

FUZZY LOGIC AND THE SLIDING SCALE THEOREM

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[M]ost legal problems end as questions of degree.¹

The law operates principally in the context of ordinary transactions and relationships. Consequently it is important to develop insights into how it operates in the everyday world. To resolve recurring legal issues in everyday affairs, judges and other decision-makers sometimes use formulas. When a legal formula contains two elements, as several do, a process of fuzzy logic produces a result that is a function of a sliding scale between the elements. Thus, if *physical presence in a new state + intent to remain = change of domicile*, there will be degrees of each element, such that the degree of physical presence (which could be treated as a fraction between zero and one or as a point on a diagram where each of two axes runs from zero to one) combines with the degree of intent to remain, to produce a result—either acquisition of a new domicile or retention of the old one. The process and the result is best illustrated by a diagram that, in most instances, resembles an economist's demand curve. The placement and slope of the curve will depend on the particular formula, and the curve may shift depending on what is at stake. The process is at work in several fields of law including contracts, civil procedure and conflict of laws.

I. INTRODUCTION

A. *The Theorem*

B. *Fuzzy Logic*

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1. *Estin v. Estin*, 334 U.S. 541, 545 (1948) (Douglas, J.).

- C. *An Example*
- II. CONTRACT ISSUES
 - A. *Liquidated Damages Clauses*
 - B. *Unconscionability*
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 - A. *Preliminary Injunctions*
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I. INTRODUCTION

A. *The Theorem*

Legal norms and procedures provide structure for the ordinary transactions and relationships that persons enter into and play out each day. Over time, the structure tends to become formulaic, containing two or more elements. The elements may be facts (objective or subjective) or they may be reflections of value judgments (for example, judgments about what is or is not fair). Each element is said to be either present or missing. According to the typical two-element formula, if elements *a* and *b* are both present, and only if both are present, a given legal result is obtained.² That the formula says so does not necessarily make it so. The premise of this Article is that in practice it often—perhaps usually—is not so. The premise is most readily illustrated by focusing on formulas that are limited to, or are dominated by, just two elements and that consequently can be diagrammed in two dimensions.

At least in the fields to be examined in this Article, the fulfillment of each stated element is a matter of degree and the attainment or non-attainment of the legal result emanates from a sliding scale reflecting the degree to which each of the two elements has been satisfied. The sliding scale theorem may be simply stated: The greater the degree to which one element is satisfied, the lesser the degree to which the other

2. To give an example that will be developed later in this Article, if a person (a) has some physical presence in a new state, and (b) demonstrates an intent to live there indefinitely, he or she has established a new domicile. Some legal formulas have more than two elements, but the focus here is on those cases in which there are only two stated elements, or those in which two elements are dominant even though there may also be some subsidiary ones. The present study deals with civil proceedings and civil responsibility, as distinguished from criminal law.

need be. The challenge is to demonstrate that it is at work in practice, and to show how it operates. This may be done by examining cases in discrete fields of law. The fields investigated here are sufficiently representative to suggest that the sliding scale theorem may apply to a wide variety of dual-element formulas in the law.³

Sometimes courts and other decision-makers recognize that they are using such a sliding scale;⁴ more often, they do not recognize it or, in any event, do not articulate it.⁵ An unarticulated use of a sliding scale frequently appears from the decision-makers' emphasis on only one of the elements while lip service is given to the other, or from their strained efforts to demonstrate that both elements have been met.⁶

B. Fuzzy Logic

The sliding scale principle may be seen as a manifestation of fuzzy logic, which holds that everything temporal can be a matter of degree.⁷ Under fuzzy logic, zero and one are simply the opposite ends of a continuum.⁸ Although some phenomena reflect true dichotomies ("crisp sets"), a great deal of what we can observe falls along a scale between the true extremes or falls in a set with inherently fuzzy boundaries.⁹ Thus, what we think of as a full glass (a glass filled to a level just far enough below the rim to prevent spillage in ordinary use) is a ninety percent full glass and a ten percent empty glass. A game won at the expense of an injury to a key player is a game eighty percent won and twenty percent lost. As one text has put it:

3. I have demonstrated the sliding scale concept elsewhere, as it relates to two discrete areas of international law. See Frederic L. Kirgis, *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146 (1987); Frederic L. Kirgis, *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304 (1994). Some other legal scholars have used the concept without identifying a broad theorem. See, e.g., Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847, 852 (1999); William M. Richman, *Part II—A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 CAL. L. REV. 1328, 1336-46 (1984). The present Article widens the scope of the inquiry without revisiting international law.

4. See, e.g., *Fotomat Corp. of Fla. v. Chanda*, 464 So. 2d 626, 629 (Fla. Dist. Ct. App. 1985) (referring to a "balancing approach" requiring a "certain quantum of procedural plus a certain quantum of substantive unconscionability").

5. See, e.g., *In re Estate of Elson*, 458 N.E.2d 637 (Ill. App. Ct. 1983) (balancing factors in change of domicile case without articulating the use of a sliding scale).

6. See, e.g., *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000), cert. granted sub nom. *Ashcroft v. ACLU*, 121 S. Ct. 1997 (2001) (No. 00-1293); *Maxwell v. Fidelity Fin. Serv., Inc.*, 907 P.2d 51 (Ariz. 1995).

7. See, e.g., BART KOSKO, *FUZZY THINKING: THE NEW SCIENCE OF FUZZY LOGIC* 18 (1993); DANIEL MCNEILL & PAUL FREIBERGER, *FUZZY LOGIC* 12 (1993).

8. KOSKO, *supra* note 7, at 18.

9. See MARTIN GARDNER, *WEIRD WATER & FUZZY LOGIC* 158 (1996); GEORGE J. KLIR & TINA A. FOLGER, *FUZZY SETS, UNCERTAINTY, AND INFORMATION* 3 (1988).

Temperature, distance, beauty, friendliness, greenness, pleasure—all come on a sliding scale. The Canadian Rockies are *very beautiful*. My next-door neighbor is *fairly lazy*. Boston is *quite close* to Cape Cod. Likewise, objects are objects to degrees. Astronomers say Jupiter is a *star* to a weak extent. Egypt was partly a *colony* of Britain; the United States was largely one. A dagger is very much a *weapon*, while a curtain rod is scarcely a *weapon* at all. Such sliding scales often make it impossible to distinguish members of a class from nonmembers. When does a hill become a mountain, or a pond a lake? How far is far?¹⁰

Fuzzy logic in its full regalia is much more splendid than this.¹¹ For purposes of developing a sliding scale theorem, however, we need only accept that in the observable world, hot and cold, or fast and slow, are not absolutes. There are degrees of “hotness” and “coldness.” We are dealing, in other words, with fuzzy sets.

Nor do we need to accept fuzzy logic in every corner of human existence in order to accept it for much of what can be observed; in particular, we need not necessarily accept it as ubiquitous in order to find it at work in the law. Indeed, we might expect to find it especially in the law, since so many legal concepts and doctrines have fuzzy boundaries. Consider, for example, the technique (though not the language) of fuzzy logic in the classic two-part article written by Lon L. Fuller and William R. Perdue, Jr., in the 1930s, *The Reliance Interest in Contract Damages*.¹² Fuller and Perdue attacked the then-prevailing view that a promise is either contractual—in which case expectancy damages are to be awarded for a breach—or it is not contractual—in which case no damages should be awarded.¹³ Professor Fuller later said, “I consider the contribution made in my article on the reliance interest to lie, not in calling attention to the reliance interest itself, but in an analysis which breaks down the contract-no contract dichotomy, and substitutes an ascending scale of enforceability.”¹⁴

As all students of the law know, fuzziness inheres in the law of property as well. According to a leading treatise, “[t]itle, as all prop-

10. MCNEILL & FREIBERGER, *supra* note 7, at 12.

11. See Edward S. Adams & Daniel A. Farber, *Beyond the Formalism Debate: Expert Reasoning, Fuzzy Logic, and Complex Statutes*, 52 VAND. L. REV. 1243, 1289-99, 1324-30 (1999).

12. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936) [hereinafter *Reliance Interest 1*]; L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages 2*: 46 YALE L.J. 373 (1937) [hereinafter *Reliance Interest 2*].

13. *Reliance Interest 2*, *supra* note 12, at 418-20.

14. Letter from Lon L. Fuller, Professor, Duke University School of Law, to Karl N. Llewellyn, Professor, Columbia University School of Law (Dec. 8, 1938), reprinted in ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE* 41 (4th ed. 2001).

erty rights, is a relative concept. A person may have 'title' to property as against one person but not another."¹⁵ Nor is fuzziness limited to mundane areas of the law. Faced with the problem of deciding whether it had admiralty jurisdiction over salvage rights to the *R.M.S. Titanic* lying 400 miles off the coast of Newfoundland in 12,500 feet of water, the Court of Appeals for the Fourth Circuit came up with the concept of "shared sovereignty" by which it asserted "imperfect" in rem jurisdiction over the wreck, even though it recognized that admiralty tribunals in other countries might do so too.¹⁶

The United States Supreme Court has endorsed fuzziness as well. Declining to review the impeachment conviction of a federal judge, the Supreme Court said:

A controversy is nonjusticiable—i.e., involves a political question—where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . ." [T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.¹⁷

The questions to be examined here are whether we can find fuzzy logic at work in dual-element formulas across selected fields of the law, and if so, how it operates in those fields. If it is indeed at work, it should not only supply an interesting theorem about how the law works; it should also help us predict how cases within its ambit will be decided. No claim is made that it is a precise predictive tool; just that it is *helpful* in those situations where it operates.

C. *An Example*

To give an example that will be developed more fully below, it is generally said that for a person to acquire a new domicile, there must be (a) a voluntary physical presence in the new state, and (b) an intent to make a home there.¹⁸ In practice, the more attached the physical

15. RALPH E. BOYER ET AL., *THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY* 1 (4th ed. 1991).

16. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 967-69 (4th Cir. 1999).

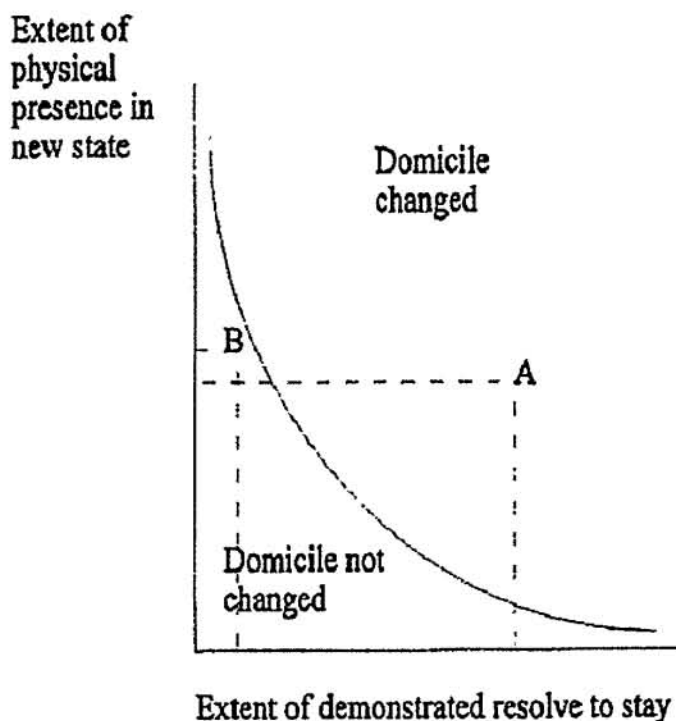
17. *Nixon v. United States*, 506 U.S. 224, 228-29 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (citations omitted).

18. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* §§ 15-18 (1971).

presence, the less exacting the decision-maker will be regarding a showing of intent (though some showing of intent will still be required).¹⁹ The reverse is also true: the clearer the intent to remain indefinitely, the less connected to the new territory the presence must be.²⁰

The sliding scale between these two elements may be illustrated by what looks like an economist's demand curve. The precise location and slope of the curve will shift depending on the ultimate issue to which the person's change of domicile is relevant, but the sliding scale principle is at work no matter what the ultimate issue is. In the diagram, the vertical axis represents the extent to which the person has established a physical presence in the new state. The horizontal axis represents the extent of the person's demonstrated resolve to put down roots there. The further up on the vertical axis, the more settled the person is in the new state; at the top, the person would be fully (100%) settled there. The further to the right on the horizontal axis, the clearer the resolve to stay; at the far right end, the person would be absolutely certain (at that moment) that he or she will stay there for a lifetime.

Figure 1



19. See discussion *infra* Part IV.A.

20. See discussion *infra* Part IV.A.

At any point along either axis, relevant factual influences are in play to some degree. Thus, at any point along the horizontal axis, such factors as the likely duration of the person's employment in the state, the extent of the person's tolerance of (or preference for) the physical characteristics of the area (e.g., mountains, seashore, climate, air quality) and the availability of amenities (e.g., sporting events, theaters, shopping) are in combination to form a fuzzy set. At the origin of an axis, there is an "empty set;" at the end of an axis, there is a "total set" for that axis.²¹

Within the constraint "that an object's degrees of membership in complementary groups must sum to unity"²² (i.e., must total one on a scale of zero to one, or 100% on a scale of zero percent to 100%) fuzzy logic is intentionally imprecise. Thus, in the diagram, very often the location of a point on either axis is more a matter of judgment than of precise observation. Consequently the diagrams used throughout this Article cannot be used as a bright-line predictor of outcomes in particular cases. Rather, the diagrams illustrate what is actually going on, in a form that has been simplified enough to be manageable, yet sufficiently focused on the relevant factors to be meaningful to students and practitioners of the law.

In Figure 1 above, any combination of established physical presence and a demonstrated resolve to remain that falls above the curve (e.g., at the intersection of the two dotted lines at point *A*) results in a change of domicile to the new state; any combination below the curve (as at point *B*) leaves the domicile unchanged. Point *B* would represent, for example, a person in the military who has been assigned to a relatively long-term duty station in a new state, but who has not demonstrated any real intent to stay once the military service is completed.

The fields selected for examination here are basic to the law. This Article will examine how the principle applies and adapts itself to discrete issues of contract law, civil procedure and conflict of laws.²³

II. CONTRACT ISSUES

A. *Liquidated Damages Clauses*

According to the current Restatement of Contracts, a liquidated

21. See Bart Kosko & Satoru Isaka, *Fuzzy Logic*, SCI. AM., July 1993, at 76, 80 (illustrating this concept in a non-legal context).

22. *Id.* at 76.

23. Other fruitful areas of further inquiry include international law, see *supra* note 3, and constitutional criminal procedure. See *United States v. Chaidez*, 919 F.2d 1193 (7th Cir. 1990) (applying a sliding scale approach to determine the constitutionality of searches and seizures).

damages clause in a contract is enforceable, "but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss."²⁴ Although this is stated as a reasonableness test consisting of two independent elements—(a) the anticipated or actual loss (either one will normally suffice), and (b) the difficulty of proving a loss—the Restatement's comment makes it clear that the two elements are interdependent:

A determination whether the amount fixed is a penalty turns on a combination of these two factors. If the difficulty of proof of loss is great, considerable latitude is allowed in the approximation of anticipated or actual harm. If, on the other hand, the difficulty of proof of loss is slight, less latitude is allowed in that approximation.²⁵

The common law cases bear this out, though they do not all say so. However, at least one state Supreme Court has been quite explicit. The Wisconsin Supreme Court has said in a case involving a liquidated damages clause in an employment contract that there are three factors in determining the validity of the clause.²⁶ It said the first—whether the parties intended to provide for damages or for a penalty—was rarely helpful.²⁷ The other two were the traditional ones. The court said:

The second factor—the "difficulty of ascertainment" test—assists in determining the reasonableness of the clause. The greater the difficulty of ascertaining damages due to breach, the more probable it is that the stipulated damages are reasonable. .

. .

. . . .
The third factor—does the clause represent a reasonable forecast of harm caused by the breach—is intertwined with the second factor.²⁸

When the liquidated amount in a contract is reasonable in light of either the anticipated or actual loss, as it was in the Wisconsin case, the courts pay little attention to the difficulty of ascertaining damages, at least if it is not an adhesion contract.²⁹ When the loss would be quite

24. RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981).

25. *Id.* at cmt. b.

26. *Koenings v. Joseph Schlitz Brewing Co.*, 377 N.W.2d 593, 600 (Wis. 1985).

27. *Koenings*, 377 N.W.2d at 600.

28. *Id.* (citations omitted).

29. *See id.*; *see also* *Farmers Export Co. v. M/V Georgis Prois*, 799 F.2d 159 (5th Cir. 1986); *Vines v. Orchard Hills, Inc.*, 435 A.2d 1022 (Conn. 1980); *Taos Constr. Co. v. Penzel Constr. Co.*, 750 S.W.2d 522 (Mo. App. 1988); *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.*, 361 N.E.2d 1015 (N.Y. 1977).

difficult to ascertain in advance, the courts are inclined to uphold a liquidated damages clause without close examination of reasonableness—even of reasonableness with the benefit of hindsight.³⁰ In practice, however, the reasonableness element is likely to weigh more heavily in the equation than is the difficulty-of-ascertainment element.³¹

The analysis under article 2 of the U.C.C. is essentially the same. Section 2-718(1) puts forth three elements for a valid liquidated damages clause—the two we have been considering, plus “the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.”³² Professor Hawkland says that the three stated elements are simply factors to consider in determining whether a liquidated damages clause is reasonable.³³ The third element, he says, probably illustrates a common situation that falls under the second element relating to the difficulty of proof of loss; otherwise, it is difficult to understand what purpose it serves.³⁴ Hawkland adds that, contrary to his earlier view, it is not necessary to satisfy each of the elements; instead, they are indicators of reasonableness.³⁵ The cases under section 2-718(1) tend to use the common law approach—the sliding scale.³⁶

As one would expect, courts are likely to shift the sliding scale to require a greater degree of compliance with the variable elements when the liquidated damages clause appears in an adhesion contract. A court may strike down a liquidated damages clause in an adhesion contract as unconscionable if it does not closely approximate the anticipated or actual damages (without much or any reference to the difficulty of proof of loss)³⁷ or the court may simply apply stricter scrutiny to each of the two traditional elements than courts normally do when a contract,

30. See, e.g., *Yockey v. Horn*, 880 F.2d 945 (7th Cir. 1989); *Better Food Mkts v. Am. Dist. Tel. Co.*, 253 P.2d 10 (Cal. 1953); *Growney v. CMH Real Estate Co.*, 238 N.W.2d 240 (Neb. 1976). If the actual damage turns out to be zero, some courts will decline to enforce a clause liquidating damages at a substantial sum, even if it was a reasonable estimate of difficult-to-determine damages as of the date of the contract. See *Colonial at Lynnfield, Inc. v. Sloan*, 870 F.2d 761 (1st Cir. 1989); accord *RESTATEMENT (SECOND) OF CONTRACTS* § 356 cmt. b (1981) (calling this an “extreme case”). But see *Kelly v. Marx*, 705 N.E.2d 1114, 1116-17 (Mass. 1999).

31. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 591-92 (4th ed. 1998); E. ALLAN FARNSWORTH, *CONTRACTS* 844-47 (3d ed. 1999).

32. U.C.C. § 2-718(1) (2000).

33. 2 WILLIAM D. HAWKLAND, *UNIFORM COMMERCIAL CODE SERIES* § 2-718:2 (1998); see also Roy Ryden Anderson, *Liquidated Damages Under the Uniform Commercial Code*, 41 SW. L.J. 1083, 1092 (1988).

34. HAWKLAND, *supra* note 33, § 2-718:4.

35. *Id.*

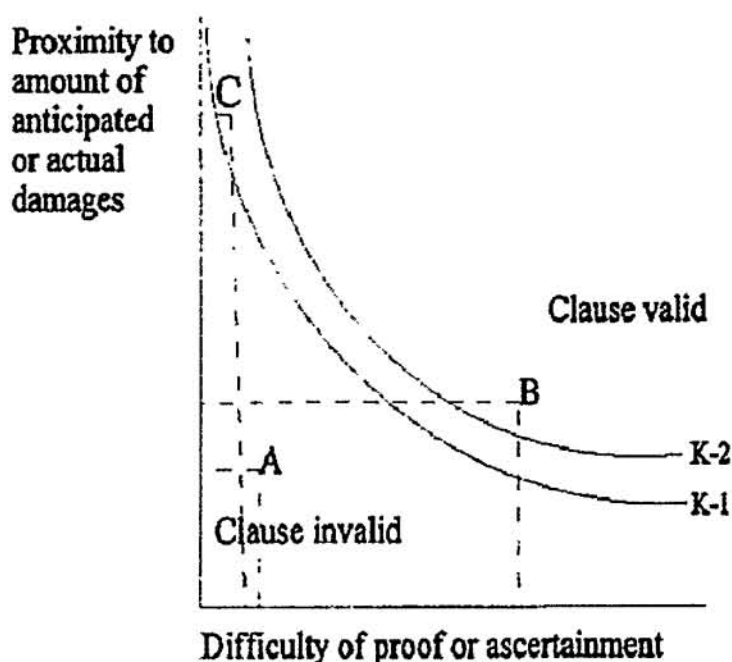
36. See, e.g., *Grumman Flexible Corp. v. City of Long Beach*, 505 F. Supp. 623 (E.D.N.Y. 1980); *Lee Oldsmobile, Inc. v. Kaiden*, 363 A.2d 270 (Md. Ct. Spec. App. 1976); *Chien v. Tova Realty*, 573 N.Y.S.2d 855 (N.Y. Civ. Ct. 1991); *Baker v. Int'l Record Syndicate, Inc.*, 812 S.W.2d 53 (Tex. Ct. App. 1991); see also Anderson, *supra* note 33, at 1091.

37. See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 163-64 (5th ed. 2000) and cases cited therein.

or at least the liquidated damages clause, is subject to negotiation.³⁸ As one state supreme court has put it, "courts are beginning to look with favor upon stipulated damage provisions between parties who have equality of opportunity for understanding and insisting upon their rights."³⁹ The implication, of course, is that courts will look with less favor on these provisions when there is no such equality of opportunity.⁴⁰

In the diagram below, the curve shifts to the northeast when the terms of the liquidated damages clause are non-negotiable. The diagram relates only to liquidated damages clauses, as distinguished from clauses limiting consequential damages.

Figure 2



In Figure 2, the lower curve (K-1) is the validation curve for a liquidated damages clause in a negotiated (or at least a negotiable) contract. The upper curve (K-2) represents a contract containing a non-

38. See, e.g., *H.J. McGrath Co. v. Wisner*, 55 A.2d 793 (Md. 1947); *Lee Oldsmobile*, 363 A.2d at 274-76; *Chien*, 573 N.Y.S.2d at 857-58.

39. *Waggoner v. Johnston*, 408 P.2d 761, 770 (Okla. 1965) (quoted with approval in Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 593 n.104 (1977)).

40. See *Weber v. Riviera*, 841 P.2d 534, 537-38 (Mont. 1992) (citing *Waggoner* and striking down a rigid liquidated damages clause in a form contract).

negotiable liquidated damages clause. The curves approach the vertical axis more closely than they do the horizontal axis, reflecting the courts' greater inclination to uphold a clause relatively high on the proximity scale and relatively low on the difficulty-of-ascertainment scale than vice-versa.

Any combination of the two relevant factors that intersects below the K-1 curve (as at point *A*) would lead a court not to enforce even a negotiated clause; any combination that intersects above the K-2 curve (as at point *B*) would be upheld, even if the clause was non-negotiable. An intersection between the curves (as at point *C*) would result in upholding a negotiated or negotiable clause, but striking down a non-negotiable one.

Point *C* represents an actual case, *H.J. McGrath Co. v. Wisner*.⁴¹ A cannery agreed to buy about eleven tons of tomatoes from a farmer during the growing season at an agreed price, and had the farmer sign its standard form contract.⁴² The contract contained a clause setting liquidated damages at \$300 if the farmer breached.⁴³ Although the clause on its face was applicable no matter how early or late in the season the farmer breached, experience showed that farmers were likely to breach fixed-price contracts, if at all, late in the season when supply became scarce and spot market prices rose.⁴⁴ The \$300 figure was tailored to such a prospective breach.⁴⁵ The farmer did breach late in the season, causing the cannery actual damages of \$275.⁴⁶ The court rejected the liquidated damages clause because it could have been invoked even if the farmer had breached earlier in the season when the stipulated amount would have been considerably in excess of the actual damages.⁴⁷ A negotiated clause surely would have been upheld.⁴⁸

B. Unconscionability

The unconscionability doctrine, codified for the sale of goods in Uniform Commercial Code section 2-302,⁴⁹ extends beyond that *genre*

41. 55 A.2d 793 (Md. 1947).

42. *Wisner*, 55 A.2d at 794.

43. *Id.*

44. *Id.* at 794-95.

45. *Id.* at 795.

46. *Id.* at 796.

47. *Wisner*, 55 A.2d at 796.

48. See 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS 383-84 (2d ed. 1964) (espousing an outcome inconsistent with *Wisner*, without distinguishing between adhesion and non-adhesion contracts); see also Ian R. Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495, 511-13 (1962).

49. U.C.C. § 2-302(1) (2000). The U.C.C. states:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce

to consumer contracts of all sorts, and even on occasion to contracts between commercial parties.⁵⁰ Its classic statement appears in *Williams v. Walker-Thomas Furniture Co.*, where Judge J. Skelly Wright identified the following two elements: absence of meaningful choice on the part of one party, and terms unreasonably favorable to the other party.⁵¹ The former element is often characterized by "bargaining naughtiness" by a party with greatly superior bargaining power.⁵² The latter element is generally characterized by very harsh terms in the contract.⁵³ The two elements have come to be known respectively as procedural and substantive unconscionability.⁵⁴

Several commentators have pointed out that a sliding scale has been used between procedural and substantive unconscionability, particularly when the abuse in one category—procedural or (especially) substantive—is pronounced.⁵⁵ Nevertheless, one leading commentator asserts, without recognizing a sliding scale, that the conduct must be unconscionable in both the procedural and substantive aspects. He concedes that there have been a few exceptions, but he does not seem to recognize degrees of procedural and substantive unconscionability.⁵⁶ The

the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Id.

50. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) (tracking U.C.C. section 2-302 almost verbatim, without limiting it to sales of goods or to consumer contracts). The Reporter's Note to section 208 says that it follows U.C.C. section 2-302. See also CALAMARI & PERILLO, *supra* note 31, at 370-71; 8 WILLISTON ON CONTRACTS § 18:5 (4th ed. 1998) [hereinafter WILLISTON].

51. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

52. See *Williams*, 350 F.2d at 449. Professor Leff appears to have coined the phrase, "bargaining naughtiness." See Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

53. See 1 WHITE & SUMMERS, *supra* note 37, at 156. Sometimes the second element is stated in terms of unreasonable allocation of risks in the contract. See also *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122 (Cal. Ct. App. 1982) (stating the second element in terms of unreasonable allocation of risks in the contract); *American Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477, 480 (Cal. Ct. App. 1996) (stating the second element as a bargain so unequal as to shock the conscience).

54. See Leff, *supra* note 52, at 487-88.

55. See 1 WHITE & SUMMERS, *supra* note 37, at 168-69; WILLISTON, *supra* note 50, § 18:14; John A. Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 950-51, 968 (1969); see also Jonathan A. Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 CAL. L. REV. 28, 42 n.56 (1977).

56. See 1 HAWKLAND, *supra* note 33, § 2-302.5. The first case Hawkland cites for the proposition that both elements must be satisfied is *NEC Technologies, Inc. v. Nelson*, 478 S.E.2d 769 (Ga. 1996). But the Georgia Supreme Court said in that case:

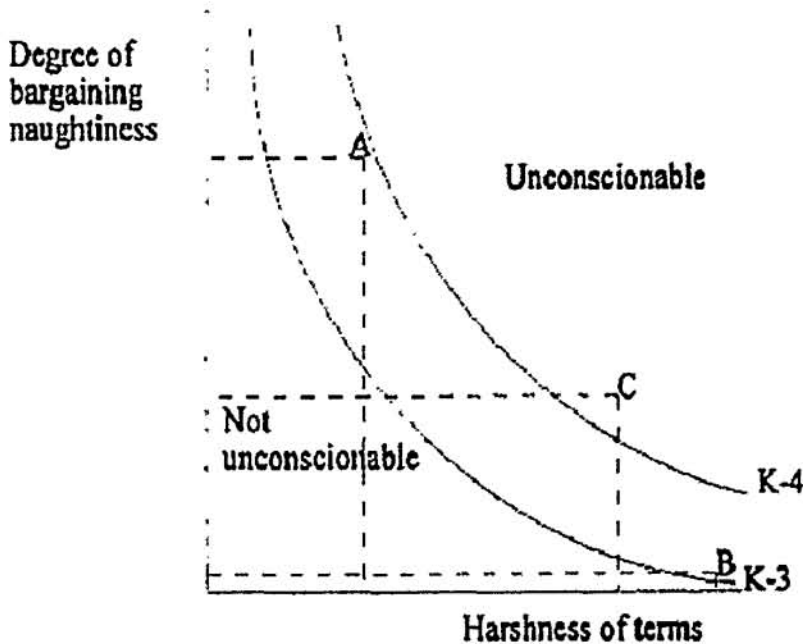
Research supports the statement made in *Fotomat Corp. of Fla. v. Chanda*, [464 So. 2d 626, 629 (Fla. Dist. Ct. App. 1985)], that "[m]ost courts take a "balancing approach" to the unconscionability question, and to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability.'

NEC Techs., Inc., 478 S.E.2d at 773 n.6. This, of course, is an application of the slid-

cases do not support him. Some courts have acknowledged using a sliding scale in unconscionability cases;⁵⁷ others do it *sub silentio* when the abuse in one category is too much to ignore.⁵⁸

In the diagram below, as in Figure 2, there are two curves. The lower curve (K-3) applies to consumer contracts. The upper curve (K-4) applies to contracts between commercial parties. The K-4 curve reflects the greater leeway courts give to seemingly one-sided commercial contract provisions than they do to one-sided provisions in consumer contracts. Both curves approach the horizontal axis more closely than the vertical, reflecting the courts' tendency to find unconscionability on the basis of extremely one-sided terms even if there is little evidence of bargaining naughtiness.

Figure 3



ing scale theorem.

57. See *Hellstrom v. North Slope Borough*, 797 P.2d 1192, 1200 (Alaska 1990); *Carboni v. Arrospeide*, 2 Cal. Rptr. 2d 845, 849 (Cal. Ct. App. 1991); *Fotomat Corp. v. Chanda*, 464 So. 2d 626, 629 (Fla. Dist. Ct. App. 1985); *NEC Techs., Inc. v. Nelson*, 478 S.E.2d 769, 773 n.6 (Ga. 1996); *Funding Sys. Leasing Corp. v. King Louie Int'l, Inc.*, 597 S.W.2d 624, 635 (Mo. Ct. App. 1979); *State v. Wolowitz*, 468 N.Y.S.2d 131, 145 (N.Y. App. Div. 1983).

58. Included among these cases are those finding unconscionability on the basis of lopsided terms in the contract (i.e., extreme cases in which the sliding scale tips overwhelmingly toward substantive unconscionability). See, e.g., *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83-84 (3d Cir. 1948); *Maxwell v. Fidelity Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995); *Am. Home Improvement, Inc. v. MacIver*, 201 A.2d 886, 889 (N.H. 1964).

Point *A* in Figure 3 represents the leading case, *Williams v. Walker-Thomas Furniture Co.*⁵⁹ Walker-Thomas sold a stereo set on credit to a woman on welfare, knowing that she was a single mother with seven children.⁶⁰ A "rather obscure provision" in the contract provided that her payments would be spread pro rata among all the items purchased.⁶¹ This meant that a balance would remain due (and a lien would remain imposed) on every item she had purchased until she paid the full balance due on all items.⁶² There was no indication that the price charged for the stereo set or any of the other items was excessive.⁶³ The trial court condemned the furniture company's business practices, but thought that it could not hold the contract unconscionable under the common law of the District of Columbia.⁶⁴ The Court of Appeals for the D.C. Circuit reversed and remanded, holding that there were adequate grounds upon which the trial court might find unconscionability.⁶⁵ The harshness of the pro rata payment clause entered into the decision, but the lack of any indication of exorbitant pricing would keep the relevant point on the horizontal axis from being far to the right. The court seems to have given considerable weight to the company's apparent misuse of its superior bargaining power.⁶⁶

Point *B* illustrates *Maxwell v. Fidelity Financial Services, Inc.*⁶⁷ A door-to-door salesman sold the plaintiff a solar home water heater for \$6,512.⁶⁸ Ten-year financing at 19.5% interest brought the total cost to almost \$15,000.⁶⁹ Under the security terms of the contract, in the event of a default the seller not only could repossess the water heater, but also could foreclose on the purchaser's modest home.⁷⁰ Reversing the trial court's grant of summary judgment to the defendant, the Arizona Supreme Court held that unconscionability can be established with a showing of substantive unconscionability alone (although the opinion also suggests that the court suspected some degree of procedural unconscionability).⁷¹

Point *C* reflects the holding in *Ilkhchooyi v. Best*,⁷² a commercial

59. 350 F.2d 445 (D.C. Cir. 1965).

60. *Williams*, 350 F.2d at 448.

61. *Id.* at 447.

62. *Id.*

63. *See id.* at 447-48.

64. *Id.* at 448. The U.C.C. had not been enacted in the District of Columbia at the time of the transaction. *See Williams*, 350 F.2d at 448.

65. *Id.* at 450.

66. *Id.*

67. 907 P.2d 51 (Ariz. 1995).

68. *Maxwell*, 907 P.2d at 53.

69. *Id.*

70. *Id.* at 53-54.

71. *See id.* at 59. Point *B* in Figure 3 also illustrates the other cases cited *supra* note 58.

72. 45 Cal. Rptr. 2d 766 (Cal. Ct. App. 1995).

contract case. Plaintiff bought a dry cleaning business from third parties and took a sublease of the premises.⁷³ The sublease was terminated before its term expired, when the sublessors went bankrupt.⁷⁴ At that point the lessor, a management company, sent the plaintiff a new lease which contained prominent terms increasing the security deposit and adding the wife of the plaintiff's business partner as a lessee.⁷⁵ When the plaintiff objected to these two changes, the lessor allowed him to delete his business partner's wife's name as a lessee, but declined to make any other changes.⁷⁶ The lessor's representative assured the plaintiff that in other respects the new lease was basically the same as the terminated sublease.⁷⁷ In fact, unnoticed by the plaintiff at the time, it contained a new paragraph 14c that gave the lessor the right to withhold its consent to any transfer of the leasehold unless the plaintiff paid it three-quarters of any compensation he might receive for a covenant not to compete with the purchaser of the business.⁷⁸ When the plaintiff sold the business and attempted to assign the lease to the buyer, the lessor demanded \$30,000 of the \$40,000 he was to receive from the buyer for his covenant not to compete.⁷⁹ The court struck down paragraph 14c, citing both procedural and substantive unconscionability.⁸⁰ The court conceded that the procedural infirmities were not overwhelming, but, expressly applying a sliding scale, found the profit-sharing clause sufficiently unfair to tip the balance in favor of unconscionability.⁸¹ Point C, in other words, was placed far enough to the right to be above even the K-4 (commercial contract) curve.

III. PROCEDURAL ISSUES

A. *Preliminary Injunctions*

"The traditional standard for granting a preliminary injunction," the United States Supreme Court has said, "requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits."⁸² This, of course, is a two-factor test. However, in the same opinion the Supreme Court said

73. *Ilkchooyi*, 45 Cal. Rptr. 2d at 768.

74. *Id.*

75. *Id.* at 769.

76. *Id.*

77. *Id.*

78. *Ilkchooyi*, 45 Cal. Rptr. 2d at 769.

79. *Id.*

80. *Id.* at 775-76.

81. *Id.* at 775.

82. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

that a district court must weigh the interests on both sides.⁸³ On the surface, that supplies a third factor. Treatises and several cases add a fourth: the public interest.⁸⁴ Sometimes this fourth factor is stated as non-party interests, which could be simply the private interests of a relatively small group of non-parties.⁸⁵

In cases directly involving constitutional claims, federal statutes or regulations that embody a clearly identifiable public policy, the public interest factor is often stressed—sometimes to the exclusion of the other factors,⁸⁶ but not always.⁸⁷ In a recent case involving freedom of speech on the Internet, the Court of Appeals for the Third Circuit affirmed the granting of a preliminary injunction against enforcement of the federal Child Online Protection Act,⁸⁸ relying heavily on the plaintiff's likelihood of successfully challenging the act on the merits.⁸⁹ The court gave cursory treatment to the other factors, relegating the public interest factor to a single paragraph at the end of the opinion.⁹⁰ And in the highly-publicized *Napster* case involving a copyright infringement challenge to the use of a popular internet site for free downloading and uploading of music, the Court of Appeals for the Ninth Circuit affirmed, subject to some modification, the District Court's issuance of a preliminary injunction based on a combination of the plaintiffs' likelihood of success on the merits and a balancing of hardships in their favor.⁹¹ The public interest was barely mentioned.⁹²

In the typical lawsuit between private parties, where no prominent statute or deep-seated public policy is at the heart of the case, the public interest factor is unlikely to be important. Nor are private non-party interests important unless one of the parties asserts them and they are legally protected interests that are likely to be affected by the litigation in some concrete manner.⁹³ The discussion below is limited to cases in which the public interest and legally protected non-party interests are

83. *Doran*, 422 U.S. at 931.

84. See 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed.1995) and cases cited therein. See also DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 118 (1991).

85. See Laura W. Stein, *The Court and the Community: Why Non-Party Interests Should Count in Preliminary Injunction Actions*, 16 REV. LITIG. 27 (1997).

86. See 11A WRIGHT ET AL., *supra* note 84, § 2948.4.

87. See, e.g., *Costandi v. AAMCO Automatic Transmissions, Inc.*, 456 F.2d 941 (9th Cir. 1972) (involving the Sherman Act); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953) (involving the Clayton Act).

88. 47 U.S.C. § 231 (West Supp. 2000).

89. *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000), *cert. granted sub nom. Ashcroft v. ACLU*, 121 S. Ct. 1997 (2001).

90. *ACLU v. Reno*, 217 F.3d at 180.

91. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013, 1019, 1022, 1024, 1025 (9th Cir. 2001).

92. See *id.* at 1028 (addressing briefly Napster's First Amendment argument).

93. See Stein, *supra* note 85, at 31-32, 50-55.

absent or too marginal to be included in the formula.⁹⁴

Irreparable injury and the balancing of interests may be regarded as a single factor.⁹⁵ In practice, "irreparable" injury to the moving party is simply a fuzzy set where the harm to the interests of the moving party, if the preliminary injunction is denied, is likely to outweigh the harm to the interests of the resisting party if the injunction is granted. We are left with a sliding scale between the balance of hardships, on one hand, and the likelihood of success on the merits, on the other. As Judge Richard Posner has put it:

If the plaintiff does show some likelihood of success, the court must then determine how likely that success is, because this affects the balance of relative harms The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor. This is a most important principle, and one well supported by cases in this and other circuits, and by scholarly commentary.⁹⁶

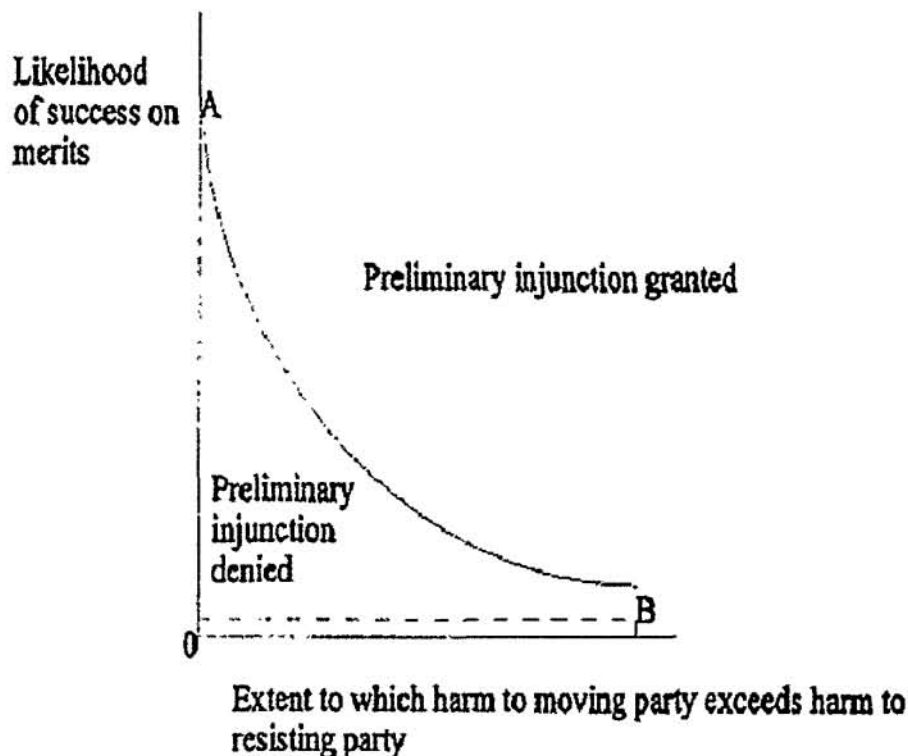
If the case does not significantly affect the public interest, the sliding scale diagram for issuance of a preliminary injunction takes the form of Figure 4 below.

94. In a number of cases, courts have felt compelled to mention the public interest factor, but have treated it cursorily or have said that it was not important on the facts of the case. *See, e.g., Meridian Mut. Ins. Co. v. Meridian Ins. Group, Inc.*, 128 F.3d 1111, 1121 (7th Cir. 1997); *J.E. Hanger, Inc. v. Scussel*, 937 F. Supp. 1546, 1556-57 (M.D. Ala. 1996); *Sluiter v. Blue Cross and Blue Shield of Michigan*, 979 F. Supp. 1131, 1145 (E.D. Mich. 1997); *La Calhène, Inc. v. Spolyar*, 938 F. Supp. 523, 531 (W.D. Wis. 1996).

95. *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 383 (7th Cir. 1984).

96. *Roland Mach. Co.*, 749 F.2d at 387 (7th Cir. 1984). Judge Posner's approach was based on a balancing model set forth in John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 540-48 (1978). Judge Posner articulated his approach mathematically in *Am. Hosp. Supply Corp. v. Hosp. Prod. Ltd.*, 780 F.2d 589, 593-94 (7th Cir. 1986), but the mathematics may have proved too daunting for trial judges. *See, e.g., Cleveland Hair Clinic, Inc. v. Puig*, 968 F. Supp. 1227, 1241 (N.D. Ill. 1996). The wording of the sliding scale formula differs somewhat among the federal circuits. *See, e.g., Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001); *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999); *Williams v. State Univ. of New York*, 635 F. Supp. 1243, 1250 (E.D. N.Y. 1986). For other sliding scale cases, see *Duct-O-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506 (7th Cir. 1994); *United States v. Odessa Union Warehouse Corp.*, 833 F.2d 172, 174 (9th Cir. 1987); *Conant v. McCaffrey*, 172 F.R.D. 681 (N.D. Cal. 1997); *United States v. Any & All Assets of Shane Co.*, 816 F. Supp. 389 (M.D. N.C. 1991); *Dixon v. Thatcher*, 742 P.2d 1029 (Nev. 1987); *Penn v. Transp. Lease Hawaii, Ltd.*, 630 P.2d 646 (Haw. Ct. App. 1981). *See also* Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 870-84 (1989) (advocating a balancing test without fully accepting Judge Posner's approach).

Figure 4



It has been pointed out that likelihood of success, like irreparable harm, is not a simple proposition.⁹⁷ Not only are there degrees of likelihood, but there may be a question about what constitutes success—a fuzzy set. For example, there may be a strong likelihood of partial success.⁹⁸ In such a case, the vertical axis in the diagram may be regarded as a measure of the likelihood that the moving party will succeed in obtaining satisfactory relief, even if it is not the full relief the complaint sought.

Point zero, at the intersection of the vertical and horizontal axes, is the point on the horizontal axis at which the harm to the moving party, if the preliminary injunction is not granted, is equivalent to the harm to the resisting party if the injunction is granted. The harm to the moving party exceeds that to the resisting party by greater degrees as we proceed to the right on the horizontal axis.

The preliminary injunction curve touches the top of the vertical axis (point A), indicating that very high likelihood of total success may well induce the court to grant the injunction even when the harm to the mov-

97. See LAYCOCK, *supra* note 84, at 120.

98. See *id.*

ing party, if it is not granted, would be no greater than the harm to the resisting party if the injunction is granted.⁹⁹ The curve does not touch the horizontal axis, indicating that there must be at least some prospect of success if the preliminary injunction is to be granted.¹⁰⁰ This is so even if the moving party can show serious harm in the absence of the injunction and the resisting party can show little or no harm if the injunction is issued (point *B*). Nevertheless, if the moving party makes a considerably stronger showing of harm than the resisting party does, the prospect of success need not be great in order to get the preliminary injunction.¹⁰¹ Hence, the curve comes close to the horizontal axis at its outermost point.

B. Personal Jurisdiction

In order to meet due process standards under the *International Shoe* formula memorized by all first-year law students, personal jurisdiction in a state court over an absent defendant depends on "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"¹⁰² In light of later cases,¹⁰³ it is clear that the *International Shoe* formula contains two elements: power of the forum state over the defendant or the transaction (stemming from the defendant's or the transaction's minimum contacts with it), and fairness to the parties (traditional notions of fair play and substantial justice).¹⁰⁴

99. See 11A WRIGHT ET AL., *supra* note 84, § 2948.3. For a recent federal case applying this approach without saying so, see *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245 (2d Cir. 1999). For examples of state court cases turning explicitly or *de facto* on a strong showings of prospective success on the merits, see 14859 *Moorpark Homeowner's Ass'n v. VRT Corp.*, 74 Cal. Rptr. 2d 712 (Cal. Ct. App. 1998); *Allen v. Prime Computer, Inc.*, 540 A.2d 417 (Del. 1988); *Penn v. Transp. Lease Hawaii, Ltd.*, 630 P.2d 646 (Haw. Ct. App. 1981); *Commonwealth v. County of Suffolk*, 418 N.E.2d 1234 (Mass. 1981); *Clark County School Dist. v. Buchanan*, 924 P.2d 716 (Nev. 1996). *But see* *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203-04 (9th Cir. 1980) (stating that "at least a minimal tip in the balance of hardships must be found even when the strongest showing on the merits is made"). *Id.*

100. See, e.g., *St. Croix of Park Falls, Ltd. v. Maurice Sporting Goods, Inc.*, 2000 WL 1053961, at *5-6 (N.D. Ill. July 31, 2000) (mem. opinion).

101. See 11A WRIGHT ET AL., *supra* note 84, at 189-95; *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380 (7th Cir. 1984); *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 526 F.2d 86 (9th Cir. 1975).

102. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 462 (1940)).

103. See *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Hanson v. Denckla*, 357 U.S. 235 (1958).

104. Cf. 1 ROBERT C. CASAD, *JURISDICTION IN CIVIL ACTIONS: TERRITORIAL BASIS AND PROCESS LIMITATIONS ON JURISDICTION OF STATE AND FEDERAL COURTS* § 2.05 (2d ed. 1991). Casad says the two-part test consists of (1) purposeful availment of the privilege of conducting activities in the forum state (or purposeful contact with the forum state), and (2) overall fairness.

The Due Process Clause is primarily a fairness check on what governmental units (including courts) may do to persons. But in certain contexts, including jurisdiction to adjudicate, it also reflects a concern that a governmental unit may try to arrogate to itself unseemly power. In *Hanson v. Denckla*, the Supreme Court stressed this power element in striking down Florida's exercise of personal jurisdiction over a Delaware trustee:

Those restrictions [on the personal jurisdiction of state courts] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.¹⁰⁵

The majority in *World-Wide Volkswagen Corp. v. Woodson* referred to this passage with approval, and then struck down Oklahoma's assertion of personal jurisdiction over the absent east coast Audi regional distributor and retail dealer primarily on power grounds.¹⁰⁶ The majority in *Asahi Metal Industry Co. v. Superior Court* struck down California's assertion of personal jurisdiction in an indemnity proceeding against a Japanese tire valve manufacturer on fairness (reasonableness) grounds,¹⁰⁷ though there was a question about the legitimate assertion of power as well.

Hanson, *World-Wide Volkswagen* and *Asahi* were specific-jurisdiction cases. That is, the state's assertion of jurisdiction over the absent defendant in each of those cases depended on whether the claim for relief arose out of (or perhaps whether it was sufficiently related to) the absent defendant's activities within the state. Additionally, it is well established that a state may assert general jurisdiction over a defendant that has ongoing, relatively strong connections with the state, such as domicile or a principal place of business there, even if the claim for relief does not arise out of (or is not related to) activities in the state.¹⁰⁸

Id. The first is essentially a test to determine the legitimacy of the forum state's assertion of power over the defendant; the second is self-explanatory. The Restatement (Second) of Conflict of Laws treats reasonableness (fairness) as an aspect of a state's power to exercise its judicial jurisdiction over a defendant. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 35-52 (1971).

105. *Hanson*, 357 U.S. at 251 (quoting *Int'l Shoe*, 326 U.S. at 319).

106. *World-Wide Volkswagen*, 444 U.S. at 294.

107. *Asahi Metal Indus. Co.*, 480 U.S. at 113-16.

108. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77 (1980). Professor Bril-

Professor William M. Richman has made a compelling case that the distinction between specific and general jurisdiction is fuzzier than the traditional analysis would have it.¹⁰⁹ He sees a sliding scale between the extent of the defendant's contacts with the forum, on one hand, and the relationship between the plaintiff's claim and the defendant's contacts with the forum, on the other.¹¹⁰ Under this view, some cases that fit neither the specific jurisdiction nor the general jurisdiction mold would nevertheless fall within due process bounds for personal jurisdiction.¹¹¹

There is indeed a sliding scale here, but it does not seem to be exactly as Professor Richman has articulated it. Rather, the sliding scale in long-arm cases seems to be between cognizant contacts with the forum (as a measure of legitimacy of the forum's power to assert personal jurisdiction over the absent defendant) and fair play toward the parties. I have styled the first element "cognizant contacts" rather than *Hanson v. Denckla's* "purposeful contacts" because, as a slightly broader test, it can encompass general jurisdiction as well as specific jurisdiction without doing violence to the *Hanson* formulation. The second element, fair play, includes the degree to which the claim is related to the cognizant contacts, but also such things as the strength of the state's interest in providing a forum for the plaintiff, reasonable statutory notice to persons in the defendant's shoes that the forum regards them as subject to its long-arm jurisdiction, any inconvenience to the defendant of defending in the state, and any benefits the defendant has received from sources in the forum state.¹¹² Although *Asahi* is the only Supreme Court case to say so, fair play also takes into account—or at least should take into account—any likelihood that the forum would make a constitutionally-suspect, plaintiff-favoring choice of its own law if it hears the case on the merits.¹¹³

mayer justifies the accepted bases for state court jurisdiction in power (sovereignty) terms. *Id.* at 85-88.

109. See RICHMAN, *supra* note 3; see also Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 663-64 (1988) (discussing a similar sliding scale); EUGENE F. SCOLES, ET AL., CONFLICT OF LAWS 300 n.12 (3d ed. 2000) (citing cases but not endorsing their sliding scale approach).

110. *Id.*

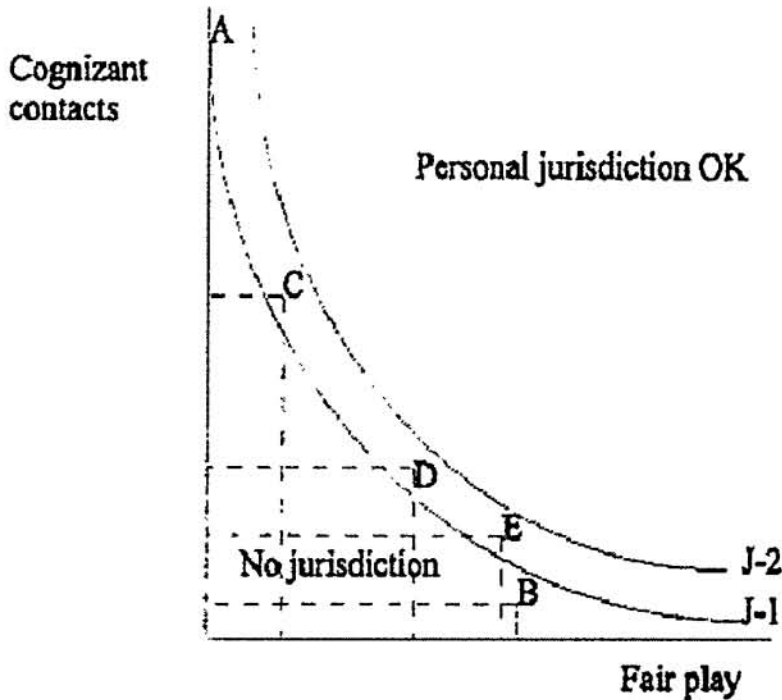
111. *Id.*

112. These fair play factors go a long way toward determining whether the defendant could have reasonably foreseen that it could be haled into court in the forum state. See *Shaffer v. Heitner*, 433 U.S. 186, 215-16 (1977); *World-Wide Volkswagen*, 444 U.S. at 297. Some cases in lower courts articulate these and other factors as separate elements of due process analysis, rather than subsuming them under "fair play." See, e.g., *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1487-88 (9th Cir. 1993).

113. See *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 115 (1987). Although the Supreme Court did not say so, *Hanson v. Denckla*, 357 U.S. 235 (1958), was also such a case. See Frederic L. Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 142-50 (1976). *Rush v. Savchuk*, 444 U.S. 320 (1980), may also fall in this category.

The diagram below illustrates all types of long-arm case in a state court in the United States without regard to the accepted taxonomy that distinguishes general jurisdiction from specific jurisdiction. It does not illustrate transient jurisdiction cases like *Burnham v. Superior Court*, where personal service within the state has been held to suffice without regard to other contacts or to any case-specific evaluation of fairness.¹¹⁴

Figure 5



Curve J-1 represents the case of the defendant who is either a citizen or resident of the United States, or of another country with a common law system. For such a defendant, any combination of cognizant contacts and fair play that falls below curve J-1 would indicate a lack of personal jurisdiction. Anything above curve J-1 would suffice for personal jurisdiction.

Curve J-2 represents the case of the defendant who is a citizen and resident of a non-common-law country and who does not have a headquarters or principal place of business in the United States. As will be shown below, the Supreme Court has applied more stringent jurisdictional standards to protect such defendants; hence the curve for them is to the right of the J-1 curve. For personal jurisdiction to be upheld in

114. 495 U.S. 604, 619 (1990).

these cases, the intersection between cognizant contacts and fair play would have to fall above curve J-2.

Curve J-1 touches the vertical axis at point *A*. That point represents the case against a defendant who is a domiciliary of the forum state or which has its corporate headquarters or principal place of business there. In other words, it is the classic general jurisdiction case, in which the extensive contacts will suffice without any case-specific examination of factors (other than proper notice to the defendant) that might go into a finding of fairness.

Neither of the J curves touches the horizontal axis. In other words, there are cases in which the cognizant contacts are so minimal that no assessment of fairness is needed in order to reject jurisdiction.

Point *B* reflects the combination of cognizant contacts and fair play in *World-Wide Volkswagen Corp. v. Woodson*.¹¹⁵ The purchaser of an Audi from a retail dealer in New York drove it west, heading for a new home in Arizona.¹¹⁶ An accident in Oklahoma severely injured three occupants of the car.¹¹⁷ The ensuing products liability action was brought in Oklahoma against the dealer and the New York regional distributor.¹¹⁸ There was no evidence that any other car the defendant distributor or dealer sold had ever made its way to Oklahoma.¹¹⁹ The United States Supreme Court held that Oklahoma could not constitutionally assert personal jurisdiction over the dealer or the distributor.¹²⁰ Their cognizant contacts with Oklahoma, according to the record in the case, were very near zero on the vertical axis. Justice Brennan's dissent demonstrated that it would not have been terribly unfair to require them to defend in Oklahoma, but that was not enough to bring point *B* above the J-1 curve.¹²¹

Point *C* illustrates *Asahi*. *Asahi*, a Japanese tire valve manufacturer, sold valves to a Taiwanese tire manufacturer, which in turn shipped tubes containing those valves to California.¹²² *Asahi* was aware that tires with its valves were going to California.¹²³ After an accident in California allegedly caused by an explosion of a defective tire, the Taiwanese manufacturer was sued.¹²⁴ It sought indemnification from *Asahi*.¹²⁵ *Asahi* contested personal jurisdiction.¹²⁶ Four Justices con-

115. 444 U.S. 286 (1980).

116. *World-Wide Volkswagen*, 444 U.S. at 288.

117. *Id.*

118. *Id.*

119. *Id.* at 289.

120. *Id.* at 291.

121. *World-Wide Volkswagen*, 444 U.S. at 302 (Brennan, J., dissenting).

122. *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 106 (1987).

123. *Asahi*, 480 U.S. at 107.

124. *Id.* at 106.

125. *Id.*

cluded that by placing its valves in the stream of commerce leading to California, Asahi had significant contacts with that state.¹²⁷ A fifth, Justice Stevens, clearly indicated that he thought so too.¹²⁸ The cognizant contacts thus may be plotted rather far up the vertical axis. But the fair play factors were weak. It was inconvenient for Asahi to defend in California. More importantly, California was asking Asahi to bear "unique burdens" by defending itself in an unfamiliar foreign legal system—a factor the majority said "should have significant weight in assessing the reasonableness" (fairness) of California's assertion of long-arm jurisdiction.¹²⁹ Moreover, the interests of the remaining plaintiff in the case (the Taiwanese tire manufacturer suing for indemnification) and of California in trying the case there were said to be slight.¹³⁰ To top it off, California would surely apply its own (generous) indemnification law to the merits—a constitutionally suspect choice of law under the circumstances.¹³¹

The resulting combination of fair play and cognizant contacts—point *C*—is below the *J-2* curve. But point *C* is above the *J-1* curve, indicating that if the defendant had been an American or Canadian company, or had its headquarters or principal place of business in the United States, personal jurisdiction over it probably would have been upheld. Not only would the sliding scale curve be lowered to *J-1*, but also the greater familiarity of the defendant with the forum's legal system would have pushed point *C* to the right.¹³²

Points *D* and *E* also fall between the two curves, but they illustrate opposite results. Point *D* depicts *Helicopteros Nacionales de Colombia, S.A. v. Hall*,¹³³ which involved a Colombian defendant in a Texas court, while point *E* represents *Burger King*,¹³⁴ where the defendant in federal district court in Florida was a Michigan resident.

In *Helicopteros*, Helicol was a Colombian company with its principal place of business in Bogotá.¹³⁵ It provided helicopter services in Peru for a Peruvian consortium pursuant to a contract partially negotiated in Texas, but signed in Peru.¹³⁶ Payments under the contract were

126. *Id.*

127. *Id.* at 111.

128. *Asahi*, 480 U.S. at 121 (Stevens, J., concurring in part and concurring in the judgment).

129. *Id.* at 114.

130. *Id.*

131. *Id.* at 115.

132. See *Aristech Chem. Int'l Ltd. v. Acrylic Fabricators Ltd.*, 138 F.3d 624, 628-29 (6th Cir. 1998), cited with approval in *SCOLES*, *supra* note 109, at 309.

133. 466 U.S. 408 (1984).

134. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

135. *Helicopteros*, 466 U.S. at 409.

136. *Id.* at 410.

to be made to Helicol's account with a bank in New York City.¹³⁷ Helicol had purchased most of its helicopters in Texas, had sent its prospective pilots to Texas for training, and had sent management and maintenance personnel to Texas for technical consultations.¹³⁸ It had no other business contacts with Texas.¹³⁹

In an action by the survivors and representatives of four United States citizens who died when one of Helicol's helicopters crashed in Peru while performing the contract, the United States Supreme Court held that Texas lacked general jurisdiction over Helicol.¹⁴⁰ The plaintiffs had conceded that special jurisdiction did not exist on the facts.¹⁴¹ Apparently, the plaintiffs also failed to argue that long-arm jurisdiction might be based on a hybrid category falling somewhere between traditional general and special jurisdiction.

Helicol had enough cognizant contacts with Texas to position the case part way up on the vertical axis, and they bore enough relation to the claim for relief to extend partially out on the horizontal axis. Professor Richman, without addressing the significance of Helicol's foreignness, has argued that the extent of Helicol's contacts with Texas, combined with the relationship of the plaintiffs' claim to those contacts, should have been enough to uphold Texas' long-arm jurisdiction.¹⁴² So they should, if Helicol had been incorporated in the United States or had its headquarters or principal place of business in the United States. Hence point *D* is above the J-1 curve.

The Supreme Court in *Helicopteros* did not mention Helicol's foreignness except in its statement of the facts,¹⁴³ so one cannot be sure whether the foreignness would have defeated jurisdiction if the plaintiff had argued all possible bases of long-arm jurisdiction. The reason the Supreme Court did not dwell on Helicol's foreignness probably was because, on the theory of the case presented to it (orthodox general jurisdiction), the traditional focus is on only one of the two usual factors—the cognizant contacts with the forum. Had the Court focused as well on fair play, it probably still would have denied jurisdiction. In effect, it would have applied the J-2 curve because of the hardship to the South American defendant in defending this wrongful death action in the United States. It is also relevant that the jury in Texas had

137. *Id.* at 411.

138. *Id.*

139. *Id.*

140. *Helicopteros*, 466 U.S. at 418.

141. *Id.* at 415. *But see id.* at 425 n.3 (Brennan, J., dissenting). Brennan expressed his disagreement with the Court's conclusion that the plaintiffs had conceded a lack of special jurisdiction. *Id.*

142. *See* Richman, *supra* note 3, at 1338-40.

143. *See Helicopteros*, 466 U.S. at 409-10.

awarded the plaintiffs more than a million dollars in damages¹⁴⁴—a staggering sum by South American juridical standards.

In *Burger King*, Rudzewicz, an individual in Michigan, obtained a franchise from Burger King, a Florida corporation with its principal place of business in Miami, to operate a fast food restaurant in a suburb of Detroit.¹⁴⁵ Although most or all of the franchise negotiations were conducted through Burger King's Birmingham, Michigan, district office, Rudzewicz knew he was obtaining a franchise from a company based in Florida.¹⁴⁶ His partner attended management courses in Miami, and the two of them purchased equipment from a Burger King affiliate in Florida.¹⁴⁷ The twenty-year franchise agreement provided that payments were to be made to Burger King in Miami, and contained a choice-of-law clause selecting Florida law.¹⁴⁸

When Rudzewicz and his partner fell far behind in their payments, Burger King terminated the franchise and sued them in federal district court in Florida, basing federal jurisdiction on diversity of citizenship and seeking damages for breach of contract.¹⁴⁹ The Supreme Court upheld the district court's long-arm jurisdiction over Rudzewicz despite his paucity of physical contacts with Florida.¹⁵⁰

Rudzewicz and his partner did, however, have one important contact with Florida—they initiated the effort to obtain a long-term franchise from the Florida company.¹⁵¹ More significant to the Supreme Court majority, though, was the fair play element. Speaking through Justice Brennan, the majority used a sliding scale: "[Fair play] considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."¹⁵²

Because Rudzewicz and his partner had signed a long-term contract binding them to deal closely with Burger King at its Miami headquarters, and had agreed in the contract that any disputes would be governed by Florida law, the majority said that Rudzewicz could reasonably foresee possible litigation there.¹⁵³ This amounted to a conclusion that there was a substantial degree of fairness in allowing Burger King

144. *Id.* at 412.

145. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464-66 (1985).

146. *Burger King*, 471 U.S. at 466-67.

147. *Id.*

148. *Id.* at 480-82.

149. *Id.* at 468.

150. *Id.* at 487.

151. *Burger King*, 471 U.S. at 466.

152. *Id.* at 477 (citing *Calder v. Jones*, 465 U.S. 783, 788-89 (1984)); see also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223-24 (1957).

153. *Burger King*, 471 U.S. at 480-81.

to haul Rudzewicz into court in Burger King's home state. It was just enough to place point *E* above the J-1 curve.

Had Rudzewicz been, let us say, a Philippine small business person dealing with Burger King from Manila, it is doubtful that the Supreme Court would have allowed a court in Florida to assert personal jurisdiction over him. The jurisdiction curve would have shifted outward to J-2.

Figure 5 does not attempt to chart *Shaffer v. Heitner*,¹⁵⁴ another leading Supreme Court case, but it could be incorporated into the diagram. The holder of one share of stock in the Greyhound Corporation, a Delaware company, filed a shareholder's derivative suit in a Delaware court against nonresident officers and directors for violation of their fiduciary duties to the corporation.¹⁵⁵ Jurisdiction was based on a Delaware statute that allowed sequestration of any property in Delaware of an absent defendant and sale of the property to satisfy any judgment.¹⁵⁶ Stock in a Delaware corporation was considered to have a Delaware *situs* for purposes of the statute.¹⁵⁷ A defendant would have to enter a general appearance in order to defend on the merits.¹⁵⁸ Statutory quasi in rem jurisdiction in *Shaffer* was thus obtained over those nonresident officers and directors who owned any stock at all in the Greyhound Corporation.¹⁵⁹

The Supreme Court struck down the Delaware statute insofar as it subjected nonresident defendants to quasi in rem jurisdiction based simply on the artificial *situs* of their stockholdings in Delaware corporations, and held that the *International Shoe* standard should be applied to such cases.¹⁶⁰ In the view of the majority, there were no cognizant contacts ("Appellants have simply had nothing to do with the State of Delaware"),¹⁶¹ and it was unfair to assert jurisdiction over defendants who "had no reason to expect to be haled before a Delaware court."¹⁶² In other words, the point of intersection between cognizant contacts and fair play would be virtually at the intersection of the horizontal and vertical axes.

It strains credulity to say that the defendants, who knowingly became officers and directors of a Delaware corporation, "simply had nothing to do with the State of Delaware."¹⁶³ Nevertheless, even if their

154. 433 U.S. 186 (1977).

155. *Shaffer*, 433 U.S. at 189.

156. *Id.*

157. *Id.* at 192.

158. *See id.*

159. *Id.*

160. *Shaffer*, 433 U.S. at 216.

161. *Id.*

162. *Id.*

163. *Id.*

cognizant contacts moved them a short distance up the vertical axis, the intersection between cognizant contacts and fair play presumably would still be below the J-1 curve under the Delaware long-arm statute in force at the time of *Shaffer*. Very shortly after *Shaffer* was decided, however, Delaware enacted a long-arm statute for violation of a non-resident director's fiduciary duties, basing jurisdiction on the director's position with the Delaware corporation, rather than on stockholdings in it.¹⁶⁴ Thus Delaware addressed the unfairness point stressed by the majority in *Shaffer*, at least as to corporate directors. That moves the fair play point on the horizontal axis far to the right, probably enough to place the intersection between cognizant contacts and fair play above the J-1 curve. Under the current Delaware statute, the case should come out the other way as to the (American) defendants who were directors.¹⁶⁵

IV. CONFLICT OF LAWS ISSUES (OTHER THAN LONG ARM JURISDICTION)

A. *Change of Domicile*

Figure 6, below, is a modified version of Figure 1, with two domicile curves instead of one. The D-1 curve represents the genre that tends to appear in appellate court reports, where the change-of-domicile issue determines which state's law governs devolution of movables at death,¹⁶⁶ or determines whether the defendant in a civil suit is subject to the forum's long-arm jurisdiction.¹⁶⁷ Any combination of physical presence in the new state and demonstrated resolve to stay that falls outside the D-1 curve (for example, at point A) will establish the change of residence in such cases—in fact, in all cases, since the D-1 curve is the more demanding of the two for a change of domicile.

The D-2 curve illustrates the less stringent application of the standard factors when the change of domicile is being considered only for such things as the right to vote or to register a car in the new state. Statutes sometimes use "residence" instead of "domicile" for such purposes, and the change in terminology may denote a legislative intent to apply a less exacting standard. On the other hand, it has been observed

164. See DEL. CODE ANN. tit. 10, § 3114 (Michie 1999).

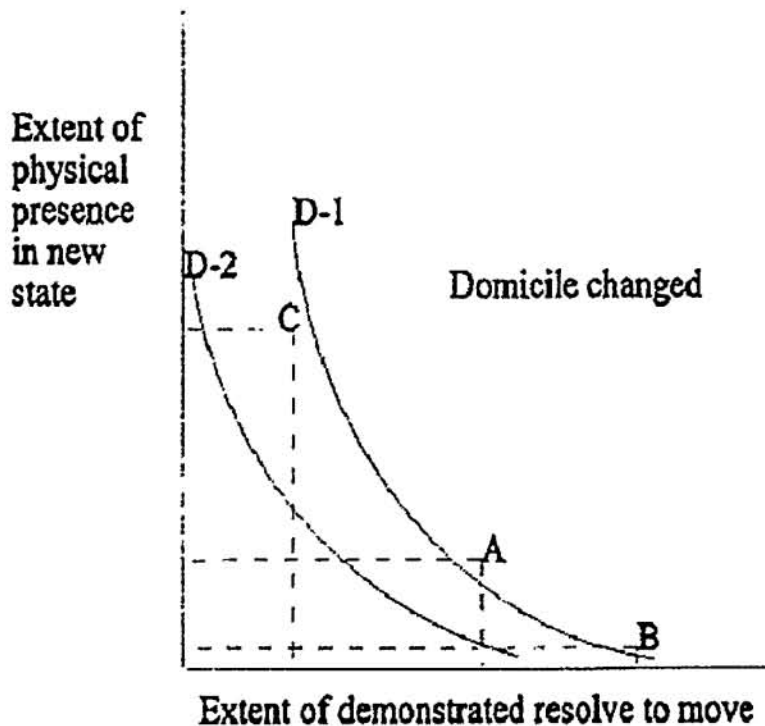
165. See *id.* The Delaware Supreme Court upheld the statute in *Armstrong v. Pomerance*, 423 A.2d 174 (Del. 1980).

166. The law of the decedent's domicile at death normally determines intestate succession to movables, and the validity and effect of the decedent's will insofar as it applies to moveables. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 260, 263 (1971).

167. See *id.* § 29; *Milliken v. Meyer*, 311 U.S. 457 (1940).

that "residence" is often used synonymously with "domicile."¹⁶⁸ Whether the D-2 curve is regarded as a change-of-residence curve or a limited change-of-domicile curve is of little significance. A combination of fairly substantial presence without much demonstrated resolve to make a long-term home in the new state, as at point C in the case of an eighteen-year-old student attending college outside the state of his or her upbringing, would suffice for voting or car registration purposes. The D-2 curve could change shape somewhat, depending on the purpose for which "domicile" or "residence" is being used. For example, it presumably would shift somewhat to the right if the issue is whether the plaintiff may bring divorce proceedings in the new state, rather than whether she may register a car there.¹⁶⁹

Figure 6



In Figure 6, the D-1 curve approaches the horizontal axis more closely than it does the vertical axis. The reason is that, for such things as administration of estates, the extent of demonstrated resolve to remain in the new state often outweighs the extent of physical presence

168. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 cmt. k (1971); Willis L. M. Reese & Robert S. Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561, 561 (1953).

169. See, e.g., *Williams v. North Carolina (Williams II)*, 325 U.S. 226 (1945).

there. A clearly demonstrated resolve to remain may well carry the day without much physical presence, but even an extended physical presence will not translate into a change of domicile unless there is more than a minimal showing of intent to stay.

Point *A* in Figure 6 illustrates *In re Estate of Elson*.¹⁷⁰ The decedent, Natalie Elson, had lived her entire life in Illinois until she traveled to Pennsylvania to study horsemanship and to work for a year on a horse farm.¹⁷¹ There was some evidence that she planned to return to Illinois at the end of the year.¹⁷² She took her horse and most of her personal belongings to Pennsylvania, leaving her jewelry and some other items in storage in Illinois.¹⁷³ She opened bank accounts in Delaware, just across the Pennsylvania line, and said in an unmailed letter that she had moved to Pennsylvania.¹⁷⁴ Six days after she arrived in Pennsylvania, she was killed in an automobile accident.¹⁷⁵

The trial court in Illinois held that Elson had become a Pennsylvania domiciliary for purposes of issuing letters of administration of her estate, and the Illinois Court of Appeals affirmed.¹⁷⁶ She had neither demonstrated a clear resolve to move permanently to Pennsylvania nor established a longstanding physical presence, but the combination of some demonstrated intent to move permanently, clear evidence of her commitment to stay at least a year, and six days' presence was enough to convince the Illinois court that she had changed her domicile to Pennsylvania.¹⁷⁷

Point *B* represents the combination of physical presence and demonstrated resolve to stay in the new state in the well-known case of *White v. Tennant*.¹⁷⁸ Michael White sold his West Virginia farm and left with his wife and livestock for a house in Pennsylvania, just across the West Virginia state line.¹⁷⁹ The house was part of a large family tract that spanned the state line.¹⁸⁰ Michael had declared his intent to move into the Pennsylvania house and to make it his home.¹⁸¹

He and his wife arrived about dusk, unloaded their household goods and turned loose the livestock, but found the house damp and uncom-

170. 458 N.E.2d 637 (Ill. App. Ct. 1983).

171. *In re Elson*, 458 N.E.2d at 640.

172. *Id.*

173. *Id.* at 640-41.

174. *Id.* at 640.

175. *Id.*

176. *In re Elson*, 458 N.E.2d at 643.

177. *See id.*

178. 8 S.E. 596 (W.Va. 1888).

179. *White*, 8 S.E. at 598.

180. *Id.*

181. *Id.*

fortable.¹⁸² Michael's wife, Lucinda, was feeling ill, so they accepted his siblings' invitation to spend the night at the mansion house on the West Virginia side of the border.¹⁸³ Lucinda, it turned out, had developed typhoid fever.¹⁸⁴ Michael remained with her in the West Virginia mansion house, going daily to the Pennsylvania land to care for his livestock.¹⁸⁵ Lucinda recovered, but Michael contracted typhoid fever and died.¹⁸⁶

The West Virginia Supreme Court held that Michael had adequately demonstrated his resolve to move to Pennsylvania, even though he had not slept there a single night.¹⁸⁷ Consequently, his personal estate would be distributed according to the law of Pennsylvania.¹⁸⁸ Presumably, if Michael had stopped at the West Virginia mansion house because of Lucinda's illness before they had gotten to Pennsylvania and had never crossed the border before he died, point *B* would have fallen below the D-1 curve (and he would have been held not to have changed his domicile), even though his demonstrated resolve to move to Pennsylvania still would have been plotted rather far out on the horizontal axis.

Point *C* illustrates *In re Estate of Getz*.¹⁸⁹ The decedent and his wife retired from Pennsylvania to Florida in 1984.¹⁹⁰ He registered to vote in Florida, obtained a driver's license, bought land and built a house there.¹⁹¹ His wife and he lived in the Florida house, but spent the summer months back in Pennsylvania at his wife's family farm.¹⁹² In 1988, he executed a will in which he said that he was "of Zion Grove, Schuylkill County, Pennsylvania."¹⁹³ He died in 1990 in Florida.¹⁹⁴ The Pennsylvania court held that, for purposes of appointment of an executor of his estate, he died a Pennsylvania domiciliary.¹⁹⁵ His will had cast doubt on his resolve to move permanently to Florida, so his rather well-established presence there was not enough to change his domicile.¹⁹⁶ For purposes of voting and obtaining a driver's license, however, the combination of physical presence and demonstrated resolve to

182. *Id.*

183. *Id.*

184. *White*, 8 S.E. at 598.

185. *Id.*

186. *Id.*

187. *Id.* at 600.

188. *Id.*

189. 611 A.2d 778 (Pa. Commonw. Ct. 1992).

190. *Estate of Getz*, 611 A.2d at 781.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 779.

195. *Estate of Getz*, 611 A.2d at 780.

196. *Id.* at 782.

move was enough.¹⁹⁷ The intersection is to the right of the D-2 curve.

B. *Choice of Law in Tort and Contract Cases*

Ever since Walter Wheeler Cook¹⁹⁸ and Brainerd Currie¹⁹⁹ began to challenge Joseph Beale's mechanical, jurisdiction-selecting approach to choice of law, courts and academics have been struggling to find a new system or systems that will produce principled decisions that take account of the policies underlying conflicting, potentially-applicable laws. Under Beale's rigid approach, the decision-maker facing a choice of law problem was supposed to characterize the issue, apply a predetermined connecting factor to that characterization, and be led inexorably to the law of a particular state or country.²⁰⁰ For torts the connecting factor was the "place of wrong;" for validity of contracts it was the "place of contracting."²⁰¹

Professor Beale's approach did not lend itself to a sliding scale. But he is no longer in vogue, and today only a relatively small minority of states retains his system in tort and contract cases.²⁰² The dominant method in these cases now focuses ostensibly on the law of the state with the most significant relationship to the occurrence (or the transaction) and the parties—the approach of the Restatement (Second) of Conflict of Laws (hereinafter Second Restatement).²⁰³ Some "modern" states eschew both Restatements and use Currie's interest analysis or Robert Leflar's combined interest analysis/better rule of law approach.²⁰⁴ And the notorious laundry list of relevant factors in section 6 of the Second Restatement is so flexible that courts using it often approximate the approaches of Currie, Leflar or some combination of the two.²⁰⁵

197. *Id.* at 781.

198. See WALTER W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS passim* (1942).

199. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS passim* (1963).

200. See 2 JOSEPH H. BEALE, *A TREATISE ON THE CONFLICT OF LAWS passim* (1935). Professor Beale was the Reporter for the Restatement (First) of Conflict of Laws, which embodied his jurisdiction-selecting approach throughout. See *RESTATEMENT (FIRST) OF CONFLICT OF LAWS passim* (1934).

201. See BEALE, *supra* note 200, §§ 311.1, 390.1.

202. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2000: As the Century Turns*, 49 AM. J. COMP. L. 1, 2 (2001) (showing which states use each choice-of-law method in tort and contract cases).

203. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* §§ 145, 188 (1971).

204. See Symeonides, *supra* note 202, at 13.

205. The laundry list applies when there is no applicable statutory directive. It includes: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determina-

Scholars have devoted reams of paper to devising the best possible policy-oriented choice-of-law system for tort and contract cases. That is not the concern here. The focus instead is on what factors predominantly influence "modern" courts' actual choices of law in tort and contract cases—on whether the courts use a sliding scale in applying them, and if they do appear to use a sliding scale, on how it operates in practice.

Professor Leflar was a pioneer in identifying factors courts actually use for choice of law. He identified five factors, not all of which would be significant in every case: (a) predictability of results, (b) maintenance of interstate and international order, (c) simplification of the judicial task, (d) advancement of the forum's governmental interests, and (e) application of the better rule of law.²⁰⁶ Each of these, except possibly the last one, has a counterpart in section 6 of the Second Restatement.²⁰⁷

Leflar not only identified the "better rule of law" as a factor operating in actual cases, but also advocated its explicit use.²⁰⁸ Some state courts of last resort now do so.²⁰⁹ But, in tort cases at least, those courts do not seem to reach results that vary significantly from the results reached by courts using any other "modern" approach. All of the "modern" approaches show a propensity to favor forum law.²¹⁰ They also tend to apply the law that favors recovery.²¹¹ In practice, that is usually the forum's law because the plaintiff chooses the forum and will select one that promises recovery if jurisdiction may be obtained over the defendant.

Often, of course, the forum will be the plaintiff's home state. When this is so, the forum will have an interest in applying its recovery-favoring rule. Even if the forum is not the plaintiff's home state, it will sometimes have other policies (such as protecting local medical creditors in a personal injury case) that would be effectuated by applying its own law. In Professor Currie's interest analysis terms, the forum is an interested state in these cases, and should apply its own law unless

tion and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

206. Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1585-88 (1966).

207. Even the last one—the better rule of law—arguably is a sharpened version of section 6(2)(e): the basic policies underlying the particular field of law.

208. Leflar, *supra* note 206, at 1588.

209. Symeonides, *supra* note 202, at 13. Symeonides identifies Arkansas, Minnesota, New Hampshire, Rhode Island and Wisconsin as states using the "better rule of law" approach in tort cases, with Minnesota and Wisconsin using it also in contract cases. *Id.*

210. See Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 377 (1992).

211. *Id.* at 378, 380.

there is a good reason not to. By definition, if the other state has no interest in applying its law, there is a false conflict and forum law will prevail. Even if the other state has an interest in applying its law, or if neither state has an interest, Currie would favor application of forum law in most cases.²¹²

To say that the forum has an interest in applying its own law when, for example, it favors a forum plaintiff, is not to say that its interest is equally strong in all such cases. Thus, if the relevant forum policy is tailored to a particularly vulnerable class of persons and the injured forum plaintiff is in that class, the forum's interest may be greater than if a more general compensatory policy is at stake. If the forum's protective policy could be effectuated reasonably well in some way other than by providing tort recovery for the forum plaintiff, its interest in allowing recovery at the expense of defeating some other state's policy may not be strong—though it would still exist in some measure.²¹³ Clearly, there are degrees of forum interest in applying its own law, ranging from no interest to intense interest. Forum interest is another example of a fuzzy set.

Courts are loathe to defeat a party's reasonable expectations, especially when he or she has relied on the expectations. They are as loathe to do so when faced with a choice of law problem as they are in other situations.²¹⁴ Whenever factors relevant to choice of law are listed, protection of reasonable expectations is included.²¹⁵ Moreover, protection of expectations underlies some rules or approaches, such as the preference for selecting the law of validation in contract validity disputes,²¹⁶ that are not couched expressly in terms of expectations.

Obviously, expectations play a far more important role in contract cases than in most tort cases, but they can be significant in some tort cases too—as when a person molds his or her conduct to a specific

212. See Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 261-62 (1958).

213. Currie acknowledged that the forum's interest was not all or nothing. See Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963) (conceding that in some true conflict cases, the forum should re-examine the situation and apply a "moderate and restrained interpretation" of its own policy and of its interest in applying its policy to the case at hand). "Comparative impairment," as a method for resolving true conflicts, is based on the perception that a state's interest in applying its own law often is not absolute. See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 19 (1963). California uses comparative impairment as a true conflict tie-breaker. See *Bernhard v. Harrah's Club*, 546 P.2d 719, 723-27 (Cal. 1976).

214. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, cmt. g (1971).

215. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(d) (1971); LUTHER L. MCDUGAL III ET AL., AMERICAN CONFLICTS LAW § 94 (5th ed. 2001); cf. DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 189-96 (1965).

216. See ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS §§ 175-185 (1962); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS §§ 7.2-7.4(d) (4th ed. 2001).

standard of care in the place of conduct, or when the owner of an automobile lends it to another without being able to foresee that the latter will drive it to another state with an especially broad rule of liability.²¹⁷ Expectations have even been given significant weight when they go no further than a general belief that a person's conduct in his home state will be judged by that state's law, no matter where the injured visitor may reside.²¹⁸ Whenever legitimate expectations may be defeated by application of one state's law, decision-makers will take them into account in the choice-of-law process. And expectations, like state interests, are matters of degree. Expectations embodied in a freely-negotiated written contract that is shaped to the law of a particular state, will normally be very strongly held;²¹⁹ but an expectation that an accident in state *X* will be governed by the law of state *X* may be only vaguely held, and in any event may not shape the conduct of the person who has the accident.

Even those courts that use defined elements such as those in section 6 of the Second Restatement, do not normally identify as the dominant factors the extent of the forum's interest in applying its own law and the extent to which that would defeat the losing party's expectations. For these reasons, any attempt to identify two key factors or elements in choice of law cases must be undertaken with some diffidence. Nevertheless, the two factors discussed above—forum preference and protection of reasonable expectations—have enough explanatory and predictive value in torts and contracts choice of law cases to be singled out, and there seems to be a sliding scale between them. They are more important explanatory or predictive elements than Leflar's "better law," because they identify key factors that are likely to shape a court's selection of a "better law." That is, the better law usually will coincide with forum law (in the eyes of the forum) unless application of forum law would defeat or seriously impair a party's reasonable expectations.

The two dominant elements interact in tort and contract cases as indicated in Figure 7, subject to one caveat. In the rare tort or contract cases in which the forum has no recognizable interest in applying its own law (because the case presents a false conflict in favor of the non-forum state or country) the model does not work. Nor does it work

217. See *Scheer v. Rockne Motors Corp.*, 68 F.2d 942, 944 (2d Cir. 1934); *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 684-85 (N.Y. 1985); *Cooney v. Osgood Machinery, Inc.*, 612 N.E.2d 277, 283-84 (N.Y. 1993).

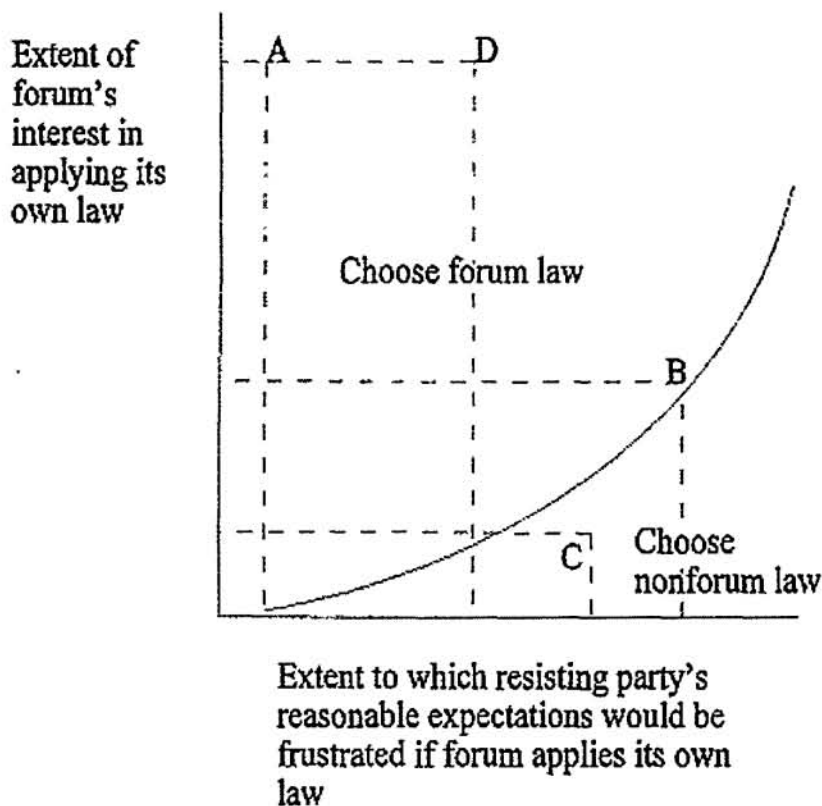
218. See *Baedke v. John Morrell & Co.*, 748 F. Supp. 700, 704 (N.D. Iowa 1990); *Casey v. Manson Constr. & Eng'g Co.*, 428 P.2d 898, 906 (Or. 1967).

219. This is particularly so if the contract contains a choice-of-law clause. The Second Restatement takes some pains to uphold such clauses if it is at all reasonable to do so. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

predictably in an "unprovided-for case" in which neither state is interested in applying its own law. These are rare cases because, as noted above, plaintiffs choose forums favorable to themselves, and even if the plaintiff is a nonresident, the court may well find (or may construct) an applicable forum policy, such as a concern that people who come into the state to litigate should have their cases adjudicated under the forum's concepts of justice.²²⁰ That would turn an apparently-false conflict into a true conflict (or would turn an apparently-unprovided-for case into a false conflict in favor of the forum), and would fit the model.

For reasons to be explained below, the curve in Figure 7 resembles an economist's supply curve rather than a demand curve.

Figure 7



The diagram assumes that the expectations are reasonable ones. Thus, for example, expectations based on an irrational delusion would

220. See Leflar, *supra* note 206, at 1594, cited with approval in *Milkovich v. Saari*, 203 N.W.2d 408, 412-17 (Minn. 1973) (applying forum recovery rule rather than Ontario guest statute when Ontario residents had an accident in the forum while on a short trip there).

not count (or could be placed at the point of origin on the horizontal axis). The vertical axis measures the extent of the forum's interest in the sense used in interest analysis; to measure it, one would have to identify the policy (or policies) underlying the particular rule of forum law and then determine how interested the forum is in applying the policy to the facts at hand. Unlike the curves in Figures 1 through 6, the curve in Figure 7 begins on the horizontal axis and proceeds northeast. The area above the curve, where the court is likely to choose forum law, is far greater than the area below it, where the court is likely to choose another state or country's law. The odds that forum law will *not* be chosen increase exponentially as the resisting party's level of reasonable frustration (were forum law to be selected) grows beyond a minimal level. But at, or quite near, the point of origin on the horizontal axis, where expectations are nonexistent or inconsequential, the forum may be inclined to apply its own law even if it has little or no interest in doing so—even if the matter before it is an unprovided-for case in which neither state has an interest in applying its own law.²²¹

In Figure 7, point *A* illustrates the classic false conflict in favor of the forum, such as occurred in *Babcock v. Jackson*.²²² Two New Yorkers took an automobile trip to Ontario, where they had an accident.²²³ Ontario had a guest statute that would have precluded the plaintiff-guest from recovering against the driver, but New York had no guest statute.²²⁴ New York applied its own law.²²⁵ It had a very strong interest in applying its compensatory policy to a case in which the only parties were New Yorkers, and to do so did not frustrate anyone's reasonable expectations, or if it did, the degree of frustration was minimal.

Point *B* represents *Lilienthal v. Kaufman*.²²⁶ The defendant, a Californian, lent money in California to an Oregonian who had previously been declared a spendthrift by an Oregon court, thus rendering his obligations voidable under Oregon law.²²⁷ The obligation was enforceable under California law.²²⁸ The California creditor was unaware that the borrower had been declared a spendthrift in Oregon, and apparently

221. See *Erwin v. Thomas*, 506 P.2d 494 (Or. 1973) (applying the forum's own law without frustrating anyone's reasonable expectations in an unprovided-for case). *But see* *Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co.*, 604 N.W.2d 91 (Minn. 2000) (applying the other state's law, again without frustrating anyone's reasonable expectations in an unprovided-for case). As has already been pointed out, the model does not apply to a false conflict in favor of the non-forum state.

222. 191 N.E.2d 279 (N.Y. 1963).

223. *Babcock*, 191 N.E.2d at 280.

224. *Id.*

225. *Id.* at 285.

226. 395 P.2d 543 (Or. 1964).

227. See *Lilienthal*, 395 P.2d at 545.

228. *Id.*

made some efforts to check his credit rating without discovering that crucial fact.²²⁹ When the Californian sued the spendthrift in Oregon to recover on a dishonored check the spendthrift had given him to pay off the loan, the Oregon court recognized the true conflict and agonized over the proper result, but finally chose Oregon law to defeat the claim.²³⁰ The court's choice thus completely frustrated the Californian's reasonable expectations, but the Oregon interest in protecting the spendthrift's family and the Oregon public fisc was sufficiently strong to bring point *B* just above the curve.²³¹

Point *C* illustrates *Bernkrant v. Fowler*.²³² The plaintiffs were Nevada residents who owed one Granrud \$24,000 for the purchase of a Nevada building.²³³ At a meeting in Las Vegas, Granrud told them he would forgive in his will any debt remaining at his death if the plaintiffs would make an immediate partial payment.²³⁴ Plaintiffs made the partial payment, but Granrud did not forgive the remaining debt.²³⁵ He died a California resident. It was not apparent whether he had been a Californian all along or whether he had moved there after the Las Vegas meeting.²³⁶ His promise was unenforceable under the California statute of frauds, but was enforceable under Nevada law.²³⁷ The California Supreme Court held that even if Granrud had been a Californian all along, California would protect the plaintiffs' reasonable expectations and eschew the application of its own statute of frauds.²³⁸

Bernkrant fell rather far to the right on the horizontal axis, though not all the way because of the possibility that Granrud was (and was known to be) a Californian at the time of the transaction. But the case did not rise very far on the vertical axis because California had an alternate means of preventing any fraudulent claim against Granrud's estate. The purpose of a trial is to ferret out the accurate facts. The plaintiffs still had the burden of proving the oral promise. Any reasonably strong suspicion of fraud on their part could be brought out at trial

229. *Id.* at 544.

230. *Id.* at 549.

231. The court mentioned that in *Olshen v. Kaufman*, 385 P.2d 161 (Or. 1963), a case decided a year earlier involving an Oregon creditor and the same spendthrift, it had decided in favor of the spendthrift. *Lilienthal*, 395 P.2d at 543-44. The disinclination to favor a nonresident creditor over a resident creditor may have caused the court to embellish the Oregon interest just enough to push it above the curve. Professor Cavers regarded *Lilienthal* as wrongly decided if, as apparently was the case, the California creditor checked Kaufman's credit and found nothing wrong. CAVERS, *supra* note 215, at 191-92; cf. WEINTRAUB, *supra* note 216, at 467 (treating unfair surprise as an overlooked issue in the case).

232. 360 P.2d 906 (Cal. 1961).

233. *Berkrant*, 360 P.2d at 907.

234. *Id.*

235. *Id.*

236. *Id.* at 910.

237. *Id.* at 908.

238. *Bernkrant*, 360 P.2d at 910.

even without Grandrud's testimony, and could defeat their claim without the aid of the statute of frauds.

Point *D* exemplifies *Bernhard v. Harrah's Club*.²³⁹ The plaintiff, a Californian, suffered severe injuries when an automobile driven by Fern Myers, also a Californian, collided with his motorcycle in California as Ms. Myers was driving back from an evening at Harrah's Club in Nevada.²⁴⁰ Ms. Myers was intoxicated at the time.²⁴¹ The plaintiff sued Harrah's Club for damages, claiming that the club proximately caused his injuries by continuing to serve alcoholic beverages to Ms. Myers after she was obviously intoxicated.²⁴² California imposed liability on tavern keepers for such conduct, but Nevada did not.²⁴³ At the time of the incident, though, Nevada imposed criminal penalties for serving liquor to an intoxicated person.²⁴⁴ The California policy was to protect members of the public from harm by imposing a duty of care on tavern keepers; the Nevada policy was to preclude tavern keepers from being exposed to ruinous liability every time they served drinks.²⁴⁵ The California Supreme Court resolved the true conflict by using a comparative impairment approach; the California policy would suffer greater impairment if Nevada law were applied than the Nevada policy would if California law were applied, so the court chose California law.²⁴⁶

California had a strong interest in applying its own law. The injured plaintiff was a Californian and the intoxicated driver was endangering safety on the California highways. Many Californians travel to nearby Nevada gambling establishments and some of them could be expected to drive home after consuming some alcoholic beverages. Consequently, the risk of accidents in California from drunk driving emanating in Nevada was substantial and might be reduced by applying California's compensatory rule; therefore, point *D* is high on the vertical axis. It is only part way out on the horizontal axis because Harrah's Club is near the California border, and it advertises regularly in California; thus, Harrah's Club officials could foresee that intoxicated Californians might drive back to California while still under the influence. Moreover, Harrah's Club would not have expected that serving alcoholic beverages to obviously-intoxicated patrons would be risk-free since that conduct was criminal in Nevada at the time of the incident. But if the

239. 546 P.2d 719 (Cal. 1976).

240. *Bernhard*, 546 P.2d at 720.

241. *Id.*

242. *Id.*

243. *Id.* at 721.

244. *Id.* at 721, 725.

245. *Bernhard*, 546 P.2d 725.

246. *Id.* at 725-26.

defendant had been a small bar in Reno that did no advertising in California, point *D* would have been further to the right on the horizontal axis and lower on the vertical axis, bringing it below the curve. Even though tavern keeper liability cases like *Bernhard* are tort cases, the reasonable expectations of the defendant can play a significant role.

Another California tort case, *Offshore Rental Co. v. Continental Oil Co.*,²⁴⁷ fits nicely into Figure 7. The Vice-President of a California corporation went to a business meeting at the defendant's premises in Louisiana, where he was injured through the negligence of the defendant.²⁴⁸ A recent Louisiana case had held that a corporate plaintiff had no cause of action for such an injury to a key employee.²⁴⁹ The California Supreme Court assumed for purposes of the case that a corporate employer would have a civil remedy against a tortfeasor under a provision of the California Civil Code of 1872.²⁵⁰ Nevertheless, it found that the 1872 statute was archaic and rarely applied, so California's interest in applying it to this case was slight.²⁵¹ On the other hand, the Louisiana defendant "would most reasonably have anticipated a need for the protection of premises' liability insurance based on Louisiana law."²⁵² Consequently, the California court chose Louisiana law.²⁵³ Like *Bernkranz v. Fowler*,²⁵⁴ the case fell at point *C* in Figure 7.

Choice-of-law clauses in contracts provide another illustration. A contract containing a clause selecting a validating non-forum law would fall very near the right end of the horizontal axis, at least if the clause is not simply boilerplate in an adhesion contract. The curve slants sharply upward just before it reaches its right extremity, indicating that in these cases it is quite likely that such a clause will be upheld. Only if the result thus reached would run counter to a strong forum public policy that applies to the facts at hand (placing the case high on the vertical axis) would forum law override the parties' expectations.²⁵⁵

V. CONCLUSION

Fuzzy logic is at-large in the law. At least in the situations exam-

247. 583 P.2d 721 (Cal. 1978).

248. *Offshore Rental*, 583 P.2d at 723.

249. *Id.* at 724.

250. *Id.*

251. *Id.* at 729.

252. *Id.*

253. *Offshore Rental*, 583 P.2d at 729.

254. 360 P.2d 906 (Cal. 1961).

255. The Second Restatement would apply the invalidating fundamental policy of a state with a materially greater interest than the chosen state, even if the more interested state were not the forum. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971). It would be unusual, though, if a forum found that any state except itself had such a materially greater interest. Cf. EHRENZWEIG, *supra* note 216, § 183.

ined in this Article, seemingly distinct elements of legal formulae are interrelated. It is not helpful to think of an element as either being met or not met, in most cases. It will be met (or not met) to a degree. It will be an unusual case when the degree equals one (i.e., 100%), and perhaps only a little less unusual when it equals zero.

When two elements need to be met in order to satisfy a legal formula, the outcome is determined by the relationship between the degrees to which each element is met. The more fully one is met, the less fully the other need be. This sliding scale can be illustrated by a curve, or in some instances by more than one curve, between a horizontal and a vertical axis. The slope and position of each curve will vary, depending on the issue to be resolved by the formula. This is not a precise exercise, but it can be done with enough accuracy to supply insights into what courts and other decision-makers are doing—whether they say so or not. Consequently, it is useful in predicting the outcomes of future cases where dual-element legal formulas are at work.

The sliding scale theorem also illustrates a significant feature of the legal process: judges and lawyers are inclined to speak in terms of absolutes (there either is or is not a likelihood of irreparable harm in a preliminary injunction situation), but the absolutes become relative when they are applied to resolving disputes arising from the untidy compartments of human and institutional activity.²⁵⁶ Strict rules tend to become malleable standards. The two-element formula provides one example of how that process can operate.

256. I would argue that there indeed are absolutes in the realm of ethics or morality, but that is a different matter from the resolution of disputes over temporal matters.

