1988

The Relevance of Administrative Considerations in the Judicial Decisionmaking Process: A Kantian Perspective

Edward D. Cavanagh

THE RELEVANCE OF ADMINISTRATIVE CONSIDERATIONS IN THE JUDICIAL DECISIONMAKING PROCESS: A KANTIAN PERSPECTIVE

EDWARD D. CAVANAGH*

This essay examines and analyzes the role of administrative considerations in the judicial decisionmaking process. The central issue is the extent to which administrative factors, such as concerns for efficiency, minimization of complexity, ease of proof, consistency of holdings, and predictability of future decisions, may be properly taken into account by courts in rendering decisions and weighed against rights granted under substantive law. Put another way, the question presented is: To what extent may a court invoke administrative considerations to reach a result different from what otherwise would be the just solution? The analysis will proceed in two steps. First, it will review the contrasting philosophical points of view with respect to the relevance of administrative considerations as set forth in Immanuel Kant's *Four Cases* contained in *The Metaphysical Elements of Justice*,[1] and in the works of Professor Ronald Dworkin. The second step will be a comparative approach, contrasting application of judicial precedent and Kantian principles to four contemporary legal doctrines: (1) *res judicata*; (2) prospective overruling; (3) the direct purchaser rule of *Illinois Brick*[2]; and (4) the so-called complexity exception to the Seventh Amendment right to a jury trial in civil cases.

I. CONFLICTING PHILOSOPHICAL VIEWS

The threshold question is whether administrative considerations are germane to the judicial decisionmaking process. Kant's *Four Cases* suggests that such considerations are indeed relevant. Professor Dworkin, on the other hand, would be trou-

* Professor of Law, St. John's University School of Law.

1. I. KANT, *Four Cases*, in THE METAPHYSICAL ELEMENTS OF RIGHT (1797). The English translation of *Four Cases* by Professor George P. Fletcher that is used in this article is unpublished. In the English translation of Kant's works by John Ladd, *Four Cases* was omitted. *See generally* Fletcher, *Why Kant?*, 87 COLUM. L. REV. 421 (1987).

2. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

bled if society were to permit administrative concerns to compromise otherwise recognized and accepted legal rights.

A. *Kant's Four Cases*

In *Four Cases*, Kant distinguishes judgments of "what is Right in itself" from judgments of "what is Right before a court."[3] The former may be referred to as judgments according to a pure theory of right, while the latter Kant describes as judgments according to an operative theory of right or *Rechtens*. Kant adopts the view that in the real world, the ideal solution may not be attainable. While he does not explicitly refer to administrative considerations, these concerns are implicit in his case analysis. Kant then identifies four cases in which judgments would diverge, depending on whether they are made under a pure theory of right or under an operative theory of right. These cases include: (1) a contract of gift; (2) a contract of gratuitous bailment; (3) claiming the return of one's own property; and (4) requiring testimony under oath.

1. *Contract of Gift*

Where a contract of gift is involved, the question posed is whether a donee can compel the donor to perform the donative promise where the alleged contact is silent on the issue of revocation. Kant argues that under a theory of pure right, the donative promise would be revocable, whereas under an operative theory of right, the promise would be irrevocable. Kant advances two possible justifications for this latter position. First, the donor presumably agreed to make the promise irrevocable. Kant concedes that this position "seems contorted."[4] Second, the court in making its decision ought to focus on what is certain, namely the donor's promise and the donee's acceptance, rather than speculate about whether the donor intended the promise to be revocable. The second argument has both a theoretical and practical justification in Kant's scheme. From a theoretical perspective, Kant believed that courts could properly function only in the realm of the phenomenal. Were courts required to examine subjective intent, they would necessarily be forced to intrude into the noumenal world—the realm of pure

3. I. KANT, *supra* note 1, at 1.
4. *Id.* at 3.

reason. Hence, Kant argues that courts must apply an objective rather than subjective standard in resolving the question.

From a practical perspective, Kant's conclusion that *Rechtens* requires the donative promise to be irrevocable is compelling. The effect of this conclusion is to preserve the institution of gift-giving. The promise to make a gift would be meaningless if the donor retained the right to renege. By placing on the putative donor the burden of reserving the right to revoke, Kant assures that donative promises can be taken at face value.

2. *Gratuitous Bailment*

The question that arises with respect to gratuitous bailments is whether the bailor assumes the risk of loss of value in the chattel that might occur while it is in the hands of the bailee, where the parties were silent on the issue of damages at the time of the bailment. Under a pure theory of right, the bailee would be liable for damages. Kant gives the following explanation:[5]

> If, for example, I enter a house in falling rain and beseech someone to lend me a coat, and it turns out that the coat is permanently damaged as a result of someone pouring out corrosive material from a window or if I enter into another house and the coat is stolen from me, it would appear odd to everyone to claim that I had no further obligation but to return the damaged coat or to provide notice of the theft; it would merely be polite [and of no legal significance] to commiserate with the owner for his loss, for he could not claim anything on the basis of his right.

On the other hand, under principles of *Rechtens*, the risk of loss from damages falls upon the bailor. As is the case with respect to donative promises, Kant states that a judge cannot "indulge in a presumption about what one or the other of the parties might have thought."[6] However, his grounds for placing the burden of loss on the bailor are more tenuous than in the case of the gift. Kant argues that under principles of operative right, the "party who has the freedom to introduce a condition concerning the allocation of loss must bear the loss."[7]

Kant's position might be justified on the grounds that the bailor is in absolute control of the transaction and therefore

5. *Id.* at 4.
6. *Id.* at 5.
7. *Id.*

should bear the onus of specifying the conditions under which the bailment is taking place, including assigning the risk of loss from damages. On the other hand, it would be difficult to conceive of a case wherein the bailor would freely assume the risk of any damage to the chattel while in the bailee's hands. Indeed, this is the most troublesome of Kant's cases.

3. *Claiming Lost Objects*

In discussing claims to lost objects, Kant distinguishes ownership from possession. Ownership rights are not extinguished by mere transfer of custody of the object to another. An owner retains noumenal possession even when the object is in another's hands. One who possesses an object, without having ownership rights in that object, however, merely has phenomenal possession. The issue that Kant addresses is the right of an owner of an object against a third-party transferee who has received the object from a possessor passing himself off as the owner. The theory of pure right would hold that the owner has a right to the object superior to that of the third-party transferee. A transferee acquires the same rights in the object as the transferor; thus, if the transferor lacks title, the transferee also lacks title. The burden is on the transferee to establish good title.

Following principles of *Rechtens*, however, would yield the opposite conclusion. As is the case with donative promises and bailments, the key is externalities. If the buyer observes the formal conditions for receiving title, a property right—not merely a personal right—is derived from the transferor. When an object is sold in the open market and local regulations regarding buying and selling are properly observed, the buyer gains title to that object. The original owner has a claim against the seller for conversion, but no claim against a good faith purchaser. Any other rule would paralyze commercial intercourse, for a buyer would never be certain of the validity of his title.

4. *Compelling an Oath*

Kant's fourth case concerns the propriety of compelling a party to a lawsuit to take an oath before testifying in support of a claim or defense. The rationale for compelling oath-taking is that one who violates an oath calls upon himself the revenge of the gods. Kant argues that this belief is based on superstition,

and under a pure theory of right, an oath could not be compelled:

> Now we confront the following question: what binds an individual, who engages another individual in litigation, to assume that the oath of the opposing litigant will provide a sufficient motive for him to speak the truth and thus put an end to the dispute? That is, what binds me as a matter of principle to believe that another person, namely the one taking the oath, believes in religion? Why should I be required to let my rights turn on his oath? Or to put the question another way: can I ever be required to take an oath? Both of these seem to be unjust.[8]

Yet, under principles of *Rechtens*, legislatures may empower courts to compel oaths for purposes of judicial administration. While oaths may be adapted to the superstitious nature of human beings rather than to their moral nature, Kant suggests that oaths are necessary to establish the truth, particularly where concealed facts are involved. Kant clearly has reservations about the legitimacy of compelling oaths but, in the end, acknowledges their usefulness in resolving litigated disputes.

B. *Limitations of Kant's Analysis*

Kant's analysis in the *Four Cases* provides valuable insight into the question of the role of administrative considerations in the judicial decisionmaking process. Nevertheless, it has certain limitations and hence does not definitively resolve that question. First, the *Four Cases*, and indeed Kant's theory of private law, deal only with property rights and contractual rights; Kant provides no discussion of restitution for personal injury or other wrongs normally subsumed under the rubric of torts. Second, Kant's position that judicial decisions ought to be based on external evidence and that courts cannot inquire into subjective intent is formalistic and strained. Moreover, it does not reflect how courts in fact operate; subjective intent is relevant in many legal disputes and taken into account by courts. While factoring subjective intent into a decision is a difficult process, it would seem that the ends of justice are better served by considering subjective intent where relevant than by uniformly ignoring it.

Third, with the exception of the last of the four cases, the

8. *Id.* at 11.

dilemmas posed could be easily solved by simply having the parties provide for the contingencies in question in the operative written instruments of transfer. Thus, the contract of gift might specify that the donor may revoke the promise at any time prior to donation. Similarly, the contract of gratuitous bailment could state that the bailee agrees to compensate the bailor for any damages incurred during the period of bailment. In Kant's case of lost objects, a system of title registration as is currently used for real property or automobiles might be developed, thereby obviating the Kantian analysis of this issue. Moreover, Kant's fourth "problem" is somewhat illusory, since it is widely recognized that courts can compel oaths. Furthermore, Kant was apparently of the view that oaths would be decisive in a case; in fact, sworn testimony is only one source of admissible evidence and hence not necessarily determinative. Finally, although Kant seems to view administrative considerations as appropriate for courts to contemplate in reaching decisions, he does not spell out the weight such considerations should be given in a particular case. Kant does not propose a pure cost-benefit analysis, nor would such an utilitarian approach be consistent with his other writings.

C. *Dworkin*

An argument that courts should not allow administrative concerns to influence their decisions can be derived from the works of Ronald Dworkin. Professor Dworkin would presumably not be troubled if the legislature required courts to take certain specified administrative concerns into account in reaching decisions, for it is the role of the legislature to compromise among competing individual goals and purposes in search of the optimal welfare of the community. He would, however, most likely be quite concerned if the courts took it *upon themselves* to weigh administrative considerations against enforcement of a substantive right. Professor Dworkin's view is that in cases where no governing rule is applicable, there are nevertheless objective criteria that point in favor of a certain decision, to constrain the judge and prevent freewheeling decisionmaking. Professor Dworkin refers to these objective standards as principles and policies. A policy is a goal to be

reached to improve the community.[9] A principle is "a standard to be observed," not because it will advance or secure a better community, but "because it is a requirement of justice, fairness or some other dimension of morality."[10] An argument of principle, unlike an argument of policy, does not rest on assumptions about the nature and intensity of different demands and concerns throughout the community. Rather, it "fixes on some interest presented by the proponent of the right it describes, an interest alleged to be of such a character as to make irrelevant the fine discriminations of any argument of policy that might oppose it."[11] Thus, policies advance collective goals, while principles secure individual or group rights.

Professor Dworkin's thesis is that "judicial decisions in hard cases are characteristically generated by principle not policy."[12] A judicial decision may fail to achieve a policy but should not fail to recognize a principle that has been accepted by the courts in that jurisdiction. Hence, a litigant's recognized right to recovery should not be balanced against policy goals, such as efficiency in handling cases and ease of proof. Put another way, an individual right ought not to be subordinated to a collective goal. Indeed, Professor Dworkin is critical of Judge Richard Posner and others of the "Law and Economics School" who maintain not only that common law decisions by judges can be shown to serve the policy of efficient resource allocation, but also that in certain cases, judges base their decisions on economic policy rather than on principles.[13]

This is not to suggest that rights are always absolute nor that consequences are irrelevant. Professor Dworkin tried to develop "a strategy for a principled account of judicial decisions that looks to consequences, including third party consequences."[14] Where there are competing rights, one right may have to be compromised. A court may limit an abstract right by appealing to public safety or scarcity of a vital resource, and this might be understood as an appeal to the competing rights of those whose security would be sacrificed or whose share of

9. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 23 (1967).
10. *Id.*
11. R. DWORKIN, TAKING RIGHTS SERIOUSLY 85 (1977).
12. *Id.* at 96-97.
13. *Id.* at 97-98.
14. Dworkin, *Is Wealth a Value?*, 9 J. LEG. STUD. 191, 223 (1980); *see also* R. DWORKIN, *supra* note 11, at 98-100.

resources would be threatened if the abstract right were made concrete.[15] Similarly, the courts might choose to disallow a type of lawsuit because this type of lawsuit might swamp the courts with litigation. In this situation the rights to be vindicated are considered more important than the rights the courts propose to bar.[16] Nevertheless, as Professor Dworkin carefully points out, the arguments for compromising competing rights in the above examples consider only the welfare of those whose rights are at stake.[17] The arguments do not, nor should they, subordinate individual rights to some collective goal of the community. Thus, Professor Dworkin would not favor a system where administrative considerations would limit otherwise recognized legal rights.

II. Four Contemporary Cases

The conflict between what rules are theoretically just and what rules can be implemented in the real world was not definitely resolved by Kant. Indeed, the conflict recurs in numerous areas of the law. This section explores four such contemporary conflicts including (1) *res judicata*; (2) prospective overruling; (3) the direct-purchaser rule in antitrust suits enunciated in *Illinois Brick Co. v. Illinois*[18]; and (4) the right to a jury trial in complex civil cases. In addition, this section analyzes the foregoing conflicts under a Kantian prism, and suggests some fresh insights as to how administrative concerns and the desire for a just resolution may be balanced.

A. *Judicial Approach*

Res judicata, one of the most widely observed, if also disliked, legal doctrines,[19] provides that once a lawsuit is finally adjudicated on the merits, it may not be relitigated. The doctrine furthers both public and private values, including the need to: (1) define an end point in the litigation so as to provide peace for the litigants; (2) foster consistency in judgments by preventing relitigation of matters previously adjudicated; and (3) promote

15. R. Dworkin, *supra* note 11, at 98-100.
16. *Id.* at 100.
17. *Id.* at 99.
18. 431 U.S. 720 (1977).
19. *See, e.g.*, Riordan v. Ferguson, 147 F.2d 983, 988 (2d Cir. 1945) (Clark, J., dissenting) ("The defense of res judicata is universally respected, but actually not very well liked.").

efficient use of judicial and private litigants' resources, by barring needless litigation. As discussed more fully below, finding the just solution is not a goal of *res judicata*, and the application of this doctrine may produce harsh results.

Traditionally, three conditions must be met for the doctrine of *res judicata* to apply: (1) the parties to what I will call the F-1 and F-2 litigations must be identical[20]; (2) the causes of action in F-1 and F-2 must be identical; and (3) F-1 must have been adjudicated "on the merits."[21] The main arguments over the application of *res judicata* have focused on the meaning of "cause of action" and "on the merits." Judgments for the plaintiff are necessarily on the merits. Judgments for defendants, however, were traditionally considered "on the merits" only if they were made on the grounds of substantive law; dismissals on jurisdictional or procedural grounds were not considered "on the merits." Unfortunately, it is not always clear whether the grounds for a judgment are procedural or substantive. Also, judges have not infrequently dismissed matters "with prejudice,"—that is, on the merits—on procedural grounds. The modern trend as exemplified by the Federal Rules of Civil Procedure is to consider judgments entered after a plaintiff has presented its proof "on the merits" unless the court designates otherwise.[22] Because of the confusion regarding what is meant by "on the merits," the *Restatement (Second) of Judgments* has deleted any reference to "on the merits" as a requirement of *res judicata*.[23]

The more difficult question concerns the meaning of "identical cause of action." At common law, the cause of action was identified by the theory of the pleading. A given set of facts involving a contract dispute might give rise to distinct causes of action based on several theories, including breach of contract, *quantum meruit*, unjust enrichment, and rescission. If F-1 was for breach of contract and the plaintiff lost, the plaintiff would not be precluded at common law from bringing a subsequent action against the same defendant for unjust enrichment based on the same facts. With the adoption of "notice pleading" in modern times, the theory of the pleadings is of less signifi-

20. As used in this essay, F-1 refers to the first litigation between the parties. F-2 refers to subsequent litigation between the same parties.

21. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS § 100A at 680-81 (4th ed. 1983).

22. *See* FED. R. CIV. P. 41(b).

23. RESTATEMENT (SECOND) JUDGMENTS § 19, comment a (1980).

cance, because the complaint serves to give notice of the pending claim. In determining whether causes of action are identical, modern jurisdictions seek to determine whether F-1 and F-2 are based on the same operative facts.[24] If so, the causes of action are identical for *res judicata* purposes, irrespective of the theory of pleading.

Determining the confines of a cause of action is important, because *res judicata* bars not only claims that were actually litigated but also those which might have been litigated in F-1. Thus, as a general rule, a plaintiff may not split its cause of action.[25] For example, if a plaintiff sustains personal injuries and property damages in an automobile accident, both claims must normally be asserted in F-1 or the unasserted claim will be barred.[26] Similarly, if a plaintiff sustains injuries to the head and foot in an accident and sues only for the head injuries in F-1, the claim for damages to the foot is lost. Where a plaintiff, after successfully recovering damages for personal injury in F-1, sues on the same claim in F-2 because the damages awarded in F-1 were inadequate to compensate the plaintiff for the injuries sustained, the F-2 action is likewise barred.

Nor does the fact that the F-1 decision was erroneous affect the applicability of *res judicata.* The aggrieved party's remedy is to appeal errors of law by the trial court. If the appellate court compounds the trial court error by affirming, the aggrieved party has no recourse, and if the F-2 court erroneously denies the *res judicata* defense, it is the F-2 judgment which is subsequently binding between the parties. Thus, strict application of the doctrine may in certain cases produce unfair results.

While courts have recognized certain exceptions to the *res judicata* doctrine,[27] the Supreme Court in *Federated Department Stores, Inc. v. Moitie*[28] made clear that there is no general exception based on injustice or harshness that would result from in-

24. RESTATEMENT (SECOND) JUDGMENTS § 24 comment a & Reporter's Note (1980). *See, e.g.*, O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 (1981):

> This state has adopted the transactional analysis approach in deciding *res judicata* issues [citations omitted]. Under this address, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy [citations omitted].

25. *See, e.g.*, RESTATEMENT (SECOND) JUDGMENTS §§ 24-26 (1980).

26. *Id.* at § 24, comment c, illustration 1.

27. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4415 (West 1981 & Supp. 1987).

28. 452 U.S. 394 (1981).

voking the doctrine. In *Moitie*, seven plaintiffs commenced an action under the federal antitrust laws alleging price-fixing.[29] The trial court dismissed the claims on the grounds that as consumers, plaintiffs had not been "injured" in their "business or property" under section four of the Clayton Act.[30] Five plaintiffs appealed; the other two commenced actions in the California courts (F-2) on state law claims alleging essentially the same facts.[31] The Ninth Circuit thereafter reversed the F-1 court's initial dismissal of the federal claims, and those cases proceeded to trial.[32] The two F-2 claims, however, after removal to federal courts, were dismissed by the trial court on *res judicata* grounds.[33] The Ninth Circuit reversed dismissal of the F-2 claims. While recognizing that ordinarily *res judicata* would apply, the Ninth Circuit held that that the position of the non-appealing plaintiffs was closely interwoven with those who had appealed F-1, and that therefore the doctrine of *res judicata* must give way to "public policy" and "simple justice."[34] Reversing, the Supreme Court rejected both bases offered by the Ninth Circuit.[35]

The Supreme Court ruled that the Ninth Circuit's reliance on public policy was "misplaced," and that "public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the results of contest."[36] Moreover, *res judicata* is a rule "which should be cordially regarded and enforced by the courts."[37] The Ninth Circuit's reliance on "simple justice" was equally misplaced,[38] and the Supreme Court found that application of accepted principles of

29. *Id.* at 395-96.

30. *Id.* Section four of the Clayton Act, 15 U.S.C. § 15(a) (1982), provides in pertinent part:

> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

31. 452 U.S. at 395-96.

32. *Id.* at 397.

33. *See* Moitie v. Federated Dep't Stores, 611 F.2d 1267, 1269-70 (9th Cir. 1980).

34. *Moitie*, 452 U.S. at 397-98.

35. *Id.* at 398-402.

36. *Id.* at 401 (quoting Baldwin v. Travelling Men's Ass'n, 283 U.S. 522, 525 (1931)).

37. *Id.* (quoting Hart Steel Co. v. Railroad Supply Co. 244 U.S. 294, 299 (1917))

38. *Id.*

res judicata would produce no injustice. The Court further stated:

> "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of *res judicata* serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*."[39]

Simply put, *res judicata*, to the Supreme Court, is justice.

To the extent *Moitie* is based on plaintiffs' failure to appeal the initial decision, the holding is defensible. The rationale of the Court, however, goes far beyond this narrow, technical ground. The rigid application of *res judicata* espoused by the Court is unacceptable. At times, the interest of justice should be permitted to outweigh the administrative concerns at the core of *res judicata*. Fashioning such an exception is difficult, but upon consideration a standard that effectively balances the traditional values embodied in *res judicata* and the values of justice can be forged. A situation in which an exception to the unbending rule of *res judicata* is appropriate is found in *Harrington v. Vandalia-Butler Board of Education*.[40] In that case the plaintiff, a public school teacher, brought a Title VII[41] action alleging gender-based discrimination. The trial court found there was such discrimination and awarded damages to the plaintiff. On appeal, the Sixth Circuit sustained the finding of discrimination but held that compensatory damages were not justified.[42] While this case was pending on appeal, the Supreme Court issued its opinion in *Monell v. Department of Social Services*,[43] overruling its prior decision in *Monroe v. Pape*,[44] which had held that municipalities were immune from Section 1983[45] damage suits.

In the wake of *Monell*, Ms. Harrington promptly filed a Section 1983 action. The Sixth Circuit ruled that this action was barred on *res judicata* grounds because it might have been asserted in the original action, notwithstanding the fact that at the time Ms. Harrington's initial complaint was filed, *Monroe*

39. *Id.* (citations omitted)
40. 649 F.2d 434 (6th Cir. 1981).
41. 42 U.S.C. §§ 2000e-2000e-17 (1982).
42. 649 F.2d at 435.
43. 436 U.S. 658 (1978).
44. 365 U.S. 167 (1961).
45. *See* 42 U.S.C. § 1983 (1982).

clearly precluded that claim.[46] Thus, Ms. Harrington was faced with a no-win situation. Had the civil rights claim been interposed as part of the initial action, it surely would have been summarily dismissed on the authority of *Monroe*. On the other hand, even if Ms. Harrington had engaged in this futile exercise, the civil rights claim would nevertheless be barred because, as more fully discussed below, the later-decided *Monell* decision would apply prospectively.[47]

Exceptions to the blanket imposition of *res judicata* seem appropriate in at least two additional types of cases. First, where the party against whom *res judicata* is asserted acted reasonably in conducting F-1. For example, where the true extent of plaintiff's medical injuries could not reasonably have been ascertained by medical experts and the plaintiff was led to believe that the extent of his injuries had been thoroughly diagnosed prior to bringing F-1, a subsequent action for further injuries should not be barred. Second, *res judicata* ought not to be invoked when doing so would impinge on an important public policy.[48] For example, a wife sues her husband for separate maintenance, hoping that the marriage can be saved. The separation is granted on grounds that would also permit a divorce decree. Subsequently, the wife concludes that the marriage is indeed dead and sues for divorce. In such a situation, it would be imprudent to bar the divorce action on *res judicata* grounds simply because the wife might have sought a divorce in the initial action. This approach would force the wife to seek the most drastic relief—divorce—in her initial filing, even though the marriage may have been salvageable. Public policy on the one hand encourages couples to work out their differences, but on the other hand, does not force parties to stay in a relationship against their wishes. Strict application of *res judicata* in this instance would further neither policy.

B. *Prospective Overruling*

A conflict between administrative concerns and justice similar to that found with respect to *res judicata* is encountered with respect to the issue of prospective overruling of precedents by the courts. As Professor Fletcher notes, prospective overruling

46. 649 F.2d at 437-38.
47. *See infra* notes 52-53 and accompanying text.
48. *See* RESTATEMENT (SECOND) JUDGMENTS § 26, comment i, illustration 8 (1980).

presents a contradiction in basic assumptions about the legal order.[49] Ideally, interpretation of the law is objective and therefore the fruits of interpretation should be only one "correct" meaning. Yet, prospective overruling requires that one standard be applied to one group of litigants and a different standard to another group. The point of demarcation may depend on whether a particular action has been commenced, has gone to trial or has become final.[50] In any case, some litigants will have had their controversies adjudicated under rules of law that have since been rejected.

Professor Fletcher further observes:

> There are sound administrative reasons for limiting the impact of innovative rulings, particularly in constitutional cases. Making the fourth amendment exclusionary rule applicable, by way of collateral relief, to all state court convictions arguably would "tax the administration of justice to the utmost." Every convicted prisoner could secure a hearing on the allegedly unconstitutional seizure of evidence used against him. Even if we disapprove of prospective overruling, we cannot deny the administrative considerations that make it desirable.[51]

In many cases, retroactive application of a decision would necessitate new hearings involving evidence which has been lost or destroyed. Witnesses may be deceased or difficult to locate; even if witnesses can be found their memories may have faded.

Nevertheless, bright line rules based on administrative considerations harbor a potential for injustice. An example of the hardship resulting from the combined application of *res judicata* and prospective overruling is found in *Harrington v. Vandalia-Butler Board of Education*, discussed above.[52] Not only did the Sixth Circuit rule that the plaintiff's subsequent civil rights action was barred by *res judicata* because it might have been interposed as part of the initial claim despite clearly contrary Supreme Court authority, but more important, the court further held that even if the civil rights action had been asserted in F-1 and had been rejected, plaintiff could not reassert the claim in the aftermath of *Monell*.[53] *Harrington* does not present a case

49. Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1272 (1985).
50. *Id.*
51. *Id.* (footnote omitted)
52. *See supra* notes 40-47 and accompanying text.
53. *Harrington*, 649 F.2d at 438-44.

where plaintiff had been dilatory, nor does it seem that the administrative considerations cited above become operative. Nevertheless, plaintiff was barred from proceeding, an outcome that appears to be unduly harsh.

The potential unfairness of prospective overruling is even more acute in criminal cases involving constitutional issues. "If an unconstitutional statute or practice effectively never existed as a lawful justification for a state action, individuals convicted under the statute . . . were convicted unlawfully, even if their trials took place before the declaration of unconstitutionality"; the ruling should be accorded retroactive effect and previously convicted persons ought to win their freedom.[54] On the other hand, if the judgment of unconstitutionality is limited to the case in question, the legality of the convictions of persons previously tried is not altered.[55]

In *Linkletter v. Walker*[56] and again in *Stovall v. Denno*,[57] the Supreme Court forged a middle ground between these two extremes and adopted what one member of the Court subsequently termed a cost-benefit analysis in determining retroactivity.[58] The Court in *Stovall*, in denying retrospective application of the holding in *United States v. Wade*[59] and *Gilbert v. California*[60] to a case which had become final prior to the date of the *Mapp* decision, ruled that in determining the retroactive affect of a given ruling, the following criteria should be considered: (1) the purpose to be served by the new standard; (2) the extent to which law enforcement officials relied on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards.[61] The effect of an unconstitutional judgment is thus treated purely as a matter of remedy.[62] Nevertheless, as Justice Black in dissent in *Stovall* observed, such an approach may make retroactive application depend on fortuitous timing.[63]

54. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 25 (1981).
55. *Id.*
56. 381 U.S. 618 (1964).
57. 388 U.S. 293 (1966).
58. *See* Shea v. Louisiana, 470 U.S. 51, 65-66 (1985) (White, J., dissenting).
59. 388 U.S. 218 (1966).
60. 388 U.S. 263 (1966).
61. *See Stovall*, 388 U.S. at 297.
62. L. TRIBE, *supra* note 54, at 26.
63. *Stovall*, 388 U.S. at 303-04 (Black, J., dissenting). *See also* Linkletter v. Walker, 381 U.S. 618, 641-45 (1964) (Black, J., dissenting).

More recently, the Court ruled that fortuitous timing cannot create a rational distinction in classes of criminal defendants; at the very least, new interpretations must apply to all cases pending on direct review.[64] The Constitution, however, does not require that new interpretations apply to cases pending on collateral review through habeas corpus.[65] This approach suggests that the key to solving the dilemma is to shift the focus from substantive rights to procedural options; where all procedural avenues of direct review have been exhausted, retroactivity is not required.[66] Yet, as Professor Fletcher points out, the Court has granted reopening of cases that implicated Sixth Amendment rights to counsel while refusing to re-examine final convictions based on new interpretations of search and seizure law of the right against self-incrimination.[67] The Supreme Court has focused its inquiry on whether the new constitutional ruling "is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function" and thereby calls into question the accuracy of guilty verdicts in previous trials.[68] The likelihood of arbitrary and unreliable results would lead to complete retroactive effect. Thus, a hierarchy of constitutional rights seems to have emerged; rights that bear on the integrity of the fact finding process are assigned greater weight than those involving the right to privacy and human dignity.[69] Professor Fletcher suggests that the distinction between Sixth Amendment rights on the one hand and Fourth and Fifth Amendment rights on the other, may make sense if the function of collateral relief is only to assure accuracy of criminal convictions, but such a distinction is less appropriate if the question is the moral status of constitutional rights.[70]

A satisfactory resolution of the dilemma posed by prospective overruling has proven elusive. Overruling prospectively in every case would be unfair, and overruling retrospectively in every case would prove impossible. Where precisely to draw the line between these two extremes is the problem. Perhaps

64. Shea v. Louisiana, 470 U.S. 51 (1985); Fletcher, *supra* note 49, at 1278.
65. *See* Solem v. Stumes, 465 U.S. 638 (1984).
66. Fletcher, *supra* note 49, at 1278-79.
67. *Id.*
68. Williams v. United States, 401 U.S. 646, 653 (1971); *see also* L. TRIBE, *supra* note 54, at 26.
69. *But see* L. TRIBE, *supra* note 54, at 26.
70. Fletcher, *supra* note 49, at 1279.

the best approximation of where the demarcation point should be was the Supreme Court's ruling in *Shea* that new interpretations apply to all cases still pending on direct review. This approach provides a bright line rule for identifying cases where retroactivity is appropriate without the administrative nightmare of undoing years of decisions under prior precedent.

C. Illinois Brick—*The Direct Purchaser Rule*

Section four of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws"[71] may recover treble damages. The broadly worded statute does not purport to establish a hierarchy of plaintiffs, nor does it limit the type of injury *compensable*. Yet in *Illinois Brick Co. v. Illinois*,[72] the Supreme Court held that in an antitrust damages action where defendants are charged with price-fixing, the only ones who could recover any overcharge were those purchasing directly from the alleged price-fixers ("direct purchasers")—not the first purchasers' customers nor others down the distribution line ("indirect purchasers"). Thus, indirect purchasers are prohibited from offering proof that illegal overcharges had been "passed on" to them.[73] The rationale for the direct purchaser rule is threefold: (1) it limits the introduction of complex evidence regarding market behavior which would serve only to further complicate already difficult issues; (2) it maximizes deterrence and incentives to sue by concentrating recovery in first purchasers; and (3) it eliminates the likelihood of multiple liability, double recovery and inconsistent judgments.[74] The right to compensation depends not on whether a person bears the burden of the overcharge but, rather, on where the overcharged person stands in the chain of distribution.

Antitrust enforcement has two fundamental goals: compensation of victims and deterrence of future violations.[75] The rule of *Illinois Brick*, by concentrating recovery in the hands of the first purchasers, prevents fragmentation of claims which might

71. 15 U.S.C. § 15(a) (1982).
72. 431 U.S. 720 (1977).
73. *Id.* at 745-46.
74. *Id.* at 736-48.
75. *Id.* at 746.

occur were indirect purchasers permitted to sue, and thereby provides significant incentives to sue. Where incentives to sue are significant, deterrence is promoted. At the same time, the direct purchaser rule is at odds with the fundamental antitrust goal of compensation. Indeed, the favored first purchasers arguably gain a windfall, for they recover 100% of the overcharges and retain those portions of such overcharges passed down the line. The real victims are out of court.

The rule of *Illinois Brick* represents an attempt to reconcile two often conflicting aims of the antitrust laws: compensation and deterrence.[76] The goal of compensation for victims would require allowance of claims by indirect purchasers, for they are arguably the ultimate out-of-pocket victims. On the other hand, the goal of deterrence would require us to bar a suit by an indirect purchaser since the direct purchaser is in the best position to sue. The latter point is more debatable than the former but it is nevertheless sound. Surely, from the wrongdoer's point of view, it does not matter who sues, as long as the threat of lawsuits is real and not imaginary. From the enforcement side, however, the identity of the plaintiff does matter. To the extent that claims are lodged in the hands of relatively few plaintiffs with large stakes in the outcome, lawsuits are far more likely to be prosecuted than if the rights of recovery were dispersed among large numbers of plaintiffs with relatively small stakes in the outcome. Moreover, if indirect purchasers were entitled to sue, direct purchasers-plaintiffs would presumably face the defense that they had sustained no losses because they passed on overcharges down the distribution line and, therefore, they may not recover. This would provide a great disincentive for direct purchasers to sue and hence would make lawsuits less likely, thereby impairing deterrence.

The *Illinois Brick* holding may be viewed in two ways. It can be viewed as suggesting that the goal of deterrence outweighs the goal of compensation; or, put another way, efficient enforcement is favored over corrective justice.[77] Such an oversimplification would appeal to trivialize the importance of compensation. The other view is that compensation and deterrence are of equal importance but that when we use administra-

76. *See* Cavanagh, *The* Illinois Brick *Dilemma: Is There a Legislative Solution?*, 48 ALB. L. REV. 273, 274 (1984).

77. Easterbrook, *Detrebling Antitrust Damages*, 28 J. LAW & ECON. 445, 446 (1985).

tive concerns as a tie-breaking factor, the aims of deterrence should prevail. Under this view, the costs of compensation in terms of (1) more complex and speculative proof; (2) lengthier and more expensive trials; (3) increased likelihood of inconsistent judgments and multiple liability; and (4) decreased incentives to sue by direct purchasers, far outweigh the benefits that are likely to be derived from permitting indirect purchaser suits.

While the result in *Illinois Brick* may, at first blush, appear arbitrary and unjust, closer examination demonstrates that on balance the decision is likely to promote effective antitrust enforcement. In this situation, administrative factors do not serve to change an otherwise just result but, rather, they harmonize conflicting currents in antitrust policy.

D. *Right to Trial by Jury in Civil Cases*

The right to a jury trial in civil cases differs from the three cases previously discussed. In those cases, the issue was whether the courts had gone too far in taking into account administrative considerations. With respect to juries, the issue is: have the courts been right in virtually ignoring administrative considerations when resolving questions involving the propriety of jury trials? The popular reverence for juries in the United States has led courts to expand the kinds of cases that juries may hear and to give near absolute protection to that right.[78] As more fully discussed below, the jury trial question differs from its companion questions in another significant way in that granting or denying a jury does not affect the claim on the merits, whereas resolutions of the other questions do go to the merits.

The Seventh Amendment to the United States Constitution provides: "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 reexamined in any Court of the United States, than according to the rules of the common law."[79] As one court has stated, "The surface simplicity of this provision is beguiling, for the exact scope of its application was unclear even when it was first

78. *E.g.*, Dairy Queen v. Wood, 369 U.S. 469 (1962); Beacon Theatres v. Westover, 359 U.S. 500 (1959).

79. U.S. CONST. amend. VII.

adopted."[80] The Amendment "preserved" the right to a jury in all actions "at common law." The purpose of this provision was to maintain the right to a jury trial as it existed in 1791— the date of the adoption of the Bill of Rights.[81] To determine whether a particular type of action is triable by a jury, the courts have applied an "historical" approach.[82] Under this approach, the courts must determine whether there was a right to a trial by jury under English practice. Thus, matters which were traditionally considered equitable in nature are not governed by the Seventh Amendment.

In addition, the right to a jury trial is specifically provided for in a number of federal statutes, particularly those creating rights which were unknown at common law.[83] Both the Seventh Amendment and statutory provisions appear unqualified on their respective faces. Thus, where the right to jury applies, it would seem to be an absolute right. Nevertheless, in recent years the concept that the constitutional or statutory right to a jury trial is absolute has come under attack on the grounds that certain cases are simply too complex for juries.[84] The complexity assault is three-pronged: (1) complex cases are analogous to equitable claims and hence not within the ambit of the Seventh Amendment; (2) in deciding whether a jury trial is appropriate, the court must consider the practical abilities and limitations of jurors; and (3) due process is violated where the jurors, because of the *size* and *magnitude* of the case, are unable to reach a rational decision.

The equitable analogy is based on the argument that, in 1791, the chancellor's jurisdiction extended to matters that he deemed too complicated for a jury.[85] If we assume that the chancellor was so empowered, this argument requires the court

80. *In re* United States Fin. Sec. Litig., 609 F.2d 411, 421 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980).

81. *Id.* at 421-22.

82. *Id.* at 421-24.

83. *See, e.g.*, Merchant Marine Act, 1920 (Jones Act), ch. 250, 41 Stat. 988 (codified as amended in scattered sections of 46 U.S.C.); Federal Employers Liability Act (Railroads), ch. 149, 35 Stat. 65 (codified as amended at 45 U.S.C. §§ 51-60 (1982)).

84. *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Elec. Corp., 106 S. Ct. 1348 (1986); *In re* Boise Cascade Sec. Litig., 420 F. Supp. 99 (W.D. Wash. 1976); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978); ILC Peripherals Leasing Corp. v. International Business Machs. Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Machs. Corp., 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

85. *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d at 1080-83.

to deduce the likely reaction of a chancellor to a hypothetical complex suit filed in 1791. Since this process would involve little more than speculation by judges, the argument has been rejected by the courts.

Ross v. Bernhard[86] was a stockholder's derivative suit brought under the federal securities laws against an investment company's directors and brokers. Notwithstanding the fact that derivative suits had been viewed traditionally as equitable actions to which no right to a jury trial attaches, the court held that a jury trial was proper, because the corporation, were it suing in its own right, would have been entitled to a jury trial.[87] The court ruled that the right to a jury trial depends on the nature of the issue to be tried rather than the character of the overall action.[88] In a footnote, however, the court suggested that the 'legal' nature of an issue is determined by considering, *inter alia*, "the practical abilities and limitations of juries."[89] Despite the cryptic nature of this footnote, its dubious authority, and the fact that the Supreme Court has never relied on it in subsequent cases, some trial courts have invoked the *Ross* footnote to deny an otherwise valid jury demand.[90] Nevertheless, such a position has not gained widespread support. As one eminent scholar observed, the *Ross* footnote "is so cursory, conclusory and devoid of cited authority or reasoned analysis that it is difficult to believe it could have been intended to reject such established historical practice or Supreme Court precedent."[91]

The third and perhaps most challenging argument in favor of limiting the right to jury trials is that where a case is so complex that jurors cannot reach a reasoned decision, due process is denied. In such a case, the Fifth Amendment right to due process outweighs the Seventh Amendment right to trial by jury. This argument merits a more detailed discussion for two reasons. First, it has been accepted by several courts.[92] Second, and more important, the rationale supporting the due process argument also supports limitation to the right to a jury trial on efficiency grounds.

86. 396 U.S. 531 (1970).
87. *Id.* at 532-33.
88. *Id.* at 538.
89. *Id.* at 538 n.10.
90. *See, e.g., In re* Boise Cascade Sec. Litig., 420 F. Supp. at 104.
91. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 Nw. U. L. Rev. 486, 526 (1975).
92. *See, e.g., In re* Japanese Elec Prods. Antitrust Litig., 631 F.2d at 1084-86.

The due process argument is straightforward. Complex cases, particularly those involving antitrust and securities matters, may present issues which are beyond a jury's ability to decide rationally. In such cases, there is a danger that the verdict may be based on whim rather than on the evidence. This would undermine a fundamental value promoted by due process in the fact-finding procedures, namely, that of minimizing the risk of erroneous decisions. In addition, juries operate under special constraints in complex cases. A lengthy trial may prove disruptive to a person's professional and personal life and thereby interfere with one's commitment to the jury's factfinding task. Long trials may disqualify potential jurors with technical backgrounds because their occupations do not allow for extended absences. Cases must be tried to those relatively unschooled in technical matters. Simply put, the man on the street may be overwhelmed by mounds of technical data and may not decide the matter based on the evidence.

This due process argument provides a basis for attacking the right to a jury trial on efficiency grounds. Trying a complex case to a jury is far more expensive than trying the identical case to a judge. First, proof is packaged differently. In a jury trial much time and effort is expended in trying to simplify proof, which is directed at a lowest common denominator; where a judge is the factfinder, a modicum of sophistication can be presumed. Thus, in preparing for a jury trial, lawyers may spend time and money rehearsing their presentations before mock juries, the make-up of which is representative of the local jury pool. Second, designated deposition transcripts and other "canned" testimony must be read aloud to jurors, while it is merely handed up to a judge. This process can add many days to a jury trial. Third, bench trials permit the court and attorneys some flexibility in trying cases; mid-trial recesses can be taken to allow the judge or counsel to devote time to other matters. In particular, a judge may be able to try short cases concurrently with complex matters and hence prevent delay. With a jury, such flexibility is lost, and the pipeline of cases is apt to become clogged.

The question then becomes whether such concerns justify a limitation on the right to a jury trial. As noted, the right to a jury trial differs from the other rights discussed above. In those cases, the application of a particular rule, whether *res judicata*,

prospective overruling or the direct purchaser rule, means that the party affected is out of court. Limiting the right to a jury trial operates not to affect the outcome, but only to change the identity of the fact-finder. It is therefore hard to see how a litigant's "rights" are prejudiced. A litigant does not have a right to a certain outcome but only to a fair process of determination. Prima facie, there is no reason to believe that the process will be any less fair with a judge than with a jury.

Concerns about the cost of juries has led to the virtual abolition of the jury trial in civil cases in Great Britain.[93] Yet, this fact has not led to a decline in the quality of justice dispensed by British courts. The popular respect for juries appears far greater in the United States. Indeed, in America, unlike in Great Britain, the right to jury trial is part of the Constitution.[94] Nevertheless, neither popular reverence nor constitutional standing creates an unqualified right to a jury trial in civil cases.

Given that situations exist wherein a case is inappropriate for a jury, the problem is to identify those situations. The jury system functions optimally when jurors are faced with discrete issues involving matters of common experience. As issues become more complex and esoteric, the liabilities of the jury system become more pronounced. The exact point at which this phenomenon occurs is difficult to identify and may vary from case to case. The ultimate decision of when to strike a jury demand is therefore best left to the sound discretion of the court.

E. *Kantian Approach*

A Kantian analysis of the foregoing modern problems would yield differing results depending on whether each question was viewed under a theory of pure right or under principles of *Rechtens*. The theory of pure right would permit relitigation of claims in the interest of justice, but practical principles of operative right would favor an ironclad rule. Similarly, the theory of pure right may require that certain Supreme Court decisions be given retroactive effect, while principles of *Rechtens* militate toward prospective effect only. In addition, indirect purchasers would be permitted to recover antitrust damages under a the-

93. *See* Sperlich, *The Case for Preserving Trial by Jury in Complex Civil Litigation*, 65 JUDICATURE 395 (1982).

94. U.S. CONST. amend. VII.

ory of pure right but would be properly excluded under principles of operative law. Finally, while *Rechtens* may permit the state to dispense with jury trial in civil cases, the theory of pure right would allow jury trials in all civil cases as provided by the Seventh Amendment.

While the four contemporary problems raise issues different from those discussed in Kant's *Four Cases*, a Kantian perspective offers a principled basis for analyzing these issues and reaching fair results. A significant distinction between the four modern cases above discussed and Kant's *Four Cases* is that in three of Kant's problems, the problem of differing results under a theory of pure right and under a theory of *Rechtens* could have been averted by simply having the parties provide for various contingencies in the operative written instruments. Thus, the donee could have specified that the promise to make a gift would be irrevocable; the bailor could require that the bailee be liable for damages to bailed goods; or society could require that loaned property could not be sold without the owner's endorsement on a certificate of title. On the other hand, the four contemporary cases present broader issues of public policy, and the parties are not free to dictate the results themselves.

Kant's fourth case, however, stands apart from the other three, since it too involves matters of public policy beyond the control of the parties, and may provide a key to the resolution of the four modern legal dilemmas. In the fourth case, Kant recognizes that oaths may be necessary to establish facts and thereby to enable courts effectively to adjudicate legal disputes. Put another way, Kant viewed oaths as presumptively necessary to the proper functioning of the judicial system. The presumption concept is useful in analyzing the contemporary cases. One approach might be to establish a rebuttable presumption that the cases in question be decided under principles of *Rechtens* unless the results of applying operative law would be so harsh as to be particularly unjust. Thus, normally, the following rules would prevail provided the results would not prove unduly harsh: (1) *res judicata* would be all encompassing; (2) Supreme Court decisions on constitutional issues would be prospective only; (3) indirect purchasers would be barred from recovering antitrust damages; and (4) civil trials would be conducted without juries.

Two problems emerge from this approach, one substantive

and the other procedural. The substantive problem is that in the case of the jury, it is arguable that the presumption be reversed, given the esteem in which the jury system is held in this country. This position, however, is not persuasive. The vast bulk of civil cases in both the state and federal systems settle prior to trial, whether a jury is demanded or not. Thus, the jury plays a relatively insignificant role in the litigation process. Moreover, in an era of fiscal belt-tightening at the state and federal levels, the civil jury may well be a luxury that the system can no longer afford.

The procedural question concerns the legal standards for determining when the application of the presumptions is unduly harsh or unjust. This determination is best left to the sound discretion of the trial judge, who is in the best position to gather all the facts and to ascertain if the application of a particular rule will work an injustice between the parties. It may be that the discretion standard may occasionally result in inconsistent rulings on similar facts, but the benefits derived from giving the judge discretion to make sure justice is done in the particular case outweigh this possible disadvantage.

III. Conclusion

Administrative considerations are clearly relevant to the judicial decisionmaking process, but it would be neither practical nor desirable to draw bright line rules automatically applicable to particular situations. This goal may require that administrative concerns be assigned different weights in different contexts, depending on the facts of a given case. The judge should have discretion in the weighing process, and decisions should not be reversed unless a manifest injustice would result.