fortified by the decisions indicating that a constitutional preservation of a right to civil jury trial does not confer a constitutional right to a *non-jury* trial.²⁶⁶

In many state cases, the courts have spoken in glowing terms of the right of trial by jury in civil suits, and have concluded that a question of fact—which was actually a question of law application—should be determined by the jurors under the relevant constitutional provisions.²⁶⁷ The willingness of these courts to say that a jury determination was constitutionally required, even though an historical analysis might have

ment would dictate that a similar pattern be followed today. On the other hand, the special verdict was at times employed by the English common law as a method of enabling the judge to apply the law to the historical facts as found by the jury. See Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575 (1923); Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 684-86 (1918). In *Walker v. New Mexico & So. Pac. R.R.*, 165 U.S. 593 (1897), the Court found no constitutional impediment to a trial judge's entering judgment in accordance with a jury's "findings of fact" made in response to interrogatories, even though the jury had also returned a general verdict which was deemed inconsistent with those findings. The Court reasoned that the seventh amendment "requires that questions of fact in common law actions shall be settled by a jury," and did not bar a judge from taking appropriate action where the jury had determined the facts and had then obviously "misinterpreted" or "misapplied" the law. *Id.* at 596; *cf.* *Baltimore & C. Line v. Redman*, 295 U.S. 654, 657 (1935); *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 498 (1931). *But cf.* *Buffalo Ins. Co. v. Spach*, 277 F.2d 529, 531 (5th Cir. 1960) ("[T]he provisions of the Seventh Amendment . . . require the submission to juries of questions of fact in dispute, or questions of conflicting inferences from undisputed facts.") (dictum); *Cox v. English-American Underwriters*, 245 F.2d 330, 332 (9th Cir. 1957); *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950). Even the modern advocates of the special verdict, without specifically referring to constitutional necessities, recognize that that technique should not be used to prevent the jury from deciding certain "questions of ultimate fact," *i.e.*, questions entailing the application of law. See Note, 74 YALE L.J. 483, 502-03 (1965).

²⁶⁶ See notes 208, 243 *supra* and accompanying text.

²⁶⁷ *E.g.*, *Lofy v. Southern Pac. Co.*, 129 Cal. App. 2d 459, 462, 277 P.2d 423, 425 (1954) ("[T]he right to trial by jury is a basic and fundamental part of our state and federal systems of jurisprudence."); *Orr v. Avon Fla. Citrus Corp.*, 130 Fla. 306, 311, 177 So. 612, 614 (1937) ("an organic right and should under no circumstances be denied"); *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 84, 117 N.E.2d 74, 80 (1954) ("a fundamental right in our democratic judicial system"); *Gard v. Sherwood Constr. Co.*, 194 Kan. 541, 549, 400 P.2d 995, 1002 (1965) ("the right should be carefully guarded against infringements"); *Shobert v. May*, 40 Ore. 68, 66 Pac. 466 (1901). These are all negligence cases. See also *DeLahunta v. City of Waterbury*, 134 Conn. 630, 59 A.2d 800 (1948) (whether "undisputed facts" established existence of absolute nuisance should be determined by jury as "plaintiff's constitutional right").

For other state cases exalting the right of trial by jury in civil cases and urging that it be vigilantly protected, see, *e.g.*, *Stephens v. Kasten*, 383 Ill. 127, 48 N.E.2d 508 (1943); *Watkins v. Siler Logging Co.*, 9 Wash. 2d 703, 116 P.2d 315 (1941); *cf.* *Dorsey v. Barba*, 38 Cal. 2d 350, 356, 240 P.2d 604, 607 (1952).

demonstrated that it was not,²⁶⁸ would appear to indicate a strong judicial commitment to the policy of trial by jury.

In addition to the policy favoring jury trial, there is an important practical benefit from permitting the jury to apply the law: The jury can be asked to return a general verdict. In contrast, if the judge applies the law, and the historical facts are in dispute, the court must either call for a special verdict or else frame hypothetical instructions keyed to the possible ways in which the jury may resolve the factual conflict.²⁶⁹ Although the special verdict has its ardent admirers,²⁷⁰ it has generally been given limited use in this country, so that most judges are relatively unfamiliar with it.²⁷¹ In addition, this device can present thorny problems of formulation.²⁷² The preparation of hypothetical instructions can also be a difficult task.²⁷³ Moreover, this latter solution is an "unsafe" one since in reality it permits the jury to perform the law-applying function which the court intended to appropriate for itself.²⁷⁴

A further practical advantage in having a jury apply the law is that an appellate court will give conclusive weight to the jury's verdict in a case where reasonable men can clearly differ. This result may well discourage an appeal by the losing party, thereby contributing to the relief of court congestion. In contrast, if the presiding judge in a jury case makes the determination as a question of law, his conclusion will be subject to review like any other claim of legal error.

B. Exclusion of the Jury: Relative Competence

With respect to some examples of law application, a judge's legal training may make him so much more qualified to perform the task than a group of twelve laymen that the basic policy in favor of trial by jury

²⁶⁸ See notes 119-37 *supra* and accompanying text. As there suggested, the cases cited in note 267 *supra* have categorically stated that determination by the jury of the negligence issue is constitutionally required, without considering what the practice of the common law was at the time that the state constitution was adopted.

²⁶⁹ See, e.g., notes 220-23 *supra* and accompanying text.

²⁷⁰ See Judge Frank's opinion in *Skidmore v. Baltimore & O.R.R.*, 167 F.2d 54 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948); sources cited in Note, 74 YALE L.J. 483, 488-97 (1965).

²⁷¹ Note, *supra* note 270, at 487, referring to the "negligible inroads made by the special verdict . . . upon common trial practice"; JAMES, CIVIL PROCEDURE 295 (1965), and sources there cited.

²⁷² JAMES, CIVIL PROCEDURE 294 (1965); 5 MOORE, FEDERAL PRACTICE ¶ 49.05, at 2218 (2d ed. 1964); Note, 74 YALE L.J. 483, 498-500 (1965).

²⁷³ Cf. JAMES, CIVIL PROCEDURE 297 (1965). For a comment upon the difficulties presented by hypothetical instructions as to "probable cause" in malicious prosecution suits, see *Pacific Nat'l Co. v. Southwest Fin. Co.*, 4 Cal. App. 2d 326, 40 P.2d 862 (1935); *Treloar v. Harris*, 66 Ind. App. 59, 74-82, 117 N.E. 975, 980-82 (1917).

²⁷⁴ See, e.g., note 223 *supra* and accompanying text. It should be noted that this possibility also exists with respect to the special verdict. See Note, 74 YALE L.J. 483, 493-94 (1965).

should yield to the court's competence and the jury's incompetence. For example, it is perfectly sensible for a judge in a malicious prosecution suit to determine whether the prior proceedings terminated in favor of the accused.²⁷⁵ Such an issue typifies the kind of question that lawyers are particularly equipped to handle;²⁷⁶ to the man in the street, it smacks of "lawyer's talk," in contrast to other issues "referable to the ordinary experience of mankind."²⁷⁷

Nevertheless, courts should adopt a cautious attitude toward exclusion of the jurors from the process of law application on the basis of the relative competence of judge and jury. With respect to matters such as the computation of damages,²⁷⁸ the resolution of a conflict in technical testimony of expert witnesses,²⁷⁹ and the determination of the employment status of an individual,²⁸⁰ it has been firmly declared that the mere complexity of the case is not a sufficient basis for denying trial by jury.²⁸¹ The Supreme Court has suggested the possible appointment of a special master "to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone"²⁸²

In any event, the approach of Chief Justice Traynor—that law application should be for the judge "unless it appears that the issue is one that the jury can determine better than the court"²⁸³—is difficult to defend. In

²⁷⁵ See note 215 *supra*.

²⁷⁶ Cf. LANDIS, *THE ADMINISTRATIVE PROCESS* 152 (1938).

²⁷⁷ *Lyman v. Putnam Coal & Ice Co.*, 182 App. Div. 705, 708, 169 N.Y. Supp. 984, 986 (1918), *aff'd mem.*, 230 N.Y. 548, 130 N.E. 888 (1920).

It should be noted that the presumably greater expertise of an administrative agency, compared with that of appellate judges, has induced reviewing courts to pay deference to an administrative decision deemed to fall within the scope of the agency's specialized knowledge. Under these circumstances, the relevant issue is said to be one of fact for resolution by the agency. See 4 DAVIS, *ADMINISTRATIVE LAW* ch. 30 (1958). This use of the law-fact terminology is the exact opposite of its present use in the civil jury context, where the relative expertness of the judge, as compared with the qualifications of the jury, is a justification for making the question one of law.

For a discussion of the difficult questions presented by the law-fact distinction in the area of review of administrative action, compare DAVIS, *op. cit. supra*, with JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* chs. 14-15 (1965); see also Davis, "Judicial Control of Administrative Action": A Review, 66 COLUM. L. REV. 635, 669-75 (1966); *NLRB v. International Union of Operating Eng'rs*, 357 F.2d 841, 846-47 (3d Cir. 1966).

²⁷⁸ *Paularena v. Superior Court*, 231 Cal. App. 2d 906, 42 Cal. Rptr. 366 (1965); *M. J. Murphy & Sons, Inc. v. Peters*, 95 N.H. 275, 62 A.2d 718 (1948); *Peters v. Dulien Steel Prods., Inc.*, 39 Wash. 2d 889, 239 P.2d 1055 (1952).

²⁷⁹ *Travelers Indem. Co. v. Parkersburg Iron & Steel Co.*, 70 F.2d 63 (4th Cir. 1934).

²⁸⁰ *Lifetime Siding, Inc. v. United States*, 359 F.2d 657 (2d Cir. 1966).

²⁸¹ For a contrary view, see Korn, *Law, Fact and Science in the Courts*, 66 COLUM. L. REV. 1080, 1103-05 (1966). On the basis of his empirical study, Prof. Kalven takes an optimistic attitude toward the competence of the civil jury to cope with the difficult case. See Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1066-68 (1964).

²⁸² *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962).

²⁸³ See note 25 *supra* and accompanying text.

view of the policy in favor of jury trial, the court must clearly qualify as the superior decision-maker before the jury should be excluded in a particular case. If both possess approximately equal competence, the working rule of jury determination of the disputed issue should be given full effect.

C. Exclusion of the Jury: Need for Uniformity and Predictability

A second possible ground for excluding the jury from the process of law application is that, with respect to a particular fact pattern, the policy in favor of uniformity, certainty and predictability outweighs the policy in favor of trial by jury.²⁸⁴ If a combination of historical facts is likely to recur, law application by a jury may lead to inconsistent results in successive cases. The verdict of prior juries will have no precedential value with respect to subsequent jury determinations; indeed, a jury will not be permitted to know what former juries have concluded.²⁸⁵ In contrast, the conclusion of a judge, if given sufficient publicity and set forth in sufficient detail, will be a precedent influencing the determination of future cases presenting a repetition of the historical facts to which the law has been applied. Of course, a trial judge may disagree with the earlier result, and may refuse to follow it; but he will not have this option if an appellate court whose mandate must be obeyed has approved the former holding. Thus, when law application is performed by a judge, it takes on aspects of law declaration; the result of the specific application is to establish a principle applicable to future cases.²⁸⁶

1. The Value of Consistency

That the law should reach consistent results in identical cases is an objective worthy of serious attention. When one plaintiff wins and another loses, despite the identity of the legally significant historical facts in both cases, the result may be attacked as violative of basic notions of fairness. Moreover, the planning of human affairs is facilitated when, on the basis of established precedent, lawyers can confidently advise their clients how the judicial process will react to a given course of conduct.

Despite the foregoing, some inconsistency has always been tolerated by the law. Assume that two children were playing together and were injured on the railroad's turntable involved in the Supreme Court's *Stout* decision.²⁸⁷ Separate actions are brought on their behalf. In the first

²⁸⁴ Cf. Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1323 (1942).

²⁸⁵ Fox, *Law and Fact*, 12 HARV. L. REV. 545, 550-51 (1899); see also Dickinson, *Legal Rules: Their Application and Elaboration*, 79 U. PA. L. REV. 1052, 1054 (1931).

²⁸⁶ See *id.* at 1077. The number of such other cases will depend upon the likelihood of a recurrence of the historical facts on which the prior conclusion was based.

²⁸⁷ See notes 62-63 *supra* and accompanying text.

action, the jury returns a verdict for plaintiff, and in the second it finds for defendant. Both verdicts would undoubtedly be upheld,²⁸⁸ even though the undisputed historical facts were the same in both cases, and even though the defendant and other railroads would not know whether the law required them to take additional precautions to guard turntables. The possibility of this kind of inconsistency may be mitigated by such procedural devices as permissive joinder, intervention, and consolidation.²⁸⁹ Moreover, expanding notions of collateral estoppel may lead to the conclusion that, in the example posed above, the second plaintiff will be permitted to appropriate the fruits of the first plaintiff's victory on the liability issue.²⁹⁰ Yet none of these procedural solutions will be available if, after termination of a suit brought by one child who was injured on the turntable, a second child is injured under the same circumstances and seeks compensation.²⁹¹ This last problem is intensified if the railroad won the first suit, and did not deem it necessary to take further steps to protect trespassing children from harm.

The willingness of the law to condone inconsistency in the negligence sphere is explainable by judicial deference toward trial by jury.²⁹² This deference may stem from the prevailing view that application of the due care standard presents a question of fact, and is constitutionally a jury function.²⁹³ With respect to the competing policies under consideration, one leading jurist cautioned that "if trial by jury is as valuable as it seemed to the founders of our institutions, the danger of holding a matter of fact to be a matter of law outweighs the inconvenience of any uncertainty likely to be produced by verdicts of juries"²⁹⁴

²⁸⁸ Cf. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 116-17 (1924).

²⁸⁹ E.g., FED. R. CIV. P. 20(a), 24(b), 42(a). A major function of impleader and interpleader is to guard against inconsistent results. See, e.g., FED. R. CIV. P. 14, 22.

²⁹⁰ On the "offensive" use of a prior judgment by a plaintiff not a party to the former suit against a defendant who was a party, see JAMES, CIVIL PROCEDURE § 11.34 (1965); *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir.), cert. denied, 377 U.S. 934 (1964); *United States v. United Air Lines, Inc.*, 216 F. Supp. 709 (D. Nev. 1962), modified on other grounds sub nom. *United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir. 1964); *Newman v. Larsen*, 225 Cal. App. 2d 22, 36 Cal. Rptr. 883 (1964); Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965).

²⁹¹ Although the collateral estoppel argument could still be made, it would be quite a novel development to permit offensive use of a prior judgment by a plaintiff not a party to the former suit, when the plaintiff's cause of action had not even arisen before termination of the first litigation, and defendant at that time had no knowledge as to the possible assertion of plaintiff's claim.

²⁹² Cf. *Mamiye Bros. v. Barber S.S. Lines, Inc.*, 360 F.2d 774, 777 (2d Cir. 1966).

²⁹³ See text accompanying notes 114-37 *supra*, observing that this view is based upon too superficial an approach to the problem.

²⁹⁴ *Gray v. Jackson & Co.*, 51 N.H. 9, 37 (1871) (Doe, J.). See generally Reid, *A Peculiar Mode of Expression: Judge Doe's Use of the Distinction Between Law and Fact*, 1963 WASH. U.L.Q. 427.

2. *A Dubious Solution*

One way of accommodating these competing policies would be to have the jury apply the law to undisputed facts in a case where reasonable men can differ.²⁹⁵ The trial judge would then give the verdict precedential value by preparing an opinion setting forth the jury's conclusion and summarizing the record on which it was based. In the future, a court would give this opinion the same weight as if the judge had acted as law applier, and would therefore deny a subsequent litigant the right to a jury determination of an issue of law application deemed to have already been resolved by a prior jury.²⁹⁶

Although Holmes in a famous pair of cases approved of giving precedential value to a jury verdict,²⁹⁷ the law has been extremely reluctant to take this approach.²⁹⁸ One may seriously question the fairness, and perhaps the constitutionality, of giving the first litigant a jury trial, but not the second. The problem seems especially acute when the second jury may react differently from the first because of a difference in emotional factors presented by the two cases. It is true that when a judge engages in law application, thereby creating a precedent, he may also have been influenced by the unique equities of the case. Yet presumably the law feels that it is less harsh to bind a subsequent party by a judge's prior conclusion than it is to give a jury verdict the same future effect.

3. *The Determinative Factors*

In the resolution of this inevitable conflict between the desire for uniformity and predictability and the policy favoring trial by jury, the first controlling factor should be the likelihood of recurrence of the historical fact pattern to which the law is being applied in a given case. If it is doubtful that the same facts will give rise to future litigation, then

²⁹⁵ If the facts are disputed, the jury could be asked to return a special verdict stating (a) what actually occurred, and (b) how these facts have been characterized, in terms of the applicable legal standard. Drafting interrogatories to elicit these categories of responses might well present difficulties.

²⁹⁶ Lord Mansfield employed the practice of submitting issues as to trade custom to a special jury of merchants, on the basis of which general principles were laid down, and the need for future jury determination of the same question eliminated. See Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 3 (1922).

²⁹⁷ In *Commonwealth v. Wright*, 137 Mass. 250 (1884), Holmes upheld a jury verdict that a certain game was a "lottery," within the meaning of a Massachusetts penal statute. In a case four years later, involving "a game substantially similar," he held that the jury verdict in the first case conclusively determined that the game was a "lottery." Holmes reasoned that "it is not necessary to go on forever taking the opinion of the jury in each new case that comes up." *Commonwealth v. Sullivan*, 146 Mass. 142, 145, 15 N.E. 491, 494 (1888). See THAYER, EVIDENCE 216 (1898).

²⁹⁸ See HART & SACKS, *THE LEGAL PROCESS* 382 (tentative ed. 1958); Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 402 (1954).

the courts need not be overly concerned with the unfairness resulting from inconsistent applications of law in substantially identical cases. Moreover, if it is recognized that the outcome of a particular example of law application turns upon events which will probably never recur in precisely the same way, there will be little sacrifice in certainty and predictability by permitting the jury rather than the judge to make the application. Even if the judge applied the law, his conclusion might not be very significant to a judge deciding another case in which the facts deviated from those presented in the previous dispute. Nor would the judge's conclusion be of much assistance in enabling people to plan future out-of-court conduct, in view of the unlikelihood that the situation confronting them would be substantially identical to that with which the judge was previously concerned.²⁹⁹

The second controlling factor in evaluating the need for predictability is whether an example of law application contained in a judge's reported decision can realistically be expected to have an influence on prospective human behavior, regardless of the probability of repetition of the fact pattern on which the particular case turned. To answer this inquiry, one must assess whether the subject matter of the suit is such that the precedent would be consulted by a lawyer in advising people what they should and should not do. In contrast, the precedent may be one which would normally be utilized only after people have already acted, and the legal consequences of their actions are being appraised by the judicial process. If the former situation prevails, then permitting a jury rather than a judge to perform the law-applying function will deprive the public of a judicial guideline which might well facilitate the planning of future action. Concededly, "after the fact" certainty also has social value, by contributing to the swift resolution of disputes which have already arisen. Yet, such predictability is probably less important than the advantages of letting people know, through their lawyers, precisely what their rights and obligations are, so that their future actions can be molded accordingly. Only such "before the fact" predictability will normally be sufficiently compelling to outweigh the policy in favor of jury trial.

D. Testing the New Approach

The conceptual framework outlined above for analyzing whether law application should be entrusted to judge or jury can now be utilized to test the soundness of the results which the law has reached in specific cases.

1. Application of a Reasonableness Standard

It is difficult to see why questions concerning the application of a

²⁹⁹ See *Gray v. Jackson & Co.*, 51 N.H. 9, 36-37 (1871).

standard of reasonableness should not be for the jury, unless fair-minded men could reach only one conclusion. The judge does not possess greater qualifications than the jury to decide what is reasonable. Such a question is not a technical one, immersed in the vocabulary of lawyers, and legal learning will not assist in answering it. Also, there is usually a low probability of repetition of the legally relevant cluster of historical facts upon which a determination of reasonableness is based. In the tort and commercial cases previously considered, the courts have repeatedly emphasized that the question of what is reasonable does not readily lend itself to generalized treatment, and that a conclusion based on the unique circumstances of one case has very limited applicability to another.³⁰⁰ Roscoe Pound has said that "no two cases of negligence have been alike or ever will be alike."³⁰¹ Although qualifications to this generalization come to mind,³⁰² his basic point—the infinite varieties of conduct raising the due care issue in negligence litigation—is unquestionably valid.

Moreover, it is doubtful whether out-of-court conduct would be greatly affected if judges decided what was reasonable in written opinions which would serve as precedents. In the negligence area, the average individual does not seek legal advice in order to *avoid* liability by preventive measures. Nobody consults a lawyer about how he should drive a car, and very few people would solicit an attorney's views on whether affirmative steps should be taken to keep trespassing children away from a potential "attractive nuisance."³⁰³ As for the reasonable time cases in the commercial field, people will rarely ask a lawyer what is a reasonable time for taking certain action. For example, if a buyer believes that a breach of warranty has been committed, he can be expected to make a prompt complaint to the seller; if he does delay, it will not be to seek legal advice as to when he should complain. Rather, lawyers are normally consulted

³⁰⁰ See notes 111-12, 157, 196-98 *supra* and accompanying text.

³⁰¹ POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 71 (rev. ed. 1954). Pound referred to negligence cases as situations that "involve not repetition, where the general elements are significant, but unique events, in which the special circumstances are significant." *Id.* at 70. See also Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753, 833 (1944).

³⁰² For example, when two persons are injured in the same accident, and bring separate actions against defendant, the liability issue will normally be identical, although not the question of damages. See notes 287-91 *supra* and accompanying text.

³⁰³ Concededly, there are possible exceptions to the proposition that lawyers are not asked whether action should be taken to avoid liability for negligence. Thus, insurance companies might inquire of their legal staff whether a risk of liability was presented by a specific condition, so that an insured could be instructed to take appropriate remedial steps if such a risk existed. Businesses acting as self-insurers might also consult their lawyers as to the advisability of specific preventive measures. These instances, however, will be relatively rare, especially when compared with the number of cases where legal advice is sought after the possibility of liability for negligence has actually materialized.

on reasonable time questions *after* action has not been as prompt as another claims it should have been.

In the malicious prosecution area, one may indeed decide to consult a lawyer before instituting criminal proceedings against another. However, the lawyer may not be particularly concerned with precedents bearing on the probable cause issue, since his advice that the client proceed, given after full disclosure of what the client knows, will by itself insulate the latter from a successful malicious prosecution charge.³⁰⁴

Finally, this area of reasonable conduct may be one where the command, and not merely the influence, of constitutional guaranties of the right to jury trial compels submittal of the issue to the jurors, at least with respect to some questions of reasonableness in some jurisdictions.³⁰⁵

The foregoing analysis of application of the reasonableness standard can be applied to other cases presenting this issue. In a fraud case, whether a misstatement is "material," that is, whether a reasonable man would attach importance to it in making his choice of action,³⁰⁶ should be decided by the jury.³⁰⁷ However, there are scattered authorities holding the question to be one of law.³⁰⁸ Whether a restraint imposed by a written agreement is reasonable should probably be a matter for the jury rather than the court (unless only one conclusion can reasonably be drawn), although the prevailing view is to the contrary.³⁰⁹ Here, however, the counterargument can be made that people *do* seek legal advice with respect to

³⁰⁴ See note 236 *supra* and accompanying text. Conceivably, an attorney who advises a client to institute a criminal proceeding might himself be liable for malicious prosecution, even though his advice to proceed would protect the client from liability. Plaintiff, however, would have a difficult task in prevailing against the attorney. "Nothing short of complete knowledge on the part of the attorney that the action is groundless, and that the client is acting solely through illegal or malicious motives, should make him liable in these actions." *Peck v. Chouteau*, 91 Mo. 138, 152, 3 S.W. 577, 581 (1887). The attorney is entitled to rely upon the information furnished by his client, unless he has personal knowledge that the client is not telling the truth. *Ibid.* See generally *Hoppe v. Klapperich*, 224 Minn. 224, 28 N.W.2d 780 (1947), and authorities there cited; *Board of Educ. v. Marting*, 88 Ohio L. Abs. 475, 185 N.E.2d 597 (C.P. 1962); 18 R.C.L. *Malicious Prosecution* § 44 (1917).

³⁰⁵ See notes 136-37, 209-13 *supra* and accompanying text.

³⁰⁶ RESTATEMENT, TORTS § 538(2)(a) (1938).

³⁰⁷ Most courts would agree. See *Rogen v. Iikon Corp.*, 361 F.2d 260 (1st Cir. 1966); RESTATEMENT, TORTS § 538(2)(a), comment i (1938); PROSSER, TORTS 735 (3d ed. 1964).

³⁰⁸ See *Bolduc v. Therrien*, 147 Me. 39, 83 A.2d 126 (1951); GREEN, JUDGE AND JURY 306-07 (1930); *cf. Laughlin v. Hopkinson*, 292 Ill. 80, 126 N.E. 591 (1920); *Luedke v. Pauly Motor Truck Co.*, 182 Wis. 346, 195 N.W. 853 (1923); see also the following criminal cases: *Gevinson v. United States*, 358 F.2d 761, 766 (5th Cir. 1966); *United States v. Ivey*, 322 F.2d 523, 529 (4th Cir.), *cert. denied*, 375 U.S. 953 (1963); *United States v. Clancy*, 276 F.2d 617, 635 (7th Cir. 1960), *rev'd on other grounds*, 365 U.S. 312 (1961).

³⁰⁹ 5 WILLISTON, CONTRACTS § 1636, at 4581 (rev. ed. 1937), and cases there cited; see also *Palmer v. Chamberlain*, 191 F.2d 532 (5th Cir. 1951); *Kutash v. Gluckman*, 193 Ga. 805, 20 S.E.2d 128 (1942). *But cf. Huron Milling Co. v. Hedges*, 257 F.2d 258, 262 (2d Cir. 1958); *Chas. S. Wood & Co. v. Kane*, 42 N.J. Super. 122, 125 A.2d 872 (App. Div. 1956).

arrangements later challenged as imposing an illegal restraint. Thus judge-made precedents might be useful in this context, despite the unique fact situations on which the determinations of reasonableness have been based.

2. Status Questions

With respect to another category of cases which has caused judicial disagreement—the classification of a person's employment status at a given time³¹⁰—the foregoing analysis dictates that the jury should characterize the historical facts if reasonable men can differ. Is *X* a servant of *Y* or is he an independent contractor? Was a specific act performed within the scope of a servant's employment? Questions such as these are not too immersed in legal complexities for a jury to comprehend. Moreover, like the cases presenting the reasonableness issue, the status cases feature an infinite variety of factual patterns and must be disposed of on a case-by-case basis.³¹¹

Finally, an employer would not normally seek legal advice prior to the litigation-producing event to find out, for example, whether a particular act would be within the scope of a servant's employment. Such questions arise after the event has occurred, and the possibility of liability has materialized.

3. Interpretation of a Contract

Another doctrine requiring re-examination is the frequently repeated maxim that, unless parol evidence is admitted, interpretation of the provisions of a contract presents a question of law for the court.³¹² Ana-

³¹⁰ See notes 23-30 *supra* and accompanying text.

³¹¹ See, e.g., *Cragun v. Krossoff*, 45 Cal. App. 2d 480, 486, 114 P.2d 431, 434 (1941), referring to the "varied circumstances that successive cases present."

The analysis in the text would seem to apply equally to the question whether a person's status is that of an "invitee" or "licensee." Compare *Lord v. Lencshire House, Ltd.*, 272 F.2d 557 (D.C. Cir. 1959) (question of law when facts undisputed), with *Biondini v. Amship Corp.*, 81 Cal. App. 2d 751, 185 P.2d 94 (1947) (question of fact for jury). Similarly, whether an individual was a "guest" in an automobile should be a jury question unless reasonable men could reach only one conclusion. Thus, in *Carman v. Harrison*, 362 F.2d 694 (8th Cir. 1966), discussed at text accompanying note 31 *supra*, the court specifically noted that prior decisions "all arise under somewhat different factual situations," and "no case is factually exactly in point with the instant case." *Id.* at 701.

³¹² 3 CORBIN, CONTRACTS § 554 (1960 ed.); 9 WIGMORE, EVIDENCE § 2556 (3d ed. 1940); 4 WILLISTON, CONTRACTS §§ 601, 616 (3d ed. 1961); see, e.g., *Saporta v. Barbagelata*, 220 Cal. App. 2d 463, 472, 33 Cal. Rptr. 661, 665 (1963); *Nizuk v. Gorges*, 180 Cal. App. 2d 699, 705, 4 Cal. Rptr. 565, 570 (1960); cf. CAL. EVID. CODE § 310(a). In *Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 865, 402 P.2d 839, 842, 44 Cal. Rptr. 767, 770 (1965), Traynor, C.J., commented that "the interpretation of a written instrument, even though it involves what might properly be called questions of fact . . . , is essentially a judicial function" (Emphasis added.)

lytically, determination of the meaning of a document may entail no more than an inquiry into actual states of mind.³¹³ The trier may attempt to reconstruct the thought processes of the contracting parties at the time that the bargain was struck to learn what they intended their words to mean. Such an inquiry will be truly "factual";³¹⁴ it will require the ascertainment of mental events as they have occurred in the past.³¹⁵ If the trier concludes that the understanding of both contracting parties was in fact the same, or that one party knew what the other's understanding in fact was, this conclusion by itself will determine the meaning to be given their agreement.³¹⁶

If it is concluded that the subjective intent of the contracting parties was not the same when the agreement was consummated, and that neither party knew the actual understanding of the other, then, as Professor Corbin analyzes the problem, the question to be determined is whether one of the contracting parties had reason to know the other's understanding.³¹⁷ This inquiry is more commonly phrased in terms of what a reasonable man in the position of the contracting parties would have thought was meant by the use of certain language.³¹⁸ Under either of these approaches, the trier must perform the familiar task of applying a standard of reasonableness. More specifically, he must determine how a hypothetical person would have reacted in a given situation.³¹⁹ In this case the reaction would be a mental one, rather than one consisting of observable acts.

In other cases said to present a question of contract interpretation, the trier may be confronted with an issue which neither of the parties considered at the time that the agreement was reached, presumably because they failed to foresee the event which created the dispute. Under these circumstances, the agreement will have to be supplemented to fill

³¹³ This is clearly the case with respect to the interpretation of a will. 3 CORBIN, CONTRACTS § 532, at 4, § 536, at 31-33, § 537, at 41 (1960 ed.).

³¹⁴ See *id.* § 554; *cf.* 4 DAVIS, ADMINISTRATIVE LAW § 30.02, at 197 (1958); THAYER, EVIDENCE 203-04 (1898); Paul, *supra* note 301, at 831 n.354.

³¹⁵ CAL. CODE OF CIV. PROC. § 1860 provides that the circumstances under which an instrument was made may be shown, "so that the judge be placed in the position of those whose language he is to interpret." One court has noted: "While the construction of writings is, to be sure, matter of law in the sense that it is an affair for a judge, still the particulars of the process of ascertaining the disclosed intention of a writer are for the most part items of fact." *Matter of City of New York*, 285 N.Y. 326, 331, 34 N.E.2d 341, 343 (1941).

³¹⁶ 3 CORBIN, CONTRACTS § 538 (1960 ed.); see also CAL. CIV. CODE § 1636 ("A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting . . ."); *cf. id.* § 1649.

³¹⁷ 3 CORBIN, CONTRACTS §§ 538-39 (1960 ed.).

³¹⁸ 1 WILLISTON, CONTRACTS § 94 (3d ed. 1961); 4 *id.* §§ 610, 611; RESTATEMENT, CONTRACTS § 230 (1932).

³¹⁹ See 3 CORBIN, CONTRACTS § 538, at 73 (1960 ed.).

the gaps left by the contracting parties.³²⁰ Corbin describes this process as one of "construction" rather than "interpretation."³²¹ In performing such a task, the trier will seek a result consistent with "fairness and justice,"³²² and may draw upon sources such as trade usage.³²³

Regardless of which of these problems is posed, one may question why the decision-maker should be the court rather than the jury.³²⁴ A jury is competent to determine actual states of mind, as it does in a host of other cases.³²⁵ It is also competent to apply a standard of reasonableness, a task confidently entrusted to it in other contexts in order to obtain the collective judgment of twelve laymen.³²⁶ Surely, the jury is competent to apply a standard of "fairness and justice." In days when juries were usually illiterate,³²⁷ it was logical for the court to interpret a written agreement. The juries could not read the document in question, and they were undoubtedly unfamiliar with a significant part of the vocabulary which would be utilized in preparing a formal instrument. Although illiteracy may explain why the English common law was willing to classify the interpretation of a writing as a question of law,³²⁸ this condition can no longer justify denial of a jury determination.

With respect to the need for uniformity and certainty, the determination of the effect which a governing agreement should have on a dispute will normally present a unique set of circumstances. As for certain repeated phrases which appear in documents, the courts may proclaim, as they have in rare cases, that the words should automatically be given some stated meaning;³²⁹ this result can be justified by the advantages of

³²⁰ *Id.* § 534, at 11-12; § 556, at 243-44.

³²¹ *Ibid.*

³²² 3A CORBIN, CONTRACTS § 653 (1960 ed.); see also *id.* § 632; 5 WILLISTON, CONTRACTS § 669 (3d ed. 1961); 6 *id.* § 825 (3d ed. 1962).

³²³ 3 CORBIN, CONTRACTS § 556 (1960 ed.).

³²⁴ *Cf. Wunderlich v. United States*, 117 Ct. Cl. 92, 212 (1950), *rev'd on other grounds*, 342 U.S. 98 (1951) ("[Q]uestions of the interpretation of written documents are not . . . in most cases questions of law in the sense that a lawyer or a judge has the special skill to answer them.").

³²⁵ See notes 14-15 *supra* and accompanying text.

³²⁶ See notes 62-63, 104-10, 202 *supra* and accompanying text.

Admittedly, the subject matter of a particular contract may be so complex that a jury may lack the ability to think in terms of a reasonable man in the position of the contracting parties. Although jury exclusion in such a case may be defended (*but cf.* notes 278-82 *supra* and accompanying text), nevertheless, many other contract cases will not present questions of interpretation too technical to be comprehended by a layman, and thus a blanket doctrine of jury exclusion cannot be justified on the ground of relative competence. See note 333 *infra* and accompanying text.

³²⁷ See *Macferson v. Thoytes*, Peake 29, 170 Eng. Rep. 67 (K.B. 1790); Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176, 1181 (1961).

³²⁸ See THAYER, EVIDENCE 206 (1898).

³²⁹ 3 CORBIN, CONTRACTS § 554, at 218 n.59 (1960 ed.); 4 WILLISTON, CONTRACTS § 614 (3d ed. 1961); RESTATEMENT, CONTRACTS § 234 (1932); *cf. Fox, supra* note 285, at 546.

predictability. The same interest may be served by the judicial declaration of rules of interpretation to guide the resolution of contract disputes.³³⁰ In a case deemed to be controlled by these fixed rules, jury exclusion would necessarily follow, just as it does in negligence cases where uniform standards of conduct have been laid down in advance.³³¹ But where the nature of the case does not require the application of fixed rules in the interest of uniformity and predictability, a strong argument can be made that the interpretation and construction of a contract should be a jury question, even in the absence of parol evidence. This result would effectuate the policy favoring trial by jury in cases where reasonable men can differ.³³² Indeed, a 1966 Fifth Circuit decision, declaring the heresy that the jury should determine "the meaning of the contract" even though "there was no dispute regarding [its] existence . . . or its terms,"³³³ may mark the beginning of a judicial reappraisal of a well-entrenched dogma.

4. Construction of a Statute

Also worthy of scrutiny is the familiar pronouncement that "the construction of a statute and its applicability to a given situation are matters of law to be determined by the court."³³⁴ As thus phrased, the doctrine is undoubtedly far broader than the courts themselves intend. For example, a California statute provides that a proposal in which no time is prescribed for acceptance is revoked by "the lapse of a reasonable time without communication of the acceptance."³³⁵ In a jury case presenting the question whether an offer was accepted within a reasonable

³³⁰ *E.g.*, RESTATEMENT, CONTRACTS §§ 235, 236 (1932).

³³¹ See notes 81-84 *supra* and accompanying text.

³³² When a contract is deemed by a judge to be "ambiguous," so that parol evidence may be introduced in aid of its interpretation, the courts have been willing to permit the jury to ascertain the meaning of the document. *E.g.*, 4 WILLISTON, CONTRACTS § 616, at 652 (3d ed. 1961), and cases there cited; *Regus v. Gladstone Homes, Inc.*, 207 Cal. App. 2d 872, 877, 25 Cal. Rptr. 25, 29 (1962); *Schmidt v. Macco Constr. Co.*, 119 Cal. App. 2d 717, 733-34, 260 P.2d 230, 240 (1953). This doctrine is sometimes qualified to permit jury participation only when the extrinsic evidence is in conflict. *E.g.*, *Milton v. Hudson Sales Corp.*, 152 Cal. App. 2d 418, 433-34, 313 P.2d 936, 946 (1957); *MacIntyre v. Angel*, 109 Cal. App. 2d 425, 435, 240 P.2d 1047, 1054 (1952). Thus, the courts are not unreceptive to the notion that the jury should, at least under some circumstances, play a prominent role in resolving disputes as to the meaning of a writing.

³³³ *Dobson v. Masonite Corp.*, 359 F.2d 921, 923-24 (5th Cir. 1966). Significantly, the court observed that "in drawing the ultimate conclusion as to the meaning of the parties, we believe the jury was fulfilling its traditional function as the finder of the facts." *Id.* at 923.

³³⁴ *Hom v. Clark*, 221 Cal. App. 2d 622, 636-37, 35 Cal. Rptr. 11, 20 (1963); *accord*, *Hoover v. Allen*, 241 F. Supp. 213, 235-36 (S.D.N.Y. 1965); *Neal v. California*, 55 Cal. 2d 11, 357 P.2d 839, 9 Cal. Rptr. 607 (1960) (Traynor, J.); *In re Madison's Estate*, 26 Cal. 2d 453, 159 P.2d 630 (1945) (Traynor, J.); *Neuber v. Royal Realty Co.*, 86 Cal. App. 2d 596, 195 P.2d 501 (1948); *State v. Moore*, 154 Kan. 193, 117 P.2d 598 (1941).

³³⁵ CAL. CIV. CODE § 1587(2).

time, and in which the historical facts were undisputed, a California court would probably permit the jury to determine the "applicability" of the statute to the "given situation,"³³⁶ although the court would probably not articulate its reasons for doing so. It would follow this course despite the mandate, codified in California, that construction of a statute presents a question of law.³³⁷ Disregard of this mandate can be justified because the legislature has enacted a flexible standard which must of necessity be applied on a case-by-case basis to a distinctive succession of fact patterns.³³⁸ Since the need for uniform results does not compel jury exclusion and the jury is as competent as the judge to apply this standard of reasonableness, the issue should be left to the jury. There is no reason to abandon the preference for jury determination simply because the legislature has embodied the common law doctrine in a statute.

In cases which do not involve the application of flexible statutory standards, the courts are far less willing to leave issues of statutory construction to the jury. They will justify jury exclusion by invoking the maxim that statutory construction presents a question of law. For example, a statute may be ambiguous as a result of faulty draftsmanship. The defect could be cured by an amendment stating with more precision the general principle of law which the legislative body wished to adopt. When confronted with such ambiguity, the courts have said that it must be resolved by ascertaining the intent of the legislature.³³⁹ To this end, legislative history, judicially adopted canons of construction and any other source deemed useful will be consulted.³⁴⁰

Determining the intent of legislators is quite a different matter from determining the intent of a testator when an ambiguous will must be interpreted. In the latter situation, the trier will attempt to ascertain the actual state of mind of a given individual.³⁴¹ But a statute represents the collective judgment of many legislators, whose individual thought processes regarding the details of the enactment in question may have been very different, or perhaps non-existent.³⁴²

Courts have resolved these statutory ambiguities without the assis-

³³⁶ See notes 178-80 *supra* and accompanying text. *But see* *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 750, 103 Pac. 938, 939 (1909).

³³⁷ CAL. EVID. CODE § 310(a), superseding as of Jan. 1, 1967, CAL. CODE OF CIV. PROC. § 2102.

³³⁸ See DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* 128, 142-45, 215-16, 230, 313-19 (1927); HART & SACKS, *THE LEGAL PROCESS* 157-58 (tentative ed. 1958).

³³⁹ *E.g.*, *Iacone v. Cardillo*, 208 F.2d 696, 699 (2d Cir. 1953); see also CAL. CODE OF CIV. PROC. § 1859.

³⁴⁰ See NEWMAN & SURREY, *LEGISLATION* ch. 8 (1955); *Moore v. Robinson*, 206 Ga. 27, 40, 55 S.E.2d 711, 720 (1949).

³⁴¹ See note 313 *supra* and accompanying text.

³⁴² See NEWMAN & SURREY, *LEGISLATION* 647-48 (1955).

tance of juries,³⁴³ and this approach makes sense. Deciphering the meaning of a legislative enactment on the basis of the available sources is clearly a lawyer's job, and the judge is more qualified than the jury to perform the task. Moreover, if one jury resolves the ambiguity one way, and a second jury takes the opposite position, the uncertainty will be perpetuated. Presumably, the law-makers wished to lay down a definite proposition. Indeed, deciding what a legislature intended to say, when the statutory language is subject to more than one interpretation, presents a classic "question of law."³⁴⁴ The court in effect will be supplementing the legislature's work by assigning a specific meaning to the law as enacted. The broadly formulated principle, as thus clarified, will be potentially applicable to future cases.

Although the need for the judiciary to select a single meaning for an ambiguous statute will necessarily arise in connection with a given fact pattern, the process of *interpreting* such a statute may be differentiated from that of *applying* the statute.³⁴⁵ When engaging in interpretation, the court is doing what the legislature itself purported to do: delineating with precision the general principle to be applied to specific situations. Since the legislative enactment is susceptible of more than one meaning, the court chooses the meaning which it is to be given. When engaging in application, the trier is performing a task which the legislature knew was inevitable when it adopted the guidelines of the statute: determining whether an established group of historical facts falls within the terms of the general principle.

In this area of statutory application, considerable confusion has arisen with respect to the province of judge and jury. For example, the federal courts have generally held that whether an individual is "a member of the crew" for purposes of the Jones Act,³⁴⁶ or "employed by [a] carrier" under the Federal Employers' Liability Act,³⁴⁷ is a "question of fact" to be decided by the jury, even if the historical facts are not in dispute.³⁴⁸

³⁴³ *E.g.*, *United States v. Gahagan Dredging Corp.*, 289 F.2d 639 (2d Cir. 1961).

³⁴⁴ See notes 8-11 *supra* and accompanying text; THAYER, *EVIDENCE* 215 (1898).

³⁴⁵ De Sloovere, *The Functions of Judge and Jury in the Interpretation of Statutes*, 46 HARV. L. REV. 1086, 1095-1101 (1933), and sources there cited; *cf.* *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944), critically discussed in JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 558-60 (1965); *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 590-91 (2d Cir. 1961).

³⁴⁶ See note 27 *supra*.

³⁴⁷ 35 Stat. 65 (1908), as amended, 45 U.S.C. § 51 (1964).

³⁴⁸ See notes 26-28 *supra* and accompanying text. As to the application of the term "employee" in the administrative context, see *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944). Here the Court indicated that a reviewing court should pay deference to an agency determination that newsboys were "employees" under the National Labor Relations Act, since the question "is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it ini-

Thus, such terms are given the same treatment as the standard of reasonable conduct would probably receive, when embraced by a statutory enactment.³⁴⁹ Not surprisingly, these cases make no mention of the "black letter law that Courts and not juries construe and apply statutes."³⁵⁰ Yet, a California court in an FELA case recently relied upon this very doctrine to reach the result that whether plaintiff was an employee of the defendant carrier was a matter "of law to be determined by the court."³⁵¹ Similarly, in a recent federal case, the Sixth Circuit held that whether an improvement in a product would have been obvious to one skilled in the art, in which case no patent was obtainable under the governing statute, was a "question of law" rather than a jury question. The court reasoned that the issue "requires application of a legal criteri[on]" and "the appellate court should be free to give effect to the general legislative standard."³⁵²

In a Georgia case, however, a different approach was used. The court was confronted with a statute providing that a passenger train shall slow down to a specified speed when crossing a drawbridge.³⁵³ It held that whether the term "drawbridge" included the immovable trestles should be decided by the court rather than the jury. The court came to this conclusion not because the judge was better qualified, but because "it is highly important to the public in general, as well as to the railroad companies, that the duty imposed by this statute should be clearly de-

tially" *But cf.* *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947). See also *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507-08 (1951) (agency determination that act within "course of employment" upheld; "the standards are . . . not of such a nature as to be peculiarly appropriate for independent judicial ascertainment as 'questions of law.'").

³⁴⁹ See text accompanying notes 336-38 *supra*. De Sloovere's statement that "the application . . . of a statute to undisputed facts is always for the court" is certainly not correct today. De Sloovere, *supra* note 345, at 1095.

³⁵⁰ *Smith v. Hobart Mfg. Co.*, 194 F. Supp. 530, 533 (E.D. Pa. 1961) (dictum), *rev'd on other grounds*, 302 F.2d 570 (3d Cir. 1962). For example, in *Lifetime Siding, Inc. v. United States*, 359 F.2d 657 (2d Cir. 1966), a suit for a tax refund, the court held that whether an individual "has the status of an employee" or "the status of an independent contractor" under the relevant tax statutes was to be determined by a jury, despite "the difficulties inherent in jury trial of issues even as relatively simple as those here involved." *Id.* at 662. The court buttressed its conclusion by referring to the statutory right of trial by jury, and made no reference to the axiom that the construction and application of statutes present a question of law for the court.

³⁵¹ *Aguirre v. Southern Pac. Co.*, 232 Cal. App. 2d 636, 642-43, 43 Cal. Rptr. 73, 77 (1965).

³⁵² *Monroe Auto Equip. Co. v. Heckethorn Mfg. & Supply Co.*, 332 F.2d 406, 411-12 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964); see also *Bentley v. Sunset House Distrib. Corp.*, 359 F.2d 140 (9th Cir. 1966).

³⁵³ *Savannah F. & W. Ry. v. Daniels*, 90 Ga. 608, 17 S.E. 647 (1892), included in *LOUISELL & HAZARD, CASES ON PLEADING AND PROCEDURE—STATE AND FEDERAL* 1018 (1962).

fined and understood"³⁵⁴ Submitting the issue to successive juries might lead to "different verdicts on exactly the same state of facts."³⁵⁵ The court's conclusion that the policy in favor of predictability and certainty should outweigh the policy in favor of trial by jury is clearly sound.³⁵⁶ More significantly, in contrast to most of the decisions in this area, the court was focusing upon the factors which should be controlling. In terms of those factors, the California FELA case and the federal patent case previously discussed³⁵⁷ would appear to have been decided erroneously.³⁵⁸

Perhaps the conflict of decisions in this area of statutory application is partially explainable in terms of an intuitive, and unexpressed, feeling on the part of the courts that the legislature intended the law to be applied by a court or by a jury.³⁵⁹ Absent constitutional restrictions,³⁶⁰ the legislature has the right to specify who shall characterize the facts in terms of the governing statute. If it clearly indicates its intent with respect to an issue, that intent should be controlling. Statutes, however, rarely speak precisely about the allocation of decision-making between

³⁵⁴ *Savannah F. & W. Ry. v. Daniels*, *supra* note 353, at 610-11, 17 S.E. at 648.

³⁵⁵ *Id.* at 610, 17 S.E. at 648.

³⁵⁶ See *Staples v. Senders*, 164 Ore. 244, 260, 101 P.2d 232, 235 (1940). Compare *Watkins v. National Elec. Prods. Corp.*, 165 F.2d 980, 982 (3d Cir. 1948) (meaning of term "poison" in statute is for court, and is "certainly not to be turned over to a jury to decide for itself in each case"), with *Aubuchon v. Metropolitan Life Ins. Co.*, 142 F.2d 20, 24 (8th Cir. 1944) (whether death from given substance constituted "death from poison" under insurance policy was "a question of fact and not of law").

³⁵⁷ See notes 351-52 *supra* and accompanying text.

³⁵⁸ It should be noted that in the patent case the court indicated that the complex questions of what the prior art was, and what improvement the patentee has made over the prior art, are "factual" ones, presumably to be determined by the jury if in dispute, and if the evidence is such that reasonable men can differ. *Monroe Auto Equip. Co. v. Heckethorn Mfg. & Supply Co.*, 332 F.2d 406, 411 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964).

In *Graham v. John Deere Co.*, 383 U.S. 1 (1966), the Court, after asserting that "the ultimate question of patent validity is one of law," but that the statutory test "lends itself to several basic factual inquiries," observed: "This is not to say, however, that there will not be difficulties in applying the nonobviousness test. What is obvious is not a question upon which there is likely to be uniformity of thought in every given factual context. The difficulties, however, are comparable to those encountered daily by the courts in such frames of reference as negligence and scienter, and should be amenable to a case-by-case development." *Id.* at 17-18. Although the Court did not squarely confront the issue of the jury's role "in applying the nonobviousness test," the foregoing remarks support the view that its function should be the same as in a negligence case; namely, determining the issue on a "case-by-case" basis if reasonable men can differ, in the absence of "uniformity of thought."

³⁵⁹ This factor may underlie the thinking in *Graham v. John Deere Co.*, *supra* note 358. *Cf. id.* at 18.

³⁶⁰ See note 265 *supra*.

judge and jury.³⁶¹ Thus, courts must necessarily address themselves to the considerations already discussed in order to determine sensibly who is to apply the statute in a particular case.

CONCLUSION

The apportionment of decision-making between judge and jurors in the civil jury trial has not received the attention it deserves from the courts. Hampered by the appealing simplicity of utilizing the conclusory terms of law and fact, the courts have neglected to construct an analytical framework capable of delineating, on a meaningful and consistent basis, the role of judge and jury in applying the law in specific cases. They have failed to recognize that the controlling factors should be the constitutionally supported policy favoring trial by jury, weighed against the superior competence of the judge, or the need for uniform results, in a particular situation. Hopefully, this article suggests an approach that may be fruitfully pursued in the future.³⁶²

³⁶¹ See, e.g., notes 181-82 *supra* and accompanying text.

³⁶² A companion article, entitled "The Civil Non-Jury Trial and the Law-Fact Distinction," will appear in a forthcoming issue of the *California Law Review*.