The New Field Code

The A.L.I. Proposed Division of Jurisdiction between State and Federal Courts

A speech delivered to the Conference of Chief Justices, on August 8, 1963.

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My text for this morning derives not from Shakespeare's currently popular *Antony and Cleopatra* but rather from the same author's *Julius Caesar*. From that drama I take the lesson: "The fault, dear Brutus, is not in our stars, But in ourselves, that we are underlings." Had I turned to *Cleopatra*, I might have chosen a gloomier theme: "We have kiss'd away kingdoms and provinces."

Let me begin by reminding you, if I may, of the genesis of the project for a redistribution of judicial business between state and federal courts. For, with all due respect, this is your baby and the question is whether you are going to abandon it entirely to the mercies of those who will bring it to maturity in a different faith than your own. I quote, then, from the Report of the Proceedings of the Eleventh Annual Meeting of the Conference of Chief Justices, held in the somewhat more effulgent climate of Miami Beach in 1959:

1. At its Tenth Annual Meeting . . . the Conference . . . resolved "that the Chairman . . . appoint a special committee to examine the allocation of jurisdiction between the state and federal courts . . . " and "that the Committee make recommendations to the Conference for achieving a sound and appropriate distribution of judicial power between the nation and the states." . . .

2. Subsequent to this action by the Conference, the Chief Justice of the United States recommended to the American Law Institute that it undertake a study toward the same ends . . .

3. Your Committee made a preliminary study of the problem. It concluded that the project is one which should be carried out . . .

4. Your Committee recommends, therefore, if the American Law Institute should undertake the task . . . that the Conference should continue its Committee on the subject; that the Committee appoint an advisor who is a specialist in this area; that the Committee, with the help of its advisor, examine the work of the American Law Institute as it is produced and report to the Conference . . . and thereafter make known the Conference's views to the Council of the Institute; and that, if and when the work of the Institute is presented for Congressional adoption, the view of the Conference be expressed through this Committee to the Judiciary [Committees] of the Senate and House of Representatives of the United States . . .

I repeat this history to remind you of your commitment. For it is a commitment that must be kept if you are not belatedly to discover that the reallocation of judicial business consists of adding to the burdens of the state courts and to the powers of the national courts.

In this light, let me turn to the Tentative Draft No. of the new Field Code. No one—certainly not I—can venture to criticize it without great trepidation. For its reporters, Richard H. Field of Harvard and Paul J. Mishkin of Pennsylvania, and its advisory committee, Judges Davis, Friendly, Lord, Weintraub, Whittemore, and Wisdom, Messrs. Horisky and Kohn, and Professor Hart, are as learned and experienced in the subject as any group could hope to be. It is perhaps foolhardy of me to propose "to beard the lion in his den," and hope "unscathed to go."

My first faltering step is to agree with the two major propositions tendered by the draft, at least as I read them. The first is the desirability of a severe limitation on the federal court's diversity jurisdiction; the second is the utilization of the federal courts for the resolution of judicial controversies that no state court is empowered to reach. But if I agree with these objectives, I am largely opposed to the methods proposed for securing them.

And I am disturbed by the rationalizations used to justify the methods proposed.

I would point out that the essential function of the proposed draft is the protection of the federal courts. At the outset the Field Code announces that "the present inquiry has a special urgency"—an urgency not reflected in the amount of time taken to produce this first draft—"because of the continually expanding workload of the federal courts and the delay of justice resulting from them." (P. 1.) Apparently of little consequence to the draftsmen is the fact that the state courts in municipal areas are facing an even greater crisis. Let me quote their own language. After recognizing that any relief of the federal court diversity docket "would increase the burden upon the State courts already the farthest behind in their work," p. 124, they brush off the problem by saying that the solution of the State court congestion problem is a responsibility of the States "and would easily be handled by the corrective measures which the States ought to take in any event." P. 125. I am sure that the members of this Conference would be very happy to learn from the authors of this Code how the problem of state court congestion could be "easily handled" and what the "measures" are that "the States ought to take in any event." The American Law Institute speaks as if it were *de minimus*, to add each year, as I understand their figures, 500 trials—not cases docketed but trials—to the caseload of the state courts in New York County, 380 trials in Philadelphia, 430 trials in Chicago, 160 trials in Baltimore, 340 trials in Los Angeles, and 300 trials in San Francisco. I point out this cavalier treatment of state court problems not because I do not think that the diversity jurisdiction in the federal courts should be abandoned, but rather because, in the absence of adequate representation of state interests, diversity jurisdiction would be curtailed without recognizing the necessity for compensating relief of state courts. It should be noted.
that state courts now handle as much federal judicial business as federal courts handle state judicial business. It is this Marie Antoinette attitude of "Let them eat cake" that I decry.

Let me return, however, to the rather complicated machinery that is proposed for the limitation of federal diversity jurisdiction. On what rationale did the promulgators of the new Field Code rest in proposing what Judge Clark of the Second Circuit has called "this quite tentative and highly controversial, possibly courageous, possibly foolhardy, argument for preserving a shell of diversity jurisdiction, but only in sharply restricted form." *Arrowsmith v. United Press International*, 7 FR Serv 2d 4d, 31, case 1 (June 11, 1963). In the words of its reporters:

Its basic principle is that the function of the jurisdiction is to assure a high level of justice to the traveler or visitor from another State; when a person's involvement with a State is so substantial as to warrant his being held responsible for the quality of its judicial system he should not be permitted to choose a federal forum, but should be required to litigate in the courts of the State. (P. 2.)

In the rather polite terms of the commentary: "Without disparagement of the quality of justice in many State courts throughout the country, it may be granted that often the federal courts do have better judges, better juries, and better procedures." (P. 37.)

In fact, no sound rationale for the continuance of diversity jurisdiction as governed by *Erie R.R. v. Tompkins* was found. A "shell of diversity jurisdiction" was preserved on the theory that federal courts afford a higher order of justice than state courts and only certain persons, those who do not share in the sin of failing to raise their state courts to the heights of federal courts, are entitled to enter the Valhalla of a federal court. And this result, even though the federal court in rendering its higher order of justice, will be required to apply the lesser quality of justice written by you and your colleagues on the state high courts. Assuming for a moment that there is merit to their proposition of the general superiority of federal courts, an assumption that I find contrary to experience, another difficulty is presented. The standards utilized to separate the sheep, entitled to the superior brand of justice available in the federal courts, from the goats, condemned to the second class justice of state courts, is so complex that, at least for several years, any potential saving of time of the federal courts will be lost in deciding the large number of jurisdictional questions that will necessarily arise under the new code provisions. And, while the Federal court load remains unabated, the state courts will be bearing the additional load of diversity cases without any compensating reduction of Federal question business now left to state courts for disposition in spite of their second-class nature.

I would amend the first essential proposition put forth by the new Field Code to provide that, with the exception I am about to discuss and in cases where actual bias is shown, federal courts should not exercise jurisdiction because of the citizenship of the parties.

When I come to the second of the Code's major proposals, I again find myself in agreement with its essential conclusion. That is, where a case involving multiple parties cannot be resolved by a state court for want of personal jurisdiction over an indispensable party, the case should be remanded to a federal court empowered to exercise national—or indeed international, we are told—jurisdiction. Again my quarrel is with the means for accomplishing this objective.

I should say, parenthetically, that I believe that the doctrine of indispensable parties is a disappearing notion and that the number of cases which fail of resolution because of the absence of such a party is very small indeed. Certainly it is much smaller than the 500 diversity cases the codifiers would add to the trial burden of the New York County courts on the argument of *de minimus*. I am, therefore, somewhat dubious that the subject requires the extensive treatment that it receives.

The new Field Code, however, is likely to make into a large category that which has heretofore been a very small one. Had they simply authorized the removal of any case that a state court held could not be decided because of the absence of jurisdiction over a person who should be a party, I should have been satisfied that the evil, however small, had been cured. Instead, however, they have created a basis for invoking the original as well as the removal jurisdiction of the federal courts. And this jurisdiction may be invoked, not on the basis that a state court has held that it cannot dispose of the claim, but rather measured by a federal standard of whether "complete relief" can be "accorded the plaintiff," § 2341(b), or by the federal standard of whether the absence of a defendant "may leave the defendant subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligation by reason of his claimed interest," § 2343(b).

Worse even than this expansion of federal judicial power, however, is the authorization to federal courts to make their own choice of law rules in these cases. I can not take your time now to argue that no such new fount of federal authority ought to be created, except to say that essentially the problems to be resolved in these cases are problems with which the federal government has no concern except to provide a forum where the state courts cannot do so. For the rest, I leave you to the writings of your colleague, Mr. Justice Traynor, and my former colleague, Professor Brainard Currie.

Obviously I have not been fair to the great effort and the myriad details that have been put into the A.L.L.'s white paper. I have talked in generalities where the code-makers have been most specific. But I think that it is
Visiting Professors, 1963–64

The School is pleased to note the addition to the Faculty of three distinguished visitors during the current academic year.

ARGYRIOS A. FATOUROS, Visiting Assistant Professor of Law

Born in Athens, Greece in 1932. Graduate of University of Athens; diploma and certificate from Faculty of letters of University of Paris, through French Institute of Athens. Master of Comparative Law, Master of Laws, Doctor of Science of Law, all from School of Law, Columbia University.

Research Associate in International Legal Research at Columbia, 1956–57.

Ensign, Royal Hellenic Navy, 1957–60.

Lecturer, Faculty of Law, University of Western Ontario, 1960–62; Assistant Professor, 1962—. Author of Government Guarantees to Foreign Investors, Columbia University Press, New York and London, 1962, and of numerous articles and book reviews in American, Canadian, and Greek journals.

He will spend the academic year 1963–64 at the University of Chicago Law School, and will teach Decedents’ Estates, Comparative Law, and a seminar in International Business Problems.

GUENTER H. TREITEL, Visiting Lecturer in Law


Assistant Lecturer, London School of Economics and Political Science, 1951–53; Lecturer, University College, Oxford, 1953–54; Fellow and Tutor, Magdalen College, Oxford, 1954 to date.


During the academic year 1963–64, he will teach Equity, Restitution, and a seminar on Problems in Contracts, and will join Professor Malcolm Sharp in teaching the first-year Contract course.

E. ALLAN FARNSWORTH, Visiting Professor of Law


Assistant Professor, Columbia University School of Law, 1954–1956; Associate Professor, 1956–1959; Professor since 1959. Visiting Associate Professor, University of Michigan Law School, Summer, 1958. Visiting Professor at the University of Istanbul, Fall, 1960.

Professor Farnsworth is the author of Cases and Materials on Negotiable Instruments (1959), and Introduction to American Private Law (1961) (in Turkish).

He will be at the University of Chicago Law School during the Autumn Quarter, 1963, and will teach Commercial Law I.

The Return of the Native

Francis A. Allen has been appointed University Professor in the Law School and the School of Social Service Administration.

Mr. Allen received his A.B. from Cornell College, in 1941, his LL.B. from Northwestern in 1946, and the honorary degree of Doctor of Jurisprudence from Cornell College in 1958.

Following graduation from Law School, he served for two years as law clerk to Chief Justice Fred M. Vinson, of the United States Supreme Court. He taught at Northwestern University’s Law School from 1948 to 1953, when he became Professor of Law at Harvard. From 1956 until 1962 he was Professor of Law at the University of Chicago; for the past year he has been a member of the Faculty of the University of Michigan Law School.

Mr. Allen is the second person to be appointed a University Professor. Last fall, the Board of Trustees of the University established a program providing for special recognition for top-ranking scholars and scientists, by authorizing the creation of ten University professorships and five named chairs for distinguished new members of the Faculties.

An internationally recognized authority on criminal law, Professor Allen was one of the principal architects of the new Illinois Criminal Code. He served from 1961–63 as Chairman of the United States Attorney General’s Committee on Poverty and the Administration of Federal Criminal Justice. The Committee’s report, which is