

Missouri Law Review

Volume 34
Issue 4 Fall 1969

Article 7

Fall 1969

Recent Cases

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Recent Cases, 34 MO. L. REV. (1969)

Available at: <https://scholarship.law.missouri.edu/mlr/vol34/iss4/7>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Recent Cases

DIVORCE—SHOULD CONNIVANCE OR COLLUSION DEFEAT A RECRIMINATORY DEFENSE IN MISSOURI?

*Day v. Day*¹

Carl and Margaret Day were married April 13, 1935, and separated January 1, 1958. After approximately 10 years of separation Carl brought suit against Margaret for divorce. The children were emancipated. Margaret contested the divorce with a general denial of the allegations in the petition. At trial Carl admitted that he had had sexual relations with other women since the time of separation in 1958. The trial court refused to grant Carl a divorce. In affirming, the Kansas City Court of Appeals followed the Missouri Supreme Court's decision in *Hoffman v. Hoffman*² by saying "[i]f both parties have a right to divorce, neither party has."³ In so holding the court followed a long line of cases recognizing recrimination as a defense to divorce in Missouri.⁴

The trial court in *Day v. Day* based its decision on the determination that petitioner's adulterous conduct was a recriminatory defense.⁵ The petitioner on appeal asserted that the wife's failure to testify prevented the trial court from knowing if the wife had consented to his misconduct, which consent, if given, would operate as connivance to deprive the wife of her grounds for a divorce. If the petitioner's wife did not have grounds for a divorce, the defense of recrimination would not apply. The appellate court, however, dismissed this argument by saying "[s]uch evidence of collusion could only have created a further bar to divorce. . . ."⁶

1. 433 S.W.2d 52 (K.C. Mo. App. 1968).

2. 43 Mo. 547 (1869).

3. 433 S.W.2d 52, 54 (K.C. Mo. App. 1968). It would be more accurate to say if both parties have grounds for a divorce, neither party may have a divorce.

4. *E.g.*, *Gregg v. Gregg*, 416 S.W.2d 672 (K. C. Mo. App. 1967); *R— v. M—*, 383 S.W.2d 894 (Spr. Mo. App. 1964); *Pippas v. Pippas*, 330 S.W.2d 132 (St. L. Mo. App. 1959); *Patterson v. Patterson*, 215 S.W.2d 761 (Spr. Mo. App. 1948); *Stevens v. Stevens*, 158 S.W.2d 238 (St. L. Mo. App. 1942); *Ranklin v. Ranklin*, 17 S.W.2d 381 (K.C. Mo. App. 1929); *Wehrenbrecht v. Wehrenbrecht*, 200 Mo. App. 452, 207 S.W. 290 (St. L. Ct. App. 1919); and *Miller v. Miller*, 14 Mo. App. 418 (St. L. Ct. App. 1883).

5. *Day v. Day*, 433 S.W.2d 52, 54 (K.C. Mo. App. 1968). Section 452.030, RSMo 1959 begins "[i]f it shall appear to the court" Thus, it is not necessary for recriminatory matter to be pleaded as an affirmative defense or in a cross-bill for divorce. The court may recognize the recriminatory matter on its own motion even if, as in the *Day* case, the answer contains only a general denial.

6. *Day v. Day*, *supra* note 5, at 54.

Recrimination was initially a rule of property in Roman law involving a wife's rights to recover her dowery upon the dissolution of her marriage.⁷ The early English law, which allowed no absolute divorces, converted this doctrine into a defense to divorce *a mensa et thoro*. Later, when absolute divorces were allowed, recrimination was transformed by the English courts into a bar to absolute divorce. The courts in this country have always allowed recrimination as a defense to absolute divorce.

Although recrimination is a common law defense in Missouri, the doctrine has been recognized in the divorce statutes. Section 452.030, RSMo states that "[i]f . . . both parties have been guilty of adultery, then no divorce shall be granted."⁸ Section 452.090, RSMo requires that the court, before granting a divorce in *ex parte* proceedings, must be satisfied that the petitioner is the innocent and injured party.⁹ In other than *ex parte* proceedings, these statutes on their face appear to limit the defense of recrimination to adultery in actions for divorce on the grounds of adultery. Missouri courts, however, have allowed recrimination as a defense (based on conduct other than adultery) to actions for divorce on grounds other than adultery.¹⁰

The principal reason Missouri courts allow recrimination as a defense in a divorce action regardless of the grounds is the Missouri Supreme Court's interpretation of section 452.010, RSMo. Section 452.010 sets forth the grounds upon which a party may obtain a divorce in Missouri and provides that the party obtaining the divorce must be the injured party. Prior to 1849 the Missouri statutes required a party to be both innocent and injured before the court could grant a divorce. In 1849 the requirement that the party be innocent was removed from the statute, leaving the requirement that the person seeking the divorce be the injured party.¹¹ The Missouri Supreme Court in *Hoffman v. Hoffman*¹² construed this statute, which preceded section 452.010, to require the party obtaining the divorce to be both innocent and injured, notwithstanding the fact that the requirement of innocence had been deleted from the statute twenty years earlier. The Missouri courts have similarly followed this construction in construing section 452.010 to mean that the person obtaining the divorce must be both innocent and injured. Because the courts interpret the statute to require the party seeking the divorce to be innocent as well as injured, recrimination is allowed as a defense

7. For a more complete analysis and history of recrimination, see H. CLARK, *LAW OF DOMESTIC RELATIONS* § 12.12 (1968) and Beamer, *The Doctrine of Recrimination in Divorce Proceedings*, 10 U.M.K.C.L. REV. 213 (1942).

8. Section 452.030, RSMo 1959.

9. Section 452.090, RSMo 1959, states in part: "[i]n all cases where the proceedings shall be *ex parte*, the court shall, before it grants the divorce, require proof of the good conduct of petitioner, and be satisfied that he or she is an innocent and injured party."

10. *E.g.*, *Stone v. Stone*, 378 S.W.2d 824 (St. L. Mo. App. 1964); *Cody v. Cody*, 233 S.W.2d 777 (St. L. Mo. App. 1950); *Jones v. Jones*, 208 Mo. App. 632, 235 S.W. 481 (Spr. Ct. App. 1921); *Willett v. Willett*, 196 S.W. 1058 (St. L. Mo. App. 1917); *Elder v. Elder*, 186 S.W. 530 (K.C. Mo. App. 1916); *Coe v. Coe*, 98 Mo. App. 472, 72 S.W. 707 (K.C. Ct. App. 1903).

11. Mo. Laws 1849, at 49.

12. 43 Mo. 547 (1869).

to actions for divorce on grounds other than adultery. As to the "degree of innocence" necessary to obtain a divorce, the Missouri courts hold that to be recriminatory, the conduct must itself constitute grounds for a divorce.¹³

Collusion arises when the parties agree that a divorce will be obtained by one of the parties based upon (1) false testimony, (2) the other party's agreement not to contest the divorce, or (3) an agreement that one of the parties appear to commit an act that will give the other grounds for a divorce.¹⁴ The defense of collusion is recognized by sections 452.030 and 452.040, RSMo. The essence of the defense of collusion is the agreement between the parties. If collusion is found by the court, the person seeking the divorce will be denied relief.¹⁵

Connivance, on the other hand, is the complaining party's intentional inducement or active procurement of the commission of acts by the other party which can be used as grounds for divorce.¹⁶ The defense of connivance is found in section 452.030 RSMo, which states that if the complainant consents to the injury or offense complained of, no divorce shall be granted.¹⁷ The essential element of connivance is the express or implied consent of the complaining party to the acts of which he is complaining.¹⁸ Considering the distinction between collusion and connivance, the petitioner in *Day* apparently was trying to prove connivance by the wife (*i.e.* expressed or implied consent to his misconduct) rather than collusion between the parties as stated by the court. In *Day* if *either* collusion or connivance had been proved, it would have defeated the wife's grounds for divorce and there would have been no place for recrimination.¹⁹

Only a few jurisdictions (not including Missouri) have reported cases dealing directly with the question of permitting collusion or connivance to defeat

13. See, e.g., *Gregg v. Gregg*, 416 S.W.2d 672 (K.C. Mo. App. 1967); and cases cited note 10, *supra*.

14. For a more complete discussion of collusion see H. CLARK, *LAW OF DOMESTIC RELATIONS* § 12.9 (1968); and Moore, *An Analysis of Collusion and Connivance, Bars to a Divorce*, 36 U.M.K.C.L. REV. 193 (1968).

15. E.g., *Bishop v. Bishop*, 151 S.W.2d 553 (St. L. Mo. App. 1941); *Welsh v. Welsh*, 230 Mo. App. 1006, 93 S.W.2d 264 (St. L. Ct. App. 1936); *Donohue v. Donohue*, 159 Mo. App. 610, 141 S.W. 465 (K.C. Ct. App. 1911); and *Gentry v. Gentry*, 67 Mo. App. 550 (K.C. Ct. App. 1896).

16. For a more complete discussion of connivance see H. CLARK, *LAW OF DOMESTIC RELATIONS* § 12.8 (1968); and Moore, *An Analysis of Collusion and Connivance, Bars to a Divorce*, 36 U.M.K.C.L. REV. 193 (1968).

17. § 452.030, RSMo 1959.

18. The Kansas City Court of Appeals has defined connivance as "the complainant's consent, express or implied, to the misconduct alleged as grounds for a divorce." *Herriford v. Herriford* 169 Mo. App. 641, 648, 155 S.W. 855, 857 (K.C. Ct. App. 1913).

19. Missouri courts have long held that before conduct will be deemed recriminatory, it must be such conduct as would entitle the other party to a divorce.

[I]f the party seeking the divorce has been guilty of conduct that would entitle the opposite party to one, he or she must fail, notwithstanding the evidence might otherwise be sufficient. This rule does not apply to conduct, however reprehensible, that would not entitle the other party to a divorce. *Hoffman v. Hoffman*, 43 Mo. 547, 551 (1868).

See also cases cited note 4 *supra*.

the defense of recrimination.²⁰ This is probably due to the fact that most divorce actions are not vigorously contested and only a small percentage of those contested are appealed. Also, the doctrine of recrimination has been weakened in many jurisdictions by (1) judicial discretion in refusing to regard many instances of misconduct as sufficient to be recriminatory,²¹ (2) the doctrine of comparative rectitude which allows the court to grant the party least at fault the divorce,²² and (3) an increase in the number of jurisdictions that allow divorces on grounds other than fault.²³ Recently there has been much criticism²⁴ of the doctrine of recrimination, but the *Day* decision indicates that recrimination is still a very effective bar to a divorce in Missouri.

L. THOMAS ELLISTON

20. In the case of *X v. Y*, 103 N.J. Super. 218, 247 A.2d 28 (1968), which closely resembles *Day* on its facts, *X* (the wife), having been deserted by *Y* in 1956, brought suit for divorce in 1967 against *Y* on the grounds of his desertion. At the trial, *X* admitted that she had had sexual relations with *Z* since 1960. A child had been born of this relationship with *Z* in 1961. The court refused to accept *X*'s confessed adultery as recriminatory matter and granted the divorce. See also *King v. Yeager*, 41 N.J. 594, 198 A.2d 443 (1964); *Klekamp v. Klekamp*, 275 Ill. 98, 113 N.E. 852 (1916).

21. *E.g.*, *DeBurgh v. DeBurgh*, 39 Cal. App. 2d 858, 250 P.2d 598 (1952); *Steward v. Steward*, 158 Fla. 326, 29 So. 2d 247 (1946); *Howay v. Howay*, 74 Idaho 492, 264 P.2d 691 (1953); *Lassen v. Lassen*, 134 Kan. 436, 7 P.2d 120 (1953); *Burns v. Burns*, 400 P.2d 642 (Mont. 1965); *King v. Yeager*, 41 N.J. 594, 198 A.2d 443 (1964); *White v. White*, 281 P.2d 745 (Okla. 1955); *Steiger v. Steiger*, 4 Utah 2d 273, 293 P.2d 418 (1956); *Flagg v. Flagg*, 192 Wash. 679, 74 P.2d 189 (1937).

22. *E.g.*, *Hensley v. Hensley*, 213 Ark. 755, 212 S.W.2d 551 (1948); *Eals v. Swan*, 221 La. 329, 59 So. 2d 409 (1952); *Gabler v. Gabler*, 72 Nev. 325, 304 P.2d 404 (1956); *Dearth v. Dearth*, 141 Pa. Super. 344, 15 A.2d 37 (1940); *Marr v. Marr*, 191 S.W.2d 512 (Tex. Civ. App. 1945); *Hendricks v. Hendricks*, 123 Utah 178, 257 P.2d 366 (1953); and *Huff v. Huff*, 178 Wash. 684, 35 P.2d 86 (1934).

23. See *Wadlington, Divorce without Fault without Perjury*, 52 VA. L. REV. 32 (1966).

24. *E.g.*, *Tenney, Divorce without Fault: The Next Step—A Model for Change*, 46 NEB. L. REV. 24 (1967); *Wadlington, Divorce without Fault without Perjury*, 52 VA. L. REV. 32 (1966); and *Note, Recrimination as a Bar to Divorce: Mitigating the Mandate*, 51 IOWA L. REV. 184 (1965).

JUDICIAL ACCEPTANCE OF RESULTS OF SCIENTIFIC EVIDENCE—
THE PARAFFIN TEST AND THE POLYGRAPH*State v. Fields*¹

James Marvin Fields was convicted of armed robbery in the Circuit Court of Greene County. The state's evidence included the results of a polygraph, or lie detector examination of defendant, and testimony by a police officer as to the results of a paraffin test² administered shortly after defendant's arrest. The lie detector test was given pursuant to a request and stipulation executed by defendant, his counsel, and the prosecutor asserting the admissibility of the results of such a test and waiving all objections to its admission.³ The results of the polygraph test were admitted at trial over defendant's objection that an individual cannot waive his constitutional rights with regard to polygraph testing. The results of the paraffin test were admitted over objections concerning their reliability and conclusiveness.⁴ On appeal, the Supreme Court of Missouri held that the paraffin test was admissible. The lie detector evidence was also held admissible, when all parties had stipulated before the court to its admissibility. The court held that defendant's fifth amendment rights were expressly waived by the stipulation and that there was no evidence of any compulsion upon defendant to take the polygraph examination.

The lie detector has had a stormy career in the courts, and a discussion of its travails is beyond the scope of this note. Suffice it to say that in no jurisdiction are the results of a polygraph examination admissible to prove the guilt or innocence of a criminal defendant. The dual reasons for its inadmissibility are that the polygraph has not achieved the degree of reliability or scientific accuracy necessary to be considered competent evidence, and that the prejudicial effect

1. 434 S.W.2d 507 (Mo. 1968).

2. A paraffin, or dermal nitrate, test is a procedure designed to ascertain whether a suspect has recently fired a gun, particularly a pistol. The subject's hands are coated with melted paraffin which then dries and is peeled from the hand. If the suspect has recently fired a weapon, the paraffin picks up small particles of nitrate and other powder residues from the pores of his hand. These residues react in a certain way when a chemical solution is placed upon the paraffin.

3. The stipulation was an agreement whereby defendant waived "absolutely and irrevocably each and every objection to the use in evidence by the prosecution of the results of said test," as well as any objections to their "relevancy, materiality, competency, accuracy, constitutionality, reliability . . ." *State v. Fields*, 434 S.W.2d 507, 511 (Mo. 1968).

4. Objection was also made to the use of evidence of the actions of a bloodhound. Here, the bloodhound was taken to the point of the arrest and followed a trail back to the scene of the robbery, a distance of between 300 and 400 yards. The court held such evidence admissible upon the establishment of the animal's pedigree and experience, affirming prior decisions of *State v. Long*, 336 Mo. 630, 80 S.W.2d 154 (1935); *State v. Freyer*, 330 Mo. 62, 48 S.W.2d 894 (1932); *State v. Steely*, 327 Mo. 16, 33 S.W.2d 938 (1930); *State v. Barnes*, 289 S.W. 562 (Mo. 1926); *State v. Dooms*, 280 Mo. 84, 217 S.W. 43 (1919); see also *Annot.*, 94 A.L.R. 413 (1935).

is so high.⁵ The courts have, however, begun to take a different stance in relation to the polygraph when the defendant has submitted to the test voluntarily and has entered into a stipulation concerning the admissibility of the results obtained.

The first such lie detector case was *People v. Houser*,⁶ a 1948 California decision where the defendant, charged with child molestation, consented to the test and executed a written stipulation that the results would be admissible whether favorable to himself or to the state. When the admission of results unfavorable to defendant was challenged on appeal, Mr. Justice Griffin replied:

It would be difficult to hold that defendant should now be permitted on this appeal to take advantage of any claim that such operator was not an expert and that as to the results of the test such evidence was inadmissible, merely because it happened to indicate he was not telling the truth. . . .⁷

The Supreme Court of Iowa in *State v. McNamara*,⁸ relying upon *Houser*, affirmed a conviction in which lie detector evidence was used, holding it admissible by reason of defendant's stipulation. Arizona in *State v. Valdez*⁹ allowed such evidence to come in upon stipulation if certain criteria were met.¹⁰ In a civil case decided under California law,¹¹ a federal district court held that the results of a polygraph test concerning the disappearance of a valuable ring were properly admitted when both parties had stipulated their admissibility.

Lie detector evidence has not always been admitted upon stipulation. In the oft-cited case of *LeFevre v. State*,¹² the Wisconsin Supreme Court held lie de-

5. *State v. Weindorf*, 361 S.W.2d 806 (Mo. 1962); *State v. Stidham*, 305 S.W.2d 7 (Mo. 1957); *State v. Cole*, 354 Mo. 181, 188 S.W.2d 43 (1945). See also *State v. Hudson*, 289 S.W. 920 (Mo. 1926), holding that the results of truth serum tests are inadmissible; *Stone v. Earp*, 331 Mich. 606, 50 N.W.2d 172 (1951), a Michigan chancery decision wherein the trial court had ordered the parties to take a lie detector test, the results of which would be weighed in its decision. On appeal this was held to be error, but not prejudicial error, lending some credence to the suggestion that the exclusion of lie detector results be limited to criminal cases. For discussions of reliability of test results, see: F. INBAU, *LIE DETECTION AND CRIMINAL INTERROGATION* 86 *et seq.* (2nd ed. 1948); J. Coghlan, *The Lie Box Lies*, 7 TRIAL LAWYER'S GUIDE 173 (1964).

6. 85 Cal. App. 2d 686, 193 P.2d 937 (1948).

7. *Id.* at 695, 193 P.2d at 942.

8. 252 Iowa 19, 104 N.W.2d 568 (1960).

9. 91 Ariz. 274, 371 P.2d 894 (1962).

10. The Arizona Court required that: (1) the prosecutor, defendant, and defendant's counsel sign a written stipulation; (2) the judge retain discretion to exclude the evidence if the expert's qualifications are not established to his satisfaction; (3) the opposing party be allowed the right of cross examination regarding the examiner's qualification, the conditions under which the test was administered, limitations of the technique, possibility of error, and any other matter the judge deems pertinent; (4) a limiting instruction be given that the testimony does not tend to prove or disprove any element of the crime, but merely indicates whether defendant was telling the truth when the examination was given. *State v. Valdez*, 91 Ariz. 274, 283, 371 P.2d 894, 900 (1962).

11. *Herman v. Eagle Star Ins. Co.*, 283 F.Supp. 33 (C.D. Cal. 1966), *aff'd per curiam*, 396 F.2d 427 (9th Cir. 1968).

12. 242 Wis. 416, 8 N.W.2d 288 (1943).

detector results, in the absence of expert testimony, inadmissible when offered by the *defendant* pursuant to the stipulation. No reason was given for this holding. *State v. Trimble*,¹³ a 1961 New Mexico case, reached a similar result, holding lie detector evidence always inadmissible, without considering the results in *Houser* or *McNamara*.

Somewhere between the extremes found in *Trimble* and *Houser* lie a group of cases in which the courts have given strong indication that, should the facts present themselves, they may be willing to follow the reasoning in *Houser*.¹⁴ It is within this group that the *Fields* case falls, and its limitations should be carefully noted. In *Fields* the Missouri Supreme Court did not reach the issue of whether questions of reliability and competency were cured by a stipulation because no objection was made at trial on these grounds. If trial counsel had objected to the admission of such evidence on the grounds that it was incompetent for any purpose by reason of its unreliability and scientific inaccuracy, the court would have been faced with the same problem as the courts in *Houser*, *McNamara*, and *Trimble*. It would have had to decide whether to follow the growing group of jurisdictions which will unquestionably accept such evidence upon stipulation, or to put an end to the lie detector question in Missouri once and for all. Judge Eager was quite explicit, saying, "We decline now to rule upon the admissibility of this evidence from the standpoint of the scientific acceptance or non-acceptance of such tests or their accuracy."¹⁵ Although the court would not consider *Houser*, *Valdez*, or *McNamara*, believing that the holdings in these cases were not relevant to the issue on appeal, it did indicate

13. 68 N.M. 406, 362 P.2d 788 (1961).

14. See *State v. Lowry*, 163 Kan. 622, 185 P.2d 147 (1947), where the court by way of dictum indicated that if the parties stipulate the introduction of the test results as evidence at trial, such evidence is admissible. See also *Colbert v. Commonwealth*, 306 S.W.2d 825 (Ky. 1957), holding an oral agreement to be bound by the results of a lie detector test insufficient and intimating that more formality, presumably a writing, was required for such evidence to be admissible. In the subsequent case of *Conley v. Commonwealth*, 382 S.W.2d 865 (Ky. 1964), a written stipulation as to admissibility was insufficient to make the evidence admissible when it was shown that defendant was illiterate, was not apprised of his rights, and was without counsel when the stipulation was made. The same result was reached on a similar state of facts in *People v. Zazzetta*, 27 Ill. 2d 302, 189 N.E.2d 260 (1963). The Illinois case of *People v. Potts*, 74 Ill. App. 2d 301, 220 N.E.2d 251 (1966), held lie detector evidence upon written stipulation inadmissible when the examiner's qualifications were not shown. In *State v. LaForest*, 106 N.H. 159, 161, 207 A.2d 429, 431 (1965), the court said:

In the circumstances of the present case the results of polygraph tests are not admissible on the basis of the stipulation involved in this proceeding. We leave open the question whether polygraph tests may be admitted where all parties and their counsel with the approval of the court have agreed by a stipulation which leaves no room for doubt that the results of the tests may be admissible in evidence regardless of their outcome.

In *State v. Arnwine*, 67 N.J. Super. 483, 171 A.2d 124 (1961), the court implied that, had the admissibility of lie detector evidence been stipulated, it would have been admitted. See also *Commonwealth v. McKinley*, 181 Pa. Super. 610, 123 A.2d 735 (1956).

15. *State v. Fields*, 434 S.W.2d 507, 513 (Mo. 1968).

that it might be receptive to the *Houser* rationale should the issue be presented.¹⁶

The court was willing to admit the paraffin test results as evidence upon agreement of the parties, or where the test operator's qualifications are established, the test is run in a standard manner, the procedure is adequately described to the jury, and the operator is present in court for cross-examination.¹⁷ The court conceded that the results of the paraffin test were not conclusive evidence that defendant fired a gun. It noted other causes, such as the handling of certain types of fertilizer and the use of old style kitchen matches, which might produce a positive reaction. However, feeling that such a possibility was remote, and upon corroborative testimony by the expert that the reaction was caused by particles positively identified as gunpowder, it affirmed the trial court's action, stating that circumstantial evidence need not be conclusive to be relevant and competent.

This decision places Missouri within the minority of jurisdictions accepting the results of paraffin testing as evidence. Courts which have excluded the results of paraffin tests have done so largely for the same reasons used to support the exclusion of lie detector evidence.¹⁸ *Brooke v. People*,¹⁹ a 1959 Colorado decision, states: "[W]e hold that the paraffin test has not gained . . . that degree of reliability to justify courts approving its use in criminal cases."²⁰ In fact, only five other decisions were found by this writer allowing such evidence,²¹ each stating that paraffin evidence is in the same category as blood tests, fingerprints, breath tests, and radar; that is, it is a technological test which has reached a degree of reliability accepted by the courts.²²

16. After a discussion of the extensive nature of the waiver of objections in the stipulation, including competency, reliability, and accuracy, the court said, "It would be almost unthinkable to permit defendant now to reverse his position and oppose the reception of this evidence for the sole reason that the results were not favorable to him." *State v. Fields*, 434 S.W.2d 507, 513 (Mo. 1968).

17. *State v. Fields*, *supra* note 16, at 516.

18. *Brooke v. People*, 139 Colo. 388, 339 P.2d 993 (1959); *Born v. State*, 397 P.2d 924 (Okla. Crim. 1964), *cert. denied*, 379 U.S. 1000 (1965); *Clarke v. State*, 218 Tenn. 259, 402 S.W.2d 863 (1966).

19. 139 Colo. 388, 339 P.2d 993 (1959).

20. *Id.* at 393, 339 P.2d at 996.

21. *Henson v. State*, 159 Tex. Crim. 647, 266 S.W.2d 864 (1953); *Commonwealth v. Westwood*, 324 Pa. 289, 188 A. 304 (1936); *People v. Simpson*, 5 Mich. App. 479, 146 N.W.2d 828 (1966). *See also Harris v. State*, 239 Ark. 771, 394 S.W.2d 135 (1965); and *State v. Foster*, 44 Hawaii 403, 354 P.2d 960 (1960), where paraffin results were admitted with little discussion by the courts.

22. The reliability of the results of paraffin tests has been seriously challenged. In *Turkel and Lipman, Unreliability of Dermal Nitrate Test for Gunpowder*, 46 J. CRIM. L.C. & P.S. 281 (1955), it was found that the test was subject to a gross error of 13 per cent and the results were inconclusive on 75 per cent of the tests. Additional substances causing positive reactions were tobacco, tobacco ash, pharmaceuticals, and urine. It was concluded that the paraffin test is "less than worthless." *Id.* at 283.

A similar inquiry was made by two forensic scientists who concurred with the findings above, stating that the test was of little or no value. *See Cowan and Purdon, A Study of the Paraffin Test*, 12 J. FOR. SCI. 19 (1967).

Fields represents a step in the liberalization of Missouri's rules of evidence in an area in which few courts are wont to be liberal. The judicial sanction of the paraffin test as evidence in a criminal case shows a regard for its usefulness as a police tool and a recognition of the jury's ability to weigh the results so obtained, but largely ignores criticism of its reliability.²³ The limitation of this holding regarding lie detectors was compelled by the failure of counsel to make the proper objection at trial. The next logical step would seem to be complete adoption of the rule that lie detector evidence is admissible upon stipulation notwithstanding an objection as to its competency. The rationale for such a rule is obvious. A defendant's attorney will not likely agree to allow his client to submit to the test unless he is reasonably confident that defendant is innocent, hence such a rule would lead to more exhaustive investigation of the merits of the case.²⁴ Furthermore, a defendant should not be able to hedge his bet by taking a lie detector test under stipulation, knowing that if adverse results are obtained he can back out by repudiating his stipulation. Similarly, should a prosecutor renege under a rule similar to that in the *Trimble* case, serious due process questions arise. For these reasons, the adoption of the *Houser* rule admitting lie detector evidence on stipulation seems the best way to deal with the problem should it arise in the future.

KENNETH W. JOHNSON

23. *Ibid.*

24. Kliensfeld, *The Detection of Deception—A Resume*, 8 Fed. B.J. 153, 164 (1947); Reid, *The Lie Detector in Court*, 4 DEPAUL L. REV. 31, 42 (1954).

CONSTITUTIONAL LAW—CHRONIC ALCOHOLISM AS A DEFENSE
TO A CHARGE OF PUBLIC INTOXICATION

*Powell v. Texas*¹

Leroy Powell was tried and convicted in the Corporation Court of Austin, Texas, of being intoxicated in a public place in violation of the Texas Penal Code.² He appealed to the County Court of Travis County, Texas, where a trial *de novo* was held.³ His counsel urged that Powell was a chronic alcoholic and that he did not appear in public in a state of intoxication of his own volition. The trial judge ruled that chronic alcoholism was not a defense to the charge and Powell was convicted. The conviction was appealed directly to the United States Supreme Court. In a split decision, the conviction was affirmed, with the Court holding that chronic alcoholism in itself is not a defense to the charge of public intoxication.

This decision was surprising since previous federal court cases had pointed to an opposite result. In 1962, the Supreme Court held in *Robinson v. California*⁴ that a narcotics addict could not be punished for the condition or status of being addicted.⁵ The court stated:

It is unlikely that any state at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease.⁶

The state admitted that a narcotics addict is mentally and physically ill,⁷ and since the statute made it a crime to use or be addicted to narcotics, the Supreme Court concluded that the statute authorized criminal punishment for a recognized illness. Under these circumstances, even a 90-day sentence was held to be a cruel and unusual punishment in violation of the eighth and fourteenth amendments. The court did not invalidate the portion of the statute proscribing the use of narcotics but only the portion authorizing criminal liability solely for drug addiction. The related problem of alcoholism came to the attention of the appellate courts

1. 392 U.S. 514 (1968).

2. TEX. PEN. CODE art. 477 (1952). "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

3. *Powell v. Texas*, 392 U.S. 514 (1968). The first time the case appeared in a court of record was in the United States Supreme Court. Therefore, any facts as to occurrences or findings of the trial court are taken from the opinions expressed by Supreme Court justices.

4. 370 U.S. 660 (1962).

5. CAL. HEALTH & SAFETY CODE § 11721 (West 1957):

No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. (emphasis added)

The emphasized portion was deleted from the statute in the 1963 edition.

6. *Robinson v. California*, 370 U.S. 660, 666 (1962).

7. *Id.* at 667.

in *Driver v. Hinnant*.⁸ Driver had been convicted of public intoxication in violation of a North Carolina statute.⁹ The court of appeals granted a writ of habeas corpus based on the authority of *Robinson*. Driver was found to be a chronic alcoholic unable to control his actions. The court stated: "the evidence . . . conclusively proved him a chronic alcoholic, his inebriation in public view an involuntary exhibition of the infirmity."¹⁰ Driver had been convicted for the same offense over 200 times during the last 35 years and had been incarcerated nearly two-thirds of his life for these infractions.

The court of appeals stated that to convict Driver for the crime of public intoxication would violate the eighth amendment as a cruel and unusual punishment because chronic alcoholism "is now almost universally accepted as a disease" and "[o]bviously includes appearances in public." This decision was based upon the *Robinson* case which, the court stated, "sustains, if not commands, the view we take."¹¹ The possibility of civil commitment was clearly left open as long as the alcoholic was not marked a criminal.¹²

The same question was decided by a different court of appeals in *Easter v. District of Columbia*.¹³ Easter was convicted of violating a statute similar to the one in *Powell* and *Driver*.¹⁴ The court reviewing Easter's conviction had, in addition to the eighth amendment, an act of congress authorizing the courts to take judicial notice that a chronic alcoholic is a sick person in need of medical help.¹⁵ Basing its opinion largely on the authority of *Robinson* and *Driver*, the *Easter* court said that the chronic alcoholic is not to be considered voluntarily intoxicated, does not have the necessary *mens rea* to commit a crime, and therefore, cannot be sentenced as a criminal.¹⁶ These conclusions were made with full realization that no rehabilitative or caretaking facilities were available. An appendix to the opinion cited several medical and legal authorities to support the court's position.¹⁷

It should be noted, however, that not all recent cases have followed the course of *Robinson*, *Driver* and *Easter*. In *Seattle v. Hill*,¹⁸ the defendant had been

8. 356 F.2d 761 (4th Cir. 1966).

9. N.C. GEN. STAT. § 14-335 (1951). "If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting, in any county, township, city, town, village . . . he shall be guilty of a misdemeanor. . . ." Since *Driver* a clause has been added which authorizes chronic alcoholism as a defense to the charge of public intoxication. If a verdict of not guilty by reason of chronic alcoholism is reached, the court is authorized to institute civil commitment procedures. N. C. GEN. STAT. § 14-335 (Supp. 1967).

10. *Driver v. Hinnant*, 356 F.2d 761, 763 (4th Cir. 1966).

11. *Id.* at 764.

12. *Id.* at 765.

13. 361 F.2d 50 (D.C. Cir. 1966).

14. D.C. CODE ANN. § 25-128 (1961):

No person shall in the District of Columbia drink any alcoholic beverage in any street, alley, park, or parking No such person shall be drunk or intoxicated in any street, alley, park, or parking

15. D.C. CODE ANN. § 24-501 (1961).

16. *Easter v. District of Columbia*, 361 F.2d 50, 53 (D.C. Cir. 1966).

17. *Id.* at 56.

18. 72 Wash. 2d 786, 435 P.2d 692 (1967).

convicted of disorderly conduct after being found lying on a public sidewalk. In upholding the conviction, the Washington Supreme Court arrived at three major conclusions. First, jail sentences do have some beneficial effect on the chronic alcoholic.¹⁹ Second, the disorderly conduct ordinance was a public welfare ordinance and therefore no finding of intent or *mens rea* was required. Third, even if the court believed that there were better ways to treat alcoholics and that a reversal of the conviction would result in establishment of rehabilitation centers, the initiation of such a policy would be within the province of the legislature rather than the court.²⁰

In 1966, the United States Supreme Court denied certiorari to a case in which it was asked to give an opinion as to the constitutionality of convicting a chronic alcoholic of public intoxication. That case was *Budd v. California*²¹ where the trial court had made no findings of fact as to whether the defendant was an alcoholic since it had ruled that, as a matter of law, chronic alcoholism was not a defense to the charge. Justices Fortas and Douglas dissented from the denial of certiorari because they believed that the *Driver* and *Easter* courts had correctly applied the medical and sociological data concerning chronic alcoholics in light of the holding in the *Robinson* decision.

In *Powell*, Justice Marshall's majority opinion²² rejected the argument that Powell's conviction violated the eighth and fourteenth amendments. The trial transcript of Powell's conviction offered a better record for review than *Budd* although the record was still not as complete as the Supreme Court would have preferred. The trial court, after hearing the testimony, made certain findings of fact:

1. That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
2. That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
3. That Leroy Powell, a defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism.²³

19. *Id.* at 790, 435 P.2d at 696. After hearing testimony that unrelieved and continuous drunkenness causes death by cirrhosis of the liver, the court stated: If uninterrupted drunkenness is a direct cause of death, then undeniably frequent periods of confinement in a clean city jail with nourishing food during 20 years of chronic addictive alcoholism, were of beneficial therapeutic effect.

20. *Id.* at 801, 435 P.2d at 702:

His arguments that there are better ways to handle alcoholics than methods now employed by the city are undoubtedly sound, but should be addressed to the legislative and executive branches of government where the money is raised, appropriated and allocated, personnel engaged and facilities established to carry out the rehabilitative policies.

21. 385 U.S. 909 (1966).

22. Justice Marshall was joined in this opinion by Chief Justice Warren and Justices Harlan and Black.

23. *Powell v. Texas*, 392 U.S. 514, 521 (1968).

Justice Marshall refused to accept these as findings of fact, saying, "whatever else may be said of them, those are not 'findings of fact' in any recognizable, traditional sense in which that term has been used in a court of law"²⁴ He could find little basis for these findings in the trial transcript. The only State witness was the arresting officer and the only defense witnesses were one policeman who testified to Powell's arrest record, Powell himself, and one psychiatrist. None of the testimony given was viewed as sufficiently decisive to support the general conclusions drawn by the trial judge.

Justice White concurring in the *Powell* result only, accepted the trial court's first and third findings but rejected the finding that a chronic alcoholic does not appear in public by his own volition. If the evidence showed that the specific defendant was compelled to be in public (*i.e.*, he had no home or became so drunk that he could not control his actions), and it could be shown that it was not feasible for the defendant to have taken precautions which would keep him out of public places, then Justice White believed it would be a violation of the eighth amendment to convict him of the crime of public intoxication.²⁵ Justice White was, however, unable to discover any evidence that Powell was compelled to be in public, even though this fact was "found" at the trial.

The dissenting opinion in *Powell*, written by Justice Fortas,²⁶ argued that if the trial judge's first two general conclusions could be validated by outside authority, his third specific finding that Powell was a chronic alcoholic should be accepted as conclusive.²⁷ Justice Fortas believed that the medical profession is in substantial agreement that alcoholism requires medical treatment and that the medical profession is in command of sufficient knowledge, if not sufficient facilities, to treat alcoholics effectively. Numerous medical and sociological authorities are cited by the dissent to support the trial judge's conclusion that chronic alcoholics are compelled to drink.²⁸ The conclusion that chronic alcoholics are compelled to be in public is supported specifically only by the defense testimony at the trial. However, the dissent accepted this conclusion as unavoidably following from the conclusion that alcoholics are compelled to drink.

In his majority opinion, however, Justice Marshall was able to find no substantial agreement among medical authorities as to the concept of alcoholism. Marshall relied heavily on a treatise by E. M. Jellinek²⁹ from which he concluded that physical withdrawal symptoms might be necessary to show that a person

24. *Ibid.*

25. *Id.* at 548-53.

26. Justice Fortas was joined in the dissent by Justices Douglas, Brennan and Stewart.

27. *Powell v. Texas*, 392 U.S. 514, 557 n.1 (1968):

I do not suggest in this opinion that Leroy Powell had a constitutional right, based upon the evidence adduced at his trial, to the findings of fact that were made by the county court; only that once such findings were in fact made, it became the duty of the trial court to apply the relevant legal principles and to declare that appellant's conviction would be constitutionally invalid.

28. *Id.* at 560-64.

29. E. M. JELLINEK, *THE DISEASE CONCEPT OF ALCOHOLISM* 11 (1960).

cannot abstain from drinking. Very few alcoholics display these symptoms. Other alcoholics have only a "compulsion" or an "exceedingly strong influence" to drink. Justice Marshall believed that these terms do not have a meaning adequately defined to form a basis for a rule of constitutional law.

It is one thing to say that if a man is deprived of alcohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a "compulsion" to take a drink but that he also retains a certain amount of "free will" with which to resist. It is simply impossible, in the present state of our knowledge, to ascribe a useful meaning to the latter statement.³⁰

Another basic disagreement between the majority and the dissent in *Powell* is the feasibility of an alternative to criminal punishment. Justice Marshall postulated that the intoxicated person could not be left on the street, then studied the feasibility of civil commitment, and decided that present medical facilities are far too inadequate to accommodate all alcoholics who would become intoxicated and subject to criminal prosecution.³¹ "Thus we run the grave risk that nothing will be accomplished beyond the hanging of a new sign—reading 'hospital'—over one wing of the jailhouse."³²

The dissent countered this argument by citing statistics to show that alcoholics place a tremendous burden on the criminal process.³³ The theory behind these

30. *Powell v. Texas*, 392 U.S. 514, 526 (1968).

31. Justice Marshall cites some startling statistics in support of his position. "The lowest current informed estimate places the number of 'alcoholics' in America . . . at 4,000,000, and most authorities are inclined to put the figure considerably higher." *Id.* at 527.

In California, for instance, according to the best estimate available, providing all problem drinkers with a weekly contact with a psychiatrist and once-a-month contact with a social worker would require the full time work of every psychiatrist and every trained social worker in the United States.

Cooperative Commission on Study of Alcoholism, Alcohol Problems, 120 (1967) (emphasis in original). Marshall's expectations for the near future are nearly as bleak as his outlook on the present situation:

Yet the medical profession cannot, and does not, tell us with any assurance that, even if the buildings, equipment and trained personnel were made available, it could provide anything more than slightly higher-class jails for our indigent habitual inebriates.

Powell v. Texas, 392 U.S. 514, 529 (1968).

32. *Powell v. Texas*, *supra* note 31, at 529.

33. Some persons have been arrested as often as 40 times during a single year for public drunkenness and during their lifetime many individuals have been arrested as many as 125, 150, or 200 times for this offense. *Id.* at 564. See F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 8 (1964). "Two million arrests in 1965—one of every three arrests in America—were for the offense of public drunkenness." *Task Force Report: Drunkenness* 1 (1967) (published by The President's Commission on Law Enforcement and Administration of Justice).

Even as staggering as these statistics may seem, they are mild in relation to the problems in some urban centers. In Washington, D.C. for example, in 1965, 86,464 arrests were made. Of these, 51.8% were for the crime of public drunkenness. When the related crimes of disorderly conduct and vagrancy are included, the figure climbs to 76.5%. The same year in Atlanta, 92,965 arrests were made of which 52.5% were for public drunkenness and 76.6% were for public drunken-

statistics is that invalidating criminal convictions such as Powell's would reduce the police work load so much that additional state funds would be available for treatment facilities. Even if this failed, the "hospital wing" of the jail would be no worse than the present situation.

Only the concurring opinion of Justice Black questioned the validity of considering either the availability of treatment facilities or the burdens upon the criminal process in deciding questions of constitutional law.³⁴ Justice Black agreed substantially with the holding in *Seattle v. Hill*³⁵ that both distribution of funds for public alcoholic rehabilitation facilities, and the determination of standards of criminal liability are basically matters of concern for local legislatures. This contention was touched only lightly by Justice Marshall and avoided completely by the dissent.

Perhaps the most important disagreement in *Powell* concerns the interpretation of *Robinson v. California*,³⁶ since the holding in *Robinson* is applicable to many "status" or "condition" crimes such as narcotics usage, insanity, homosexuality, and vagrancy. The dissent believed that *Robinson* held that one could not be punished for a condition he was powerless to change. While this position finds little support in the *Robinson* case itself,³⁷ it does seem to follow logically from the holding that an addict could not be convicted for the "crime" of being addicted. Justice White, concurring in *Powell*, also argued that the status of being an alcoholic and the act of drinking are as inseparable as the status of being an addict and the act of using narcotics. He said:

ness, vagrancy or disorderly conduct. However in St. Louis, a city of comparable size, only 44,701 arrests were made. Of these only 5.5% were for public drunkenness and 18.9% for the related crimes. Evidently this difference is attributable to different theories of law enforcement. Washington D. C. and Atlanta strictly enforce their public intoxication statutes while St. Louis is much more lenient.

Since these figures were compiled, St. Louis has taken even further steps to lessen the burden the alcoholic imposes upon criminal process. A "detoxification center" is now in operation. Intoxicated persons are taken to this center where, for a few days, they receive a high protein diet, and where Alcoholics Anonymous meetings, films, group therapy, work projects, lectures, social workers, etc. are available. However, little rehabilitative care is available to the alcoholic once he leaves the center.

Philadelphia has a center, much smaller than the one in St. Louis, where out-patient services such as vocational counseling, including social and occupational skills, and housing relocation are available. When these centers have been in operation long enough for reliable statistics to be compiled, other cities should be able to make a more rational decision as to what measures should be taken to combat the problem of drunkenness. *Task Force Report: The Challenge of Crime 234-37* (1967) (published by The President's Commission on Law Enforcement and Administration of Justice).

34. Justice Harlan joined in this opinion.

35. 72 Wash.2d 786, 435 P.2d 692 (1967).

36. 370 U.S. 660 (1962).

37. *Id.* at 664. "A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders." Note, however, that this enumeration does not include use of narcotics even though such use is one of the acts proscribed by the California statute.

Distinguishing between the two crimes is like forbidding criminal conviction for being sick with the flu or epilepsy but permitting punishment for running a fever or having a convulsion.³⁸

Justice Marshall, on the other hand, does make a distinction between the crime in *Robinson* and that in *Powell*. Since the Texas statute did not seek to punish Powell for being a chronic alcoholic, "but for being in public while drunk on a particular occasion . . . for public behavior which may create substantial health and safety hazards . . ." ³⁹ he argued that Powell's conviction does not fall under the holding in the *Robinson* case. Justice Marshall would limit the *Robinson* case by saying that it stands only for the proposition that a person must do some act in order to violate a law such as the California narcotics statute.⁴⁰ By placing this limitation on the case, Marshall refuses to interpret *Robinson* as saying that a person could not be convicted even if this act was involuntary or compelled. Such an interpretation would, in Marshall's view, open the doors to many questions as to which acts done under "compulsion" or "exceedingly strong influence" could be criminally punished. This, he contends, would make the Supreme Court "the ultimate arbitrator of the standards of criminal responsibility, in diverse areas of criminal law, throughout the country."⁴¹

The curious result is, then, that while the entire Supreme Court agrees that the *Robinson* case is unquestionably good law, there is disagreement as to just what that law is. The 4-4-1 split among the *Powell* court gives Justice White's concurring opinion a great deal of weight. Four justices believe that it was not shown in this case and cannot presently be shown in general terms that a chronic alcoholic is compelled to either drink or be in public. Four justices believe that it can be shown in general, and was shown in this case that chronic alcoholics are compelled to both drink and be in public. Justice White believes that it can be shown in general that chronic alcoholics are compelled to drink and accepted the dissent's view that the *Robinson* case prevents the alcoholic from being convicted for such a compulsion. However, Justice White would require that there be evidence, beyond mere "findings" of the trial judge, that the specific alcoholic on trial was compelled in some way to be in public.

It seems unlikely that *Powell* is the final word by the Supreme Court either as to the meaning of *Robinson* or as to the availability of alcoholism as a defense to a public intoxication charge. Justice Marshall's opinion makes a long range challenge to both the medical and legal profession:

It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, are not yet clear either to doctors or to lawyers.⁴²

Since five justices substantially agreed upon the dissent's view of the *Robinson* case, the Supreme Court may not wish to wait for further medical

38. *Powell v. Texas*, 392 U.S. 514, 548 (1968).

39. *Id.* at 532 (emphasis added).

40. See note 5 *supra*.

41. *Powell v. Texas*, 392 U.S. 514, 533 (1968).

42. *Id.* at 537.

evidence before re-examining the issues of this case. As has been noted, however, the major problem in bringing this question before the Supreme Court lies in obtaining a complete record to review. Since the penalty is usually small, few cases will arise where a verified chronic alcoholic will obtain a trial broad enough in scope and complete enough in record to give the Supreme Court the type of a trial transcript it desires. However, it is likely that further interpretations of the *Robinson* case will be forthcoming, either in the area of chronic alcoholism or in a related area such as narcotics usage, sexual deviations, or insanity.

LYND K. MISCHE

PRODUCTS LIABILITY-IMPLIED
WARRANTIES AND THE NEED FOR A SALE

*Newmark v. Gimbel's, Inc.*¹

Mrs. Newmark had no idea of what she was letting herself in for when she decided to take advantage of a special sale on permanent waves being offered at the beauty parlor she regularly attended. Immediately after application of the waving solution, which was administered without following the directions,² she experienced a burning sensation and her scalp turned red. It is not uncommon for one undergoing this beautifying process to experience these two after-effects, but here they eventually evolved into something more than merely a passing discomfort. The day after receiving the permanent wave, an unusually large amount of Mrs. Newmark's hair fell out when combed. Upon visiting a dermatologist her condition was diagnosed as contact dermatitis. Eventually the redness and tenderness of the scalp diminished but the loss of hair on the top of Mrs. Newmark's head persisted at the time of trial.

Mrs. Newmark brought suit against the beauty parlor on two theories:

1. 102 N.J. Super. 279, 246 A.2d 11 (1968).

2. The directions took the form of a warning telling the operator to "ask the patron her previous experience with cold waves to be sure she does not have a sensitivity to waving lotion."

Failure to place this warning on the product as required by the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 361 (1938), would have made the manufacturer negligent per se. James, *Products Liability*, 34 TEX. L. REV. 44, 212 (1955); Rabbit, *Duty to Warn and Adequate Warning in Missouri Products Liability Cases*, 8 ST. L. U.L.J. 407 (1964); Note, 1967 WASH. U.L.Q. 206.

Failure to conduct a patch test as required by the warning made the beautician negligent. *Romero v. And'ra*, 216 Cal. App.2d 295, 30 Cal. Rptr. 645 (1963); *Horan v. Klien's-Sheridan, Inc.*, 62 Ill. App.2d 455, 211 N.E.2d 116 (1965); *Bethancourt v. Employer's Liability Assurance Corp.*, 153 So.2d 921 (La. App. 1963); *Wrenn v. Vincent*, 235 Md. 466, 201 A.2d 768 (1964); *Arnold v. May Dept. Stores Co.*, 337 Mo. 727, 85 S.W.2d 748 (1935); *Holmes v. Ashford* [1950] 2 All Eng. 76 (C.A.).

negligence, and breach of implied and express warranties. The trial court refused to allow the warranty theories, ruling that there was no express warranty and that because the transaction between the parties amounted to the rendition of services rather than the sale of a product, there could be no implied warranty. The case was submitted to the jury solely on the issue of negligence.³ After the jury returned and the trial court upheld a verdict for the defendant, Mrs. Newmark appealed, assigning as error the refusal of the trial court to submit the warranty issues to the jury. Upon appeal, the Superior Court of New Jersey held that implied warranty principles permit recovery against a beauty parlor operator.⁴ In so holding, the court extended warranty protection in New Jersey to yet another area where there is no sale of goods.⁵

3. See W. PROSSER, LAW OF TORTS § 93 (3d ed. 1964), for considerations in deciding whether to bring an action based on contract or tort.

One should remember that in Missouri the wrongful death action was created by statute. § 537.000, RSMo 1959. Under this statute a wrongful death action arises "[w]henver the death of a person shall be caused by a wrongful act, neglect or default of another . . ." With this emphasis on negligence, it is doubtful whether one will have much success in pleading breach of warranty as the cause of death. *Bloss v. Dr. C. R. Woodson Sanitarium Co.*, 319 Mo. 1061, 5 S.W.2d 367 (1928).

Another factor to be considered is the difference in the statute of limitations. The UNIFORM COMMERCIAL CODE, § 400.2-725(1), RSMo 1963 Supp., provides for a maximum four-year statute of limitation, accruing when the breach occurs, with a provision permitting the parties to reduce the period of limitation to one year. In comparison, the statute of limitation for a tort cause of action is five years. § 516.120, RSMo 1959. *Krauskopf, Products Liability*, 32 Mo. L. REV. 459, 459-62 (1967). With these considerations in mind, it is advisable always to plead negligence, strict tort liability, and warranty.

4. For other beauty parlor cases where the plaintiff was successful, although not always under a warranty theory, see: *Garthwait v. Burgio*, 153 Conn. 284, 216 A.2d 189 (1965); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967); and cases cited note 2 *supra*.

For unsuccessful attempts to recover, see: *Cassina v. Morris M. Taylor & Sons, Inc.*, 2 UCC Rep. 1148 (1964); *Epstein v. Giannattasio*, 25 Conn. Sup. 109, 197 A.2d 342 (1963); *Ptomey v. Sayers*, (1963-1965) C.C.H. Products Liability Rptr. § 5305; *Quist v. Bressard Distributors, Inc.*, 24 App. Div.2d 420, 260 N.Y.S.2d 394 (1965); *Young v. Clairol, Inc.*, (1963-1965) C.C.H. Products Liability Rptr. § 5168.

5. The New Jersey courts have pursued a liberal policy in applying warranties in areas where an ordinary sale of goods is not present. See: *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965), where the court permitted the child of a purchaser's lessee to recover on an implied warranty theory against the builder-vendor of a mass housing project. Citing W. PROSSER, TORTS § 85 (2d. ed. 1955) the court said, "[T]here is no visible reason for any distinction between the liability of one who supplies a chattel and one who erects a structure." Later in the opinion two factors that the court in *Newmark* also considered important were emphasized. First, as with a sale of goods, there was reliance on the skill and implied representations of the seller. Second, the developer was in a better economic position to bear the loss than the purchaser or his lessee. *Id.* 44 N.J. at 91, 207 A.2d at 325-26. *Totten v. Gruzen*, 52 N.J. 202, 245 A.2d 1 (1968), extended the principles adopted in *Schipper* to all builders and contractors. *Cintrone v. Hertz Truck Leasing*, 45 N.J. 434, 212 A.2d 769 (1965), involved injury suffered by the employee of a lessee caused by a defective chattel (truck) supplied by the lessor. Here the court saw no good reason for restricting warranties to sales when the factors giving rise to a warranty situation were present. The

The basis for the *Newmark* decision, as well as for other warranty-extending decisions the New Jersey courts have handed down, is simple, practical, and logical.⁶ The underlying premise is that there are certain instances where the law will imply warranties to protect the consumer irrespective of what classification under which the transaction falls (*i.e.*, sale, service, bailment (lease), construction contract, etc.).⁷ The court looked through the labels affixed to the transaction to the relationship between the parties,⁸ and considered the following factors: (1) reliance of the buyer upon the seller in selecting the source of supply;⁹ (2) enterprise liability¹⁰—the seller should bear the risk of loss as one of the costs of doing business; (3) seller's ability to spread the risk of loss because

lessor was in a better position to know and control the condition of the chattel transferred and to distribute the losses which occurred. The leading decision on blood transfusions, *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E.2d 792 (1954), which established that no implied warranties attach to a transfusion of blood performed in a hospital because the furnishing of blood is a service and not a sale, was repudiated in *Jackson v. Muhlenberg Hospital*, 96 N.J. Super. 314, 232 A.2d 879 (1967). The New Jersey court flatly rejected the doctrine that a transfusion of blood for a charge is not a sale and went on further to say that it made no difference whether the transaction was a sale or service if the basic policy considerations which lead to strict liability are applicable.

6. Implied warranties first developed in the food area. W. PROSSER, *LAW OF TORTS* § 97 (3d ed. 1964); 1 S. WILLISTON, *SALES* § 242 (3d ed. 1948).

7. The development of this doctrine of applying warranties where they are needed to protect the consumer can be traced through the following cases: *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), which contains a brief historical background of sales transactions; *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 377 P.2d 897 (1963); *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

After *Santor v. A. & M. Karagheusian, supra*, it was clear that warranties would be implied where courts deemed them needed, but there still remained the question of the necessity of a sale to someone. This question was answered by *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965), in which a warranty was implied in the home construction area, see note 5 *supra*, and *Cintrone v. Hertz Truck Leasing*, 45 N.J. 434, 212 A.2d 769 (1965), which held that "[t]here is no good reason for restricting such (implied) warranties to sales," see note 5, *supra*. Thus, warranties had evolved to the point where privity and the sale of goods were no longer needed.

8. *Worley v. Procter & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (St. L. Ct. App. 1952).

9. 1 S. WILLISTON, *SALES* § 242b (2d ed. 1924). "The basis of implied warranty is justifiable reliance on the judgment and skill of the warrantor . . ." 2 F. HARPER & F. JAMES, *TORTS* § 28.30 (1956). "If reliance upon the seller is needed, it may be found in the customer's reliance on the retailer's skill and judgment in selecting his sources of supply;" Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 670 (1957).

Reliance is not needed under the RESTATEMENT (SECOND) OF TORTS § 402A, Comment *m* (1965).

10. Relying on *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 377 P.2d 897 (1963), the court in *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 65, 207 A.2d 305, 312 (1965), defines the purposes of "enterprise liability" as being

To insure that the cost of injuries or damage . . . resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves.

of his strategic position in the sales transaction chain;¹¹ (4) ability to promote safety on the part of the manufacturer who controls production and on the part of the seller who can use his purchasing power to demand a better product.¹² If it is determined that the relationship between the parties, in light of the above factors, is such that a warranty is needed, one will be implied by the court regardless of what the parties say¹³ or do. The fact there is a written contract disclaiming warranties may prove to no avail.¹⁴ A combination of modern marketing practices,¹⁵ a reduction in the purchaser's bargaining power,¹⁶ and the

11. The "risk-spreading" theory is closely akin to the "enterprise liability" theory. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120 (1960), defines the "risk-spreading" argument as being: [T]he manufacturers, as a group and an industry, should absorb the inevitable losses which must result in a complex civilization from the use of their products, because they are in the better position to do so, and through their prices to pass such losses on to the community at large. This contention, as Dean Prosser points out, was first given notoriety by Justice Traynor concurring in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944).

12. R. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 169-70 (1951); Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 670 (1955); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 799 (1966).

13. These implied warranties are not dependent upon the manufacturer's or retailer's advertising. *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 65, 207 A.2d 305, 312 (1965).

14. Despite the fact that the parties had executed a written contract by which the seller had expressly limited its liability to a ninety-day parts replacement warranty, the court, finding this aspect of the contract unconscionable, implied a warranty of merchantability. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

The UNIFORM COMMERCIAL CODE § 2-316 (1962) makes provisions for excluding warranties, but a seller cannot go too far without running afoul of § 2-719, which states that "[l]imitation of consequential damages for injuries to the person in the case of consumer goods is prima facie unconscionable . . ."

15. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), expressed concern over the marketing device of the "independent dealer," note 7 *supra*, the form contract, note 14 *supra*, and the loss of consumer bargaining power, note 16 *infra*; *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 467, 150 P.2d 436, 443 (1944), noted the changing relationship between buyer and seller. The consumer no longer has the opportunity or skill to investigate a product. He trusts the manufacturer and buys according to highly publicized brand names; *Randy Knitwear, Inc., v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962), describes how today's warranty is made through mass advertising instead of being included as an express term of the sale contract. For this reason, one cannot adhere to the conventional law of sales and demand privity before implying a warranty; 2 F. HARPER & F. JAMES, TORTS § 28.33 (1956); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 363-65 (1965); 8 L. WILLISTON, CONTRACTS § 998A (3d ed. 1964).

16. The loss of consumer bargaining power in our highly industrialized society was one of the elements making a disclaimer of warranties unconscionable in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). See note 14 *supra*.

The traditional contract is the result of free bargaining of the parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality . . . But in present-day

fact that people are becoming more interdependent on one another for goods and services which they do not have the time, opportunity, or inclination to inspect before purchase,¹⁷ results in an ever increasing variety of transactions falling under the typical warranty situation.¹⁸ To compensate for this disparity in economic position between the buyer and seller, courts have used the device of implied warranty, which permits the consumer to recover damages without

commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. 'The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms.' *Id.* at 389, 161 A.2d at 86 (emphasis added).

17. *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305, 311 (1965), recognizes that frequently in today's commercial transaction the "public has neither adequate knowledge nor sufficient opportunity to determine if articles bought or used are defective"; King, *New Conceptualism of the Uniform Commercial Code: Ethics, Title, and Good Faith Purchase*, 11 Sr. L. U.L.J. 15, 20 (1966), discussing the time element in contemporary society, facetiously makes the point that if an attempt were made to understand every form contract signed, a substantial portion of one's life would be spent pursuing this task rather than in the use of the articles being purchased.

18. The following types of transactions have given rise to implied warranties. *Contract for labor and materials.* *Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal.2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961), implied a warranty of merchantability to a contract to furnish the necessary labor and material for constructing a radiant heating system; *Kopet v. Klein*, 275 Minn. 525, 148 N.W.2d 385 (1967), held that the purchase of an installed water softener gave rise to a warranty as to the installation as well as to the goods; *Burge Ice Machine Co. v. Weiss*, 219 F.2d 573 (6th Cir. 1955), involving a contract to install refrigeration equipment for a proposed abattoir and storage plant, implied a warranty of fitness that a certain volume of beef could be handled; *Samuels v. Davis* [1943] 2 All E.R. 3 (C.A.), in which the patient of a dentist was permitted to recover on an implied warranty of merchantability theory for faulty dentures; *G. H. Myers and Co. v. Brent Cross Service Co.*, 1 K.B. 46, 150 L.T.R. 96 (1933), held that "[a] repairer of goods, who contracts to do work and labor and supply material . . . impliedly warrants that the material supplied shall be reasonably fit for the purpose . . . intended"

Construction contracts. *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *Totten v. Gruzen*, 52 N.J. 202, 245 A.2d 1 (1968); *Baerveldt & Honing Construction Co. v. Szombathy*, 365 Mo. 845, 849, 289 S.W.2d 116, 118 (1956), "in every contract to perform work there is an implied agreement that the work will be done in a skillful and workmanlike manner"; *Hoye v. Century Builders*, 52 Wash.2d 830, 329 P.2d 474 (1958). Implied warranty that a new dwelling would be fit for human habitation.

Work, labor, and services. (See notes 2 and 4 *supra.*) *Central & South Truck Lines v. Westfall GMC Truck, Inc.*, 317 S.W.2d 841 (K.C. Mo. App. 1958), held that the doctrine of *McPherson v. Buick Motor Co.*, 217 N.Y. 328, 111 N.E. 1050 (1916), extended to persons who repair autos as well as to manufacturers; *Connolly v. Hagi*, 24 Conn. Supp. 198, 206, 188 A.2d 884, 887 (1963), extended a warranty of merchantability to "all those who could reasonably be anticipated to use, occupy or service the operation of the chattel"; *Cheshire v. Southampton Hospital Assn.*, 53 Misc.2d 355, 278 N.Y.S.2d 531 (1967) (emphasis added), refused to dismiss a warranty claim against a hospital "since it may be possible to prove a sale somewhere . . . as opposed to an overall services contract" The court also cited two cases as representing a minority view that there may be an express warranty made in the course of performing a contract for services: *Napoli v. St. Peter's Hospital of Brooklyn*, 213 N.Y.S.2d 6 (1961), and *Payton v. Brooklyn Hospital*, 21 App. Div. 898, 252 N.Y.S.2d 419 (1964), dissenting opin-

regard to the care exercised by the seller.¹⁹ It has been said that strict tort liability is a better term than warranty because of the contractual connotation of the latter.²⁰ The *Restatement (Second) of Torts* § 402A (1965), which imposes strict liability on the seller, discards sales concepts²¹ and adopts the "enterprise

ion; *Jackson v. Muhlenberg Hospital*, 96 N.J. Super. 314, 232 A.2d 879 (1967), see note 5 *supra*. "The transfer of human blood for a consideration is a sale"; *Russell v. Community Blood Bank*, 185 So.2d 749 (Fla. App. 1966), held that a cause of action for breach of implied warranty can be maintained against a blood bank; *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960), assumed no sale of polio vaccine from doctor to patient but allowed the initial sale from manufacturer to distributor to permit the patient to maintain an implied warranty cause of action against the manufacturer; *Dodd v. Wilson* (1946) 2 All E.R. 691 (K.B.), implied a warranty against a veterinarian who recommended, supplied and administered a certain toxoid to cattle.

Bailment for hire. The following treatises cover the cases adequately: 2 F. HARPER & F. JAMES, *TORTS* § 28.19 (1956); 2 R. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 19.02(2) (1960); W. PROSSER, *LAW OF TORTS* § 98 (3d ed. 1964); L. VOLD, *SALES* § 94 N.42a (2d ed. 1959), covering bailment of containers in food cases.

Borrower. *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961).

Self service stores. James, *Products Liability*, 34 TEX. L. REV. 44, 200 (1955). Here passage of title seemed to be the main consideration.

19. It is generally agreed that warranty liability is not based on negligence of the seller. This is clearly consistent with the theory of "enterprise liability," note 10 *supra*. 2 F. HARPER & F. JAMES, *TORTS* § 28.15 (1956); W. PROSSER, *LAW OF TORTS* §§ 74, 95 (3d ed. 1964); *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958). *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

20. Perhaps the most colorful description of warranty can be found in W. PROSSER, *LAW OF TORTS* § 95 (3d ed. 1964). "The seller's warranty is a curious hybrid, born of the illicit intercourse of tort and contract, unique in the law." Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888), points out that warranty liability was originally based on tort and it was not until the late Eighteenth Century that the first warranty case relying on contract theory was reported. Gradually warranty came to be looked upon as an implied term of most contracts. More recently the common law of warranty has been codified, first by the Uniform Sales Act and then by the UNIFORM COMMERCIAL CODE. Missouri has enacted the latter. Chapter 400, RSMo 1963 Supp. It is because the transaction of a sale of goods, with its direct confrontation between buyer and seller, lent itself so readily to the implying of warranties, that the warranty law developed primarily in this area. As a result of this sales background, the courts experienced difficulty when they attempted to abandon such sale concepts as privity and the necessity for a sale of goods. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *m* (1962). In a long line of cases beginning with *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), the privity requirement was finally discarded. Missouri has discarded the privity requirement. See *Roberts, Implied Warranties—The Privity Rule & Strict Liability—The Non-Food Cases*, 27 MO. L. REV. 194 (1962); *Lauer, Sales Warranties Under the Uniform Commercial Code*, 30 MO. L. REV. 259, 277-80 (1965); *Krauskopf, Products Liability*, 32 MO. L. REV. 459 (1967); *Krauskopf, Products Liability*, 33 MO. L. REV. 24 (1968).

Although warranty has continued to develop, it is still a complex and confusing area in which courts intermingle contract and tort concepts. L. VOLD, *SALES* § 84 (2d ed. 1959); *Jaeger, Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQUESNE L. REV. 1, 27 (1963); *Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1126 (1960); Note, 39 NOTRE DAME L. REV. 680, 681 (1964).

21. Although RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965) speaks in terms of a sale, it extends coverage to "users" and "consumers". Comment *l* states

liability" doctrine.²² Using this approach, it is immaterial whether a transaction is a sale or service;²³ the important consideration is the economic relationship between the parties.²⁴

In the *Newmark* case, the relationship was ripe for warranty.²⁵ Mrs. Newmark was a regular customer and the beautician knew the condition of her hair and scalp. The operator alone selected the waving lotion from sources known only to him. He alone knew of the special instructions accompanying the product and, therefore, was in the best position to make certain the lotion was applied

that "[i]t is not even necessary that the consumer have purchased the product at all." Continuing, Comment *l* gives a broad definition to "consumption" (all ultimate uses for which the product is intended) and then specifically says that a "customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer." (emphasis added)

22. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *c* (1965) justifies strict liability by stating that "public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained." Compare this language with the "enterprise liability" doctrine, note 10 *supra*, and the "risk spreading" doctrine, note 11 *supra*. Missouri has adopted the RESTATEMENT (SECOND) OF TORTS § 402A (1965). *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo. En Banc. 1963).

23. The RESTATEMENT (SECOND) OF TORTS § 402A (1965), speaks in terms of users and consumers, note 21 *supra*. Thus, if a person falls into one of the above categories he may recover regardless of the type of transaction.

The category of "user" has played an important role in extending warranty protection to service transactions. *Garthwait v. Burgio*, 153 Conn. 284, 216 A.2d 189 (1965), permitted the patron of a *beauty parlor* to recover against the manufacturer of hair dye. 2 R. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 19.02 (1960), maintains that the "user" theory as applied in *Simpson v. Powered Products of Mich., Inc.*, 24 Conn. Supp. 409, 192 A.2d 555 (1963), (a lessor-lessee situation) can also be used to allow a beauty parlor patron to recover on a warranty theory. *Hacker v. Rector*, 250 F. Supp. 300 (W.D. Mo. 1966), permitted a guest passenger in an automobile to maintain a cause of action based upon the *Restatement's* "user" theory. There also have been cases permitting airline passengers to maintain a warranty action based upon the "user" theory. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); *Taylorson v. American Airlines, Inc.*, 183 F.Supp. 882 (S.D.N.Y. 1960); *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D.N.Y. 1959). For a compilation of aviation cases see 8 S. WILLISTON, CONTRACTS § 995(a) (3d ed. 1964).

24. As *Newmark v. Gimbel's, Inc.*, 102 N.J. Super, 279, 285, 246 A.2d 11, 14 (1968) points out, "the instances in which implied warranties may be imposed are not limited to 'sales' that come strictly within the meaning of c2 of the Uniform Commercial Code." UNIFORM COMMERCIAL CODE § 2-313, Comment 2 (1962) states:

[t]he warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract . . . [T]he matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

25. The court cites 2 F. HARPER & F. JAMES, TORTS § 28.30 (1956), as setting out the policy reasons for implying a warranty. (1) Reliance upon the seller-reliance is not needed under the RESTATEMENT (SECOND) OF TORTS § 402A, Comment *m* (1965). (2) "Enterprise liability," see note 10 *supra*. (3) Seller in a strategic position to promote safety. (4) Seller known to his customers and sub-

properly. Finally, the situation was such that the risk of injury should be borne by the beauty parlor as the price of doing business and because it had the ability to spread these risks.²⁶

After expounding this broad policy of applying warranties wherever warranties are needed without regard to the type of transaction, the court restricted the scope of the holding by limiting application to cases where a product has been supplied.²⁷ It would seem that if one is going to imply warranties according to the relationship between the parties and not according to the type of transaction, the fact that goods are supplied should not be controlling. Using the New Jersey court's approach, warranties should be implied in pure service situations where the policy consideration supporting a warranty are present.²⁸ An argument can be made that warranties are needed even more in pure service areas than in service combined with goods areas. In the former situation the consumer has nothing tangible to inspect even if given the opportunity. Perhaps at a future date when the present line of decisions become more widely accepted the court will take the next step forward and apply warranties to pure service transactions.

The Missouri courts have been relatively liberal in applying warranties, recognizing that public policy considerations underlie the warranty area. *Maddouros v. Kansas City Coca-Cola Bottling Co.*²⁹ stated that "[r]emedies of injured

ject to their suits. (5) Seller in a good position to pass the loss back to his supplier—"risk spreading," see note 11 *supra*. *Newmark v. Gimbel's Inc.*, 102 N.J. Super. 279, 287, 246 A.2d 14, 16 (1968).

26. The court has found all five elements required to imply a warranty. See note 25 *supra*.

27. *Magrine v. Krasnica*, 94 N.J. Super. 228, 227 A.2d 539 (1967), *aff'd sub. nom.*, 100 N.J. Super. 223, 241 A.2d 637 (1967), involved a hypodermic needle which broke off in the gum of a dental patient. Recovery was denied because the dentist was not in the business of supplying goods of the particular kind. The court distinguishes the *Newmark* case from *Magrine v. Krasnica*, *supra*, by emphasizing that, in *Magrine*, a tool of the dental profession was involved which was never intended to be supplied whereas in *Newmark* a product was supplied and used completely in the process of giving Mrs. Newmark a permanent wave. *Newmark v. Gimbel's, Inc.*, 102 N.J. Super. 279, 287, 246 A.2d 11, 16 (1968).

The UNIFORM SALES ACT § 15 (1906), the UNIFORM COMMERCIAL CODE § 2-314(1) (1962), and the RESTATEMENT (SECOND) OF TORTS § 402A(1)(a) (1965), all require that the seller be engaged in the business of selling such products as the injury producing product. But these provisions are meant to keep a casual seller from becoming strictly liable and not to grant immunity to persons in the business of supplying services of the kind that have injured.

28. Most authorities do not go so far as to advocate the application of implied warranties in pure service situations. Although it is generally recognized that the same policy considerations are present in service and sales transactions, implied warranties have not been extended further than transactions involving the rendering of services where goods are also supplied. 2 R. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 19.02 (1960); 2 F. HARPER & F. JAMES, TORTS § 28.30 (1956); W. PROSSER, LAW OF TORTS § 95 (3d ed. 1964); L. VOLD SALES § 94 (2d ed. 1959); 4 S. WILLISTON, CONTRACTS § 1041 (rev. 3d. ed. 1936); Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 669 (1957).

29. 230 Mo. App. 275, 282-83, 90 S.W.2d 445, 449 (K.C. Ct. App. 1936), implied a warranty of "fitness for use" in holding the manufacturer liable for injury sustained by a consumer who drank part of the contents of a bottle of coke containing a decomposed mouse. See also, *Morrow v. Caloric Appliance Corp.*,

consumers ought not to be made to depend upon the intricacies of the law of sales." *Worley v. Proctor & Gamble Mfg. Co.*³⁰ attempted to break away from the traditional warranty concepts which were based on the law of sales. Here the court said, "[T]he administration of justice should not be restricted by a label attached to the remedy. We should look beyond the procedural form to see the real nature of the wrong." In *Williams v. Ford Motor Co.*,³¹ the practice of basing liability for defective products either on the principles of negligence or on the law of sales (privity requirement) was rejected. "Liability is to be measured by the principles of strict liability for breach of warranty of fitness."³² The court then proceeded to set out the *Restatement (Second) of Torts* § 402A (1965) upon which recovery was based. Thus, if a case similar to *Newmark* were to arise in Missouri and the court were persuaded that the situation was ripe for warranty regardless of the type of transaction, a warranty could be implied based upon existing Missouri case law.

JOHN C. MONICA

372 S.W.2d 41, 55 (Mo. En Banc. 1963), which adopted the RESTATEMENT (SECOND) OF TORTS § 402A (1965) and thus extended the doctrine of strict liability for implied warranty to non-food cases.

30. 241 Mo. App. 1114, 1121, 253 S.W.2d 532, 537 (St. L. Ct. App. 1952) involved a box of Tide soap powder that was not kind to the consumer's hands as advertised.

31. 411 S.W.2d 443, 448 (St. L. Mo. App. 1966). The court also recites the "enterprise liability" doctrine set out in note 10 *supra*.

32. One should not be misled by this statement which tends to mix pre-code law, code law, and strict liability into one generalized category. For a discussion of warranty under early English law and its subsequent development in the United States see: 1 S. WILLISTON, SALES §§ 195-99 (3d ed. 1948). W. PROSSER, LAW OF TORTS § 95 (3d ed. 1964) also contains an enlightening discussion of the complexity of the development of strict liability.

LANDLORD AND TENANT-SENIOR MORTGAGE FORECLOSED--
EFFECT ON JUNIOR LEASE*Kage v. 1795 Dunn Road, Inc.*¹

A deed of trust on the Labor Discount Center had been recorded on December 21, 1962. Plaintiff Kage² alleged that he leased a portion of the Labor Discount Center for fifteen years on January 2, 1964, and that on November 4, 1964 the Dunn Road, Inc., acting on behalf of other defendants, foreclosed the deed of trust to the whole of the property. By affidavit Dunn stated that the plaintiffs had been permitted to continue to occupy a portion of the building during the 1964 Christmas season, that on January 19, 1965, a notice of termination was served on Kage, and that the building was closed after February 28, 1965. The plaintiffs alleged that Dunn took title with knowledge of the plaintiffs' lease and was thereby obligated to continue the lease. Plaintiffs sought both actual and punitive damages for being locked out of the building. The trial court granted the defendants' motion for summary judgment. On appeal, the Missouri Supreme Court affirmed the trial court.

At the outset the *Kage* case should be distinguished from the situation where the lease is superior to the mortgage because it is prior in time or because a prior mortgage has been subordinated to a subsequent lease. When the lease is superior, foreclosure of the mortgage does not extinguish or affect the lease, and the basic problems are to whom the tenant should pay rent and the liability of the foreclosure sale purchaser as the assignee of the original landlord for the performance of covenants in the lease.³

Kage, on the other hand, involves the effect of a mortgage foreclosure sale on a lease given subsequent to the execution of the mortgage and junior to it. The case clearly seems to be within the prevailing law both in Missouri and elsewhere in holding that the mortgage foreclosure sale extinguished the lease, and extinguished all rights and liabilities running between the tenant and the purchaser.⁴ Likewise, the court seems to be in accord with existing law in

1. 428 S.W.2d 735 (Mo. 1968).

2. This case is a consolidation of two cases individually brought against the defendant by two lessees: Kage and Eberle. Apart from some differences in the terms of the two leases and the amount of damages requested by the two plaintiffs, the facts in the cases are virtually identical.

3. G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES, 347-56 (1951), is helpful in distinguishing these situations.

4. "Also, like all interests in the mortgaged property attaching to it subsequent to the mortgage, the lease can be wiped out by foreclosure in all jurisdictions, title or lien." *Id.* at 351. The two Missouri cases that the court cited as illustrative of this proposition were *McFarland Real Estate Co. v. Joseph Gerardi Hotel Co.*, 202 Mo. 597, 603, 100 S.W. 577, 578 (1907), and *Roosevelt Hotel Corp. v. Williams*, 227 Mo. App. 1063, 1066, 56 S.W.2d 801, 802 (St. L. Ct. App. 1933). In this latter case the court pointed out the basic rationale: "There is no privity of either estate or contract between the mortgagee and the lessee of the mortgagor to bind either . . ." *Roosevelt Hotel Corp. v. Williams*, *supra* at 1066, 56 S.W.2d at 802.

holding that the oral agreement between Dunn and the plaintiffs, whereby the plaintiffs were permitted to continue to occupy the premises during the Christmas season, created at most a month to month tenancy requiring one month's notice to effect termination.⁵ Since defendants' affidavits showed that timely notice of termination had been given, summary judgment seemingly was proper.

This note will consider primarily the relationship, if any, arising between a foreclosure sale purchaser and a tenant under a junior lease and what notice, if any, is required to terminate this relationship. Following this is a brief discussion of whether equity under certain conditions will find that either the purchaser or tenant is bound for the full term of an oral lease. Preliminarily, where the foreclosure sale purchaser recognizes no rights in the tenant and accepts no rent but demands that he vacate the premises and, upon the tenant's refusal starts eviction proceedings the question arises whether the tenant has any rights other than to harvest growing crops.⁶ In the absence of additional facts giving rise to a month to month or year to year tenancy the answer clearly seems to be no. The tenant has no right to continue in possession and must vacate the premises on demand by the purchaser.⁷

The primary focus of this note involves the situation where there is a mortgage foreclosure sale followed by an oral agreement⁸ between the purchaser and the

5. § 441.060(2), RSMo 1959, reads in part as follows:

All contracts or agreements for the leasing, renting or occupation of stores, shops, houses, tenements or other buildings in cities, towns or villages, and of stores, shops, houses, tenements or other buildings except when such leasing, renting or occupation is as tenant of real estate used or rented for agricultural purposes, other than garden purposes, not made in writing, signed by the parties thereto, or their agents, shall be held and taken to be tenancies from month to month, and all such tenancies may be terminated by either party thereto, or his agent, giving to the other party, or his agent, one month's notice, in writing, of his intention to terminate such tenancy.

6. Upon a mortgage foreclosure sale a tenant shall have the right "to the growing and unharvested crops . . . to the extent of the interest of the tenant under the terms of contract or lease between the tenant and the mortgagor or his personal representatives." § 443.290, RSMo 1965 Supp.

7. See note 4 *supra*. Missouri has an attornment statute, § 441.150, RSMo 1959, which at first blush might be read to cover the situation where a tenant tries to attorn to the purchaser following a mortgage foreclosure sale. However, in *Roosevelt Hotel Corp. v. Williams*, 227 Mo. App. 1063, 1066, 56 S.W.2d 801, 802 (St. L. Ct. App. 1933) the court stated that the statute is not applicable to this situation. § 441.150, RSMo 1959 reads:

The attornment of a tenant to a stranger shall be void, and shall not in anywise affect the possession of his landlord, unless it is made:

- (1) With the consent of the landlord; or
- (2) Pursuant to or in consequence of a judgment at law, or a decree in equity, or sale under execution or deed of trust; or
- (3) To a mortgagee, after the mortgage has been forfeited.

8. In the case of farm property, this assumes that the duration of the lease is more than one year from the date of the agreement and hence violative of the Statute of Frauds. § 432.010, RSMo 1959, in part reads as follows:

No action shall be brought to charge any . . . person . . . upon any contract made for the sale of lands, tenements, hereditaments, or an in-

tenant to continue under the terms of the original lease, or under a new set of terms with a definite termination date.⁹ If, subsequent to the termination date of the oral lease, the purchaser brings an eviction proceeding the question arises whether a month to month or a year to year tenancy was created. If either tenancy is found to have been created it must also be decided whether the tenant is entitled to the requisite statutory notice¹⁰ before the tenancy can be terminated.

If there is no explicit agreement between the tenant and the purchaser that the new landlord-tenant relationship should cease at a definite date, the statutory notice will probably be required. However, such notice of termination may not be required if the parties have orally agreed that the lease should terminate at a definite date.¹¹ The problem in this area is illustrated in *McFarland v. Gerardi Hotel*.¹² In this case the purchaser at a foreclosure sale was suing the tenant under a junior lease for unlawful detainer.¹³ Following the foreclosure sale on a prior deed of trust there was an oral agreement between the tenant and the purchaser to continue under the terms of the original lease. The tenant continued to occupy the premises after the termination date of the original lease had expired, thus giving rise to the suit. The court found for the defendant lessee, holding that the foreclosure sale had extinguished all rights under the original junior lease and that the oral agreement created a month to month tenancy under section 441.060(2), RSMo 1959, which requires one month's notice before termination. Since the requisite notice concededly had not been given, unlawful detainer did not lie.

However, since *McFarland* was decided, the Supreme Court of Missouri, in *Vanderhoff v. Lawrence*,¹⁴ has taken a position which arguably casts doubt on whether *McFarland* is still good law on the question of notice. In *Vanderhoff* there was an oral contract by which the original owners rented the property in question to defendants on January 24, 1945, for one year starting March 1, 1945.¹⁵

terest in or concerning them, or any lease thereof, for a longer time than one year, or upon any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith . . .

In the case of other property, § 441.060(2), RSMo 1959, note 5 *supra*, would convert the oral agreement into a month to month tenancy.

9. Conceivably, this situation may also arise where there is no explicit agreement but the tenant commences to pay rent to the purchaser which the purchaser accepts.

10. Sixty days notice is required for a year to year tenancy. § 441.050, RSMo 1959.

11. *Vanderhoff v. Lawrence*, 206 S.W.2d 569 (Mo. 1947); Russell, *Landlord and Tenant—Periodic Tenancy Arising from Occupancy Under Void Lease—Notice to Terminate*, 13 Mo. L. Rev. 324 (1948).

12. 202 Mo. 597, 100 S.W. 577 (1907).

13. § 534.030, RSMo 1959.

14. 206 S.W.2d 569 (Mo. 1947); Russell, *Landlord and Tenant—Periodic Tenancy Arising From Occupancy Under Void Lease—Notice to Terminate*, 13 Mo. L. Rev. 324 (1948).

15. Note that the oral agreement was violative of the Statute of Frauds, note 8 *supra*. It is the date of the contract that is important in determining whether the arrangement is for more than one year, not the date of entry upon the

Defendants entered into possession on February 21, 1945. They refused to surrender possession on March 1, 1946, because no notice or demand for possession had been served upon them sixty days before the end of the term as required by the statute for a tenancy from year to year.¹⁶ The trial court found an unlawful detainer and gave judgment for the plaintiffs. The Kansas City Court of Appeals, applying section 441.070, RSMo 1959,¹⁷ affirmed the trial court's decision.¹⁸ The case was certified to the Missouri Supreme Court because of a conflict with a principle announced by the Springfield Court of Appeals in *Coleman v. Fletcher*,¹⁹ and was affirmed.

Admittedly, there is some difference between the facts in *McFarland* and *Vanderhoff*. *McFarland* involved the requisite notice to terminate a month to month tenancy arising from an oral agreement between the lessee and the foreclosure sale purchaser of a prior mortgage. *Vanderhoff*, however, involved only the notice due under an oral contract which was invalid because it was not to be performed within one year.²⁰ Despite these differences, it is submitted that since *Vanderhoff*, *McFarland* is no longer good law on the question of notice. *Vanderhoff* and section 441.070, RSMo 1959, would seem to dictate that a tenancy from month to month can be terminated without a month's notice if the parties have agreed on a definite termination date.²¹

Finally, to be discussed briefly is the question of whether equity under certain conditions will find that the foreclosure sale purchaser or the tenant under a junior lease becomes bound for the full term of the oral lease. The Statute of Frauds requires a contract for the conveyance of real estate to be in writing.²² However, it has long been the rule in Missouri and elsewhere that equity will afford relief to one seeking to enforce an oral contract to convey land if he can show part or full performance in reliance upon the contract and that he has made a material change of position.²³ Likewise, where there is an

performance of the contract. *Vanderhoff v. Lawrence*, 201 S.W.2d 509, 512 (K. C. Mo. App. 1947); *Womach v. Jenkins*, 128 Mo. App. 408, 413, 107 S.W. 423, 425 (K.C. Ct. App. 1908).

16. § 441.050, RSMo 1959. "Either party may terminate a tenancy from year to year by giving notice, in writing, of his intention to terminate the same, not less than sixty days next before the end of the year."

17. "No notice to quit shall be necessary from or to a tenant whose term is to end at a certain time, or when, by special agreement, notice is dispensed with."

18. *Vanderhoff v. Lawrence*, 201 S.W.2d 509 (K.C. Mo. App. 1947).

19. 238 Mo. App. 813, 822, 188 S.W.2d 959, 963 (Spr. Ct. App. 1945). The broad principle laid down in this case was that a tenancy from year to year "can be terminated on the part of the landlord, only, by giving the tenant a written notice to vacate at least 60 days before the end of the year."

20. See notes 8 and 15 *supra*.

21. The parties in *McFarland* had agreed to abide by the terms of the original lease including the termination date. Though there was some controversy as to whether this date was January 7 or January 9, it was conceded to be one or the other, and hence could be considered a definite date after both dates had passed.

22. See note 8 *supra*.

23. A fully performed oral contract by one or both of the parties to convey land is not within the Statute of Frauds. For example, see *Bick v. Mueller*, 346 Mo. 746, 142 S.W.2d 1021 (1940). This was a suit for specific performance of an

oral lease, it may be possible to get the lease enforced in equity,²⁴ even though in an action at law the equitable doctrine of part performance alone does not

oral contract to convey real estate made by an elderly man in his lifetime in consideration for plaintiff's taking care of him for the rest of his life. As there was evidence that plaintiff had done this, the trial court granted specific performance on the theory that one party's full performance takes an oral contract out of the Statute of Frauds. The supreme court affirmed. See also *Jennings v. Achuff*, 272 S.W.2d 263 (1954). Part performance, likewise, if substantial, by one of the parties may justify the intervention of equity. For example, in *Alonzo v. Laubert*, 418 S.W.2d 94 (Mo. 1967), there was an oral agreement between plaintiffs and their sister, who was the chief beneficiary under the father's will, whereby in return for the plaintiffs' not contesting the will the sister was to convey to each of them a portion of the realty devised to her. In an action for specific performance of the oral agreement the trial court held that the plaintiffs' refraining from contesting the will was sufficient part performance to justify granting specific performance. The supreme court affirmed. See also *Jones v. Linder*, 247 S.W.2d 817 (Mo. 1952) (though recognizing that substantial part performance may take an oral agreement out of the Statute of Frauds, the court held that there had not been sufficient part performance in this case); *Roberts v. Clevenger*, 225 S.W.2d 728 (Mo. 1950); *Hobbs v. Hicks*, 320 Mo. 954, 8 S.W.2d 966 (1928).

24. If part performance by one of the parties is very substantial, a court may grant specific performance as in *Last Chance Mining Co. v. Tuckahoe Mining Co.*, 202 S.W. 287 (Spr. Ct. App. 1918), where a mining lease was orally modified, and one party in reliance thereon sank shafts, took out ore, and paid royalties. The court held that the part performance was sufficient to take the oral agreement out of the Statute of Frauds.

However, Missouri courts are reluctant to find that there has been sufficient part performance to take an oral lease out of the Statute. For example, in an unlawful detainer action one court has held that where a person is already in possession of land under an unexpired prior lease, mere continuance of possession, even if accompanied by plowing and seeding land, is not sufficient part performance to take an oral agreement extending the lease out of the Statute. *Todd v. Fitzpatrick*, 222 S.W. 888 (Spr. Ct. App. 1920). This is probably the type of situation which § 441.120(1), RSMo 1959 contemplates rather than the situation in which a tenant holds over following the extinguishment of his junior lease by a foreclosure sale. It reads as follows:

In all cases where a tenant holds over after the termination of the time for which the premises were let or leased, under a written contract between the lessor or his agent and the tenant or his agent, in any suit for possession by the party entitled to possession of said premises against such tenant, after the termination of the time for which said premises were let or leased under written contract, oral evidence shall not be admissible that said lease or letting was renewed or extended, or that a new contract was entered into or substituted for the written contract, but the tenant's right to continued possession or the landlord's right to collect rent on said premises after the termination thereof, shall be established by contract in writing; provided, however, this section shall not prevent a recovery of damages by either party for breach of the written contract.

In an action at law full performance by one of the parties to an oral lease takes the lease out of the Statute of Frauds. For example, in *Ordelleide v. Traube*, 183 Mo. App. 363, 166 S.W. 1108 (St. L. Ct. App. 1914), plaintiff contracted to purchase a livery and undertaking business, including the unexpired portion of a lease extending for more than a year. Defendant was to secure a valid transfer of the lease to plaintiff. Defendant contended that the written memorandum of sale was vague regarding the obtaining of the landlord's consent to the assignment

take the oral contract out of the Statute of Frauds.²⁵

In conclusion, if the purchaser at a mortgage foreclosure sale and the tenant under the extinguished lease desire to continue under the terms of the extinguished lease or to form a new lease they should do so in writing, explicitly enumerating the desired terms. There is a plethora of terms, of course, which they could include in the written lease. They could adopt the balance of the old lease *in toto* or adopt it with modifications such as a different termination date. On the other hand, if the purchaser does not want to continue the lease, it behooves him to notify the tenant to this effect in writing immediately following the foreclosure sale. The trouble arises, as in the *Kage* case, where the parties drift along without agreement, or where their explicit agreement is oral.

RICHARD D. MOORE

of the lease and hence invalid under the Statute of Frauds. The court rejected this, holding that plaintiff's full performance—going into possession and paying the total contract price—removed the oral contract from the Statute and entitled plaintiff to recover damages for defendant's failure to secure the assignment. *See also* Lunt v. Biehl, 159 Mo. App. 361, 140 S.W. 757 (K.C. Ct. App. 1911), in which in an action for rent under an oral lease for more than a year plaintiff was not barred by the Statute of Frauds because he had fully performed by allowing defendant to go into possession and remain there for the length of the agreed term.

25. "This doctrine that part performance will take a case out of the operation of the statute is purely one in equity, and has no application in a suit at law." *Aylor v. McInturf*, 185 Mo. App. 707, 711, 171 S.W. 606, 608 (K.C. Ct. App. 1914).

RECENT CASES

COLLATERAL ATTACK UPON MILITARY
COURTS-MARTIAL IN THE COURT OF CLAIMS

*United States v. Augenblick*¹

Richard Augenblick and Kenneth Juhl, who had been convicted by courts-martial, brought suits in the United States Court of Claims for back pay.² Augenblick had been convicted of committing an indecent act and dismissed from the service, while Juhl had suffered a reduction in rank, partial forfeiture of pay, and six months confinement for unlawfully selling merchandise from an overseas Air Force exchange. Having exhausted all other available remedies without relief,³ each sought to recover back pay from the government, contending that the courts-martial had been invalid on constitutional or statutory grounds. The Court of Claims reviewed the military convictions and rendered judgments for the plaintiffs⁴ from which the government appealed. The Supreme Court reversed.

Prior to World War II, the authority of federal courts to review both state and federal criminal convictions and military courts-martial through writs of habeas corpus was restricted to those cases involving defects in the jurisdiction of the convicting court. This traditional or narrow concept of jurisdiction was limited to questions of whether the convicting court was properly constituted, whether it had jurisdiction over the person and subject matter, and whether it had exceeded

1. *United States v. Augenblick*, 393 U.S. 348 (1969).

2. Back pay suits in the Court of Claims are brought under 28 U.S.C. § 1491 (1948), which gives the court jurisdiction over any claims against the United States based upon its Constitution, laws, regulations, contracts, or tortious acts. Augenblick's suit was filed October 22, 1964. Juhl's suit was filed October 12, 1965.

3. *United States v. Augenblick*, 393 U.S. 348, 349 n. 1 (1969), states:

Augenblick's conviction was reviewed by a Navy Board of Review and affirmed, one member dissenting. The Court of Military Appeals denied a petition for review without opinion January 11, 1963
See 10 U.S.C. § 871.

. . . .

Juhl's conviction was reviewed by the Staff Judge Advocate. The Air Force Board for Correction of Military Records also denied relief.

4. Augenblick's first contention, which was rejected by the Court of Claims, stated that he was twice placed in jeopardy when his initial court-martial was prematurely terminated in favor of a second one. The Court of Claims accepted his second contention that a violation of the Jenks Act, 18 U.S.C. § 3500 (1957), by the court-martial (in not providing for the production of a prosecution witness's notes and tape recorded statements made during interrogation) was a denial of the sixth amendment right to a fair trial. Section 3500(b) of the Act, makes mandatory the production of any statement of a witness which relates to his testimony. *Augenblick v. United States*, 180 Ct. Cl. 131, 377 F.2d 586 (1967), *rev'd*, 393 U.S. 348 (1969).

Juhl was granted relief based upon a violation by the court-martial of paragraph 153(a) of the Manual for Courts-Martial (prescribed by the President pursuant to the UNIFORM CODE OF MILITARY JUSTICE, art. 36, 10 U.S.C. § 836 (1956), which prohibits conviction "based upon the uncorroborated testimony of a purported accomplice in any case, if such testimony is self-contradictory, uncertain, or improbable." The testimony of one Hughes, an accomplice of Juhl, was accepted in violation of the above provision. *Juhl v. United States*, 181 Ct. Cl. 210, 383 F.2d 1009 (1967), *rev'd*, 393 U.S. 348 (1969).

its authorized power.⁵ Although some review was allowed in rare cases,⁶ persons were usually unable to attack collaterally alleged constitutional defects in their trials and resulting convictions. Errors in trial court procedure resulting in deprivation of one's constitutional rights⁷ were held not to deprive the convicting courts of the necessary jurisdiction.⁸ Beginning with the Supreme Court's 1938 decision in *Johnson v. Zerbst*,⁹ the jurisdiction of federal courts to review both federal and state convictions has been greatly expanded.¹⁰ No longer need the reviewing court find a defect in the trial court's jurisdiction in the narrow sense; an allegation of infringement of one's constitutional rights is sufficient to allow review.¹¹ The military, however, has not felt the impact of this expansion in habeas corpus review.¹² While the federal courts, in spite of a Congressional enact-

5. This scope of review was applied to military convictions. *See, e.g., Collins v. McDonald*, 258 U.S. 416 (1922); *Carter v. McClaughry*, 183 U.S. 365 (1902); *Carter v. Roberts*, 177 U.S. 496, 498 (1900); *In re Grimley*, 137 U.S. 147 (1890). For cases applying the standard to collateral review of civilian convictions, *see, e.g., In re Gregory*, 219 U.S. 210 (1911), *Harlan v. McGourin*, 218 U.S. 442 (1910); *In re Moran*, 203 U.S. 96 (1906); *Dimmick v. Tompkins*, 194 U.S. 540 (1904); *Storti v. Massachusetts*, 183 U.S. 138 (1901). For a thorough discussion of these grounds see Fratcher, *Review by Civil Courts of Judgments of Federal Military Tribunals*, 10 OHIO S.L.J. 271 (1949).

6. *Frank v. Mangum*, 237 U.S. 309, 327, 330-331 (1915), indicated that an extreme violation of due process may allow the court to look further than just the trial court's jurisdiction and into the substance of the trial record. The case stated that the trial court's jurisdiction may be lost "in the course of the proceedings." *Id.* at 327. In *Johnson v. Sayre*, 158 U.S. 109, 116 (1895), the court considered briefly the record as it related to a possible violation of the eighth amendment. *See also Moore v. Dempsey*, 261 U.S. 86 (1923).

7. If a state conviction is involved, the allegations arise from the Due Process Clause of the fourteenth amendment; if a federal court, from the fourth, fifth, sixth, or eighth amendments.

8. *In re Grimley*, 137 U.S. 147, 150 (1890) states:

[I]t is equally clear that by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and that no mere errors in their proceedings are open to consideration.

9. 304 U.S. 458 (1938).

10. Beginning with *Johnson v. Zerbst*, 304 U.S. 458, 466, 468, (1938), which held that an infringement of one's constitutional rights in federal court allowed the federal courts the jurisdiction to review the subject matter in order to discover whether such an infringement had caused the convicting court to lose the necessary jurisdiction, the Supreme Court has developed this review in subsequent cases: *Waley v. Johnston*, 316 U.S. 101 (1942), holding that deprivation of constitutional rights in trial procedure, as well as jurisdictional defects, represented a separate ground for review by federal courts; *House v. Mayo*, 324 U.S. 42 (1945), extending the reasoning of *Johnson v. Zerbst* and *Waley v. Johnston* to violations of due process in state court convictions; *Fay v. Noia*, 372 U.S. 391 (1963), requiring only the allegation of infringement of one's constitutional rights to obtain review and defining clearly the scope and procedure involved in such review.

11. *See, e.g., Sanders v. United States*, 373 U.S. 1 (1963); *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963).

12. Following the decision in *Johnson v. Zerbst*, a number of federal courts applied the reasoning in that case to review of military courts-martial and thus began to allow expanded review in the military area. *See, e.g., Hiatt v. Brown*, 175 F.2d 273 (5th Cir. 1949), *rev'd*, 339 U.S. 103 (1950); *Montalvo v. Hiatt*, 174 F.2d

ment providing that the findings of military tribunals are final and binding on the reviewing courts,¹³ have recognized habeas corpus in military cases,¹⁴ the Supreme Court has been unwilling to expand this jurisdiction to the same extent it has in the civilian area.

Not until *Burns v. Wilson*,¹⁵ decided in 1953, was the Court willing to indicate that the scope of review was any broader than review of the convicting court's jurisdiction.¹⁶ Although it failed to apply the broad standard of *Johnson v. Zerbst* to military habeas corpus, the Supreme Court in *Burns* nevertheless appeared to broaden the scope of review. Speaking for four members of a divided Court, Chief Justice Vinson set forth the following criteria:

[W]hen a military decision dealt fully and fairly with an allegation raised . . . it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.¹⁷

. . . .

It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims.¹⁸

Justice Frankfurter, who neither dissented nor concurred in the original opinion, subsequently urged the Court to rehear the case and to consider fully the jurisdictional problem raised in the light of *Johnson v. Zerbst*, but the Court refused.¹⁹ The result was the introduction of a standard somewhat more liberal than the requirement that jurisdiction in the narrow sense be defective before the court

645 (5th Cir.), *cert. denied*, 338 U.S. 874 (1949); *Smith v. Hiatt*, 170 F.2d 61 (3d Cir. 1948), *rev'd*, *Humphrey v. Smith*, 336 U.S. 695 (1949); *Benjamin v. Hunter*, 169 F.2d 512 (10th Cir. 1948); *Wrublewski v. McInerney*, 166 F.2d 243 (9th Cir. 1948); *United States ex rel. Weintraub v. Swenson*, 165 F.2d 756 (2d Cir. 1948); *United States ex rel. Innes v. Hiatt*, 141 F.2d 664 (3d Cir. 1944); *Schita v. King*, 133 F.2d 283 (8th Cir. 1943). The Supreme Court, however, did not accept this broad view of jurisdiction but adopted the narrow "jurisdictional" concept for determining the scope of review in military cases. *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *Humphrey v. Smith*, 336 U.S. 695 (1949). *See also In re Yamashita*, 327 U.S. 1, 8-9 (1946).

13. UNIFORM CODE OF MILITARY JUSTICE, art. 76, 10 U.S.C. § 876 (1956), provides:

The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter . . . are final and conclusive. . . . [A]ll action taken pursuant to those proceedings are binding upon all . . . courts . . . of the United States.

14. *See, e.g., United States v. Augenblick*, 393 U.S. 348, 349 (1969); *Burns v. Wilson*, 346 U.S. 137, 142 (1953); *Gusik v. Schilder*, 340 U.S. 128, 130 (1950). The last case interprets article 53 of the ARTICLES OF WAR, Act of June 24, 1948, ch. 625, § 230, 62 Stat. 639.

15. *Burns v. Wilson*, 346 U.S. 137 (1953).

16. In *Hiatt v. Brown*, 339 U.S. 103 (1950), the Supreme Court adopted the same test used in all habeas corpus cases decided before *Johnson v. Zerbst*. The only test was that of "jurisdiction." *Id.* at 111.

17. *Burns v. Wilson*, 346 U.S. 137, 142 (1953).

18. *Id.* at 144.

19. *Burns v. Wilson*, 346 U.S. 137, *rehearing denied*, 346 U.S. 844 (1953).

would review, but falling short of the liberal scope of collateral review found in the non-military area.²⁰

The above standard, set forth by less than a majority of the Court, is inadequate. Although it is a clear indication of a desire within the Court to liberalize the scope of review,²¹ it has brought a confused response from the lower courts.²² While some courts take a liberal view of *Burns* and weigh the allegations of infringement upon constitutional rights,²³ most courts are content to deny jurisdiction either on the ground that the court-martial had adequate jurisdiction or that the contentions of the petitioners had been fully and fairly considered by

20. Although several varying interpretations of the meaning of this standard are possible, it is fairly clear that there was an intent upon the part of the Court to broaden the scope of review. While the review is not as broad in the military area as it is in the civilian, it is not restricted merely to jurisdictional questions. Rather, the reviewing court is apparently allowed to review the military court's action to see if the constitutional allegations have been given proper consideration. The confusion arises when one attempts to determine what constitutes lack of a "fair consideration" by the military or failure of the military court system to deal "fully and fairly" with these allegations. Is the civilian court allowed to review the record only if no consideration was given by the military courts to constitutional allegations? Or, is the court allowed to go further in reviewing the military's treatment of these allegations? If the federal court can go further, how close may this scope of review approach the standard set forth in *Johnson v. Zerbst*?

21. In addition to the four justices joining Chief Justice Vinson in the plurality opinion and the one justice concurring in the result, Justices Black and Douglas, dissenting, and Justice Frankfurter, neither concurring nor dissenting, indicated that collateral review of military cases should not be construed only to include questions of jurisdiction. *Burns v. Wilson*, 346 U.S. 137, 149, 152-155 (1953). Only Justice Minton felt that review should not exceed the traditional jurisdictional bounds. *Id.* at 146.

22. It has been suggested that post-*Burns* lower court cases fall into four categories: (1) courts which, after reviewing the facts and allegations, find petitioners' allegations insufficient to raise constitutional defects no matter how liberal the scope of review might be; (2) courts which attempt to rationalize *Hiatt v. Brown* and *Burns v. Wilson* by stating (apparently in contradiction) that the civilian courts are unable to extend review to constitutional allegations, and then that these same allegations are insufficient to demonstrate any denial of due process; (3) courts (constituting a majority of the lower courts) which flatly refuse to look at constitutional allegations raised by petitioners because of lack of jurisdiction in the convicting court; and (4) courts which go beyond a narrow scope of review and make their own determinations as to the validity of constitutional allegations despite considerations by the military establishment. Katz and Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 OHIO ST. L.J. 193, 206-211 (1961). Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 60 (1961), on the other hand, states that the "reported opinions of the lower federal courts . . . do not lend themselves to facile taxonomy."

23. *E.g.*, *Kennedy v. Commandant*, 377 F.2d 339, 342 (10th Cir. 1967); *Swisher v. United States*, 354 F.2d 472 (8th Cir. 1966); *Gibbs v. Blackwell*, 354 F.2d 469 (5th Cir. 1966); *White v. Humphrey*, 212 F.2d 503 (3d Cir.), *cert. denied*, 348 U.S. 900 (1954); *In re Stapley*, 246 F. Supp. 316 (D. Utah 1965); *U.S. ex rel. Atkinson v. Kish*, 176 F. Supp. 820 (M.D. Pa. 1959). Although all of the above cases employed some form of an independent determination of due process, each case, with the exception of *In re Stapley*, used language in the opinions indicating that the scope of review was narrower in military than in civilian cases. Also, these courts were careful to frame their opinions in terms of existing standards.

the military appellate system.²⁴ Even those courts that do weigh the constitutional objections and seem to indicate a willingness to expand review beyond a narrow interpretation of *Burns*, have repeatedly found that none of the petitioners' constitutional rights were infringed. As a result of these positions taken by the federal courts, habeas corpus relief has been almost non-existent for military convictions.²⁵

Another type of collateral remedy, in which the petitioner seeks nullification of his conviction following imprisonment, has recently met with more success. Both the First²⁶ and Tenth²⁷ Circuits have allowed an action in the nature of mandamus compelling the Secretary of Defense to change records of petitioners from dishonorable to honorable discharges.²⁸ Both of these courts have taken a most liberal view of *Burns v. Wilson* in allowing review of courts-martial based upon allegations of infringement of constitutional rights.²⁹ Not only did they allow relief under a broad concept of collateral review, but they asserted that the

24. *E.g.*, *United States ex rel. Thompson v. Parker*, 399 F.2d 774 (3d Cir. 1968); *Puhl v. United States*, 376 F.2d 194 (10th Cir. 1967); *Palomera v. Taylor*, 344 F.2d 937 (10th Cir. 1965), *cert. denied*, 382 U.S. 946 (1966); *Crigler v. United States Army*, 285 F.2d 260 (10th Cir. 1961); *Mitchell v. Swope*, 224 F.2d 365 (9th Cir. 1955); *Bouchries v. Van Matre*, 223 F.2d 646 (D.C. Cir. 1955); *Easley v. Hunter*, 209 F.2d 483 (10th Cir. 1953); *United States ex rel. O'Callahan v. Parker*, 256 F. Supp. 679 (M.D. Pa. 1966); *Dennis v. Taylor*, 150 F. Supp. 597 (M.D. Pa. 1957); *Bokoros v. Kearney*, 144 F. Supp. 221 (E.D. Tex. 1956).

25. *In re Stapley*, 246 F. Supp. 316 (1965). This is the only instance in which a federal district court has ordered the release of a military prisoner on a writ of habeas corpus. The district court found that the federal courts should be allowed jurisdiction to review and grant relief where the court-martial has denied one's constitutional rights. Unlike other courts which have suggested expanded review and then denied relief on other grounds, the court here found that the court-martial had not met the constitutional requirements of the fifth and sixth amendments. The possible implications of this case were not realized, nor was the case allowed to gain any precedential value because of the government's failure to take an appeal. *See also Gibbs v. Blackwell*, 354 F.2d 469 (5th Cir. 1965), in which the court cited *In re Stapley* and remanded a lower court's dismissal of a petition for habeas corpus for further consideration.

26. *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965).

27. *Smith v. McNamara*, 395 F.2d 896 (10th Cir. 1968).

28. Mandamus was granted under 28 U.S.C. § 1361 (1962), which allows the district courts original jurisdiction in mandamus actions against government officials, to compel the Secretary of Defense to act pursuant to 10 U.S.C. § 1552 (1956). Section 1552 (a) provides that "the Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, . . . may correct any military record . . . when he considers [it] necessary to correct an error or remove an injustice."

In at least one case, an injunction has been sought following conviction, but prior to imprisonment, to compel the United States Court of Military Appeals to review petitioner's conviction. The injunction was denied; *Gallagher v. Quinn*, 363 F.2d 301 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966).

29. Both courts indicated that even if these constitutional allegations had been reviewed by the military authorities, it was not a bar to a consideration of them by the federal courts. *Smith v. McNamara*, 395 F.2d 896, 899 (10th Cir. 1968); *Ashe v. McNamara*, 355 F.2d 277, 279 (1st Cir. 1965). This is a position quite similar, if not identical, to *Johnson v. Zerbst*. Both courts appear to suggest that the liberal view of jurisdiction in civilian cases is applicable to military courts-martial.

exceptions to the finality provisions of 10 U.S.C. § 876³⁰ are not limited to habeas corpus.³¹ But more significantly, unlike the result in those courts which had construed *Burns* liberally in habeas corpus situations, petitioners were *successful* in obtaining the desired relief.³²

By far the most prevalent collateral attack on courts-martial following imprisonment³³ has been the Court of Claims suit for back pay of the type brought by Augenblick and Juhl.³⁴ Although the Supreme Court has recognized such a remedy, the jurisdiction of the federal courts in such cases was construed to include only those instances where the courts-martial lacked jurisdiction in the narrow sense.³⁵ However, in *Shapiro v. United States*,³⁶ while couching its language in narrow terms, the Court of Claims extended review to a situation where the petitioner's right to counsel had been flagrantly violated.³⁷ The court considered that such a deprivation, as evidenced upon the record, rendered the determination of the court-martial void.³⁸

30. UNIFORM CODE OF MILITARY JUSTICE, art. 76, 10 U.S.C. § 876 (1956).

31. *Smith v. McNamara*, 395 F.2d 896, 899 (10th Cir. 1968). See also *Gusik v. Schilder*, 340 U.S. 128, 133 n. 3 (1950).

32. The existence of a broader scope of review with this remedy as compared to that allowed in habeas corpus actions, presents a paradox. While it would seem that an individual in confinement as the result of a constitutionally defective court-martial would be suffering a greater disability than one whose record has been tarnished by the same type of procedure, the latter individual is apparently afforded a broader scope of review than the prisoner. This situation is just the reverse in the civilian area where the prisoner is allowed a broad scope of review, but once he is released, his chances for relief are slight, if not non-existent. Although the Supreme Court in *Jones v. Cunningham*, 371 U.S. 236 (1963), has granted habeas corpus relief to a state parolee, there appears to be no remedy available beyond those situations where the individual is characterized as in custody.

33. The Supreme Court in *United States v. Augenblick*, 393 U.S. 348, 349 (1969), suggested the possibility of back pay relief in suits not exceeding \$10,000 under the Tucker Act, 28 U.S.C. § 1346(a)(2)(1940).

34. The suit was brought under 28 U.S.C. § 1491 (1948), discussed in note 2 *supra*.

35. See, e.g., *United States v. Brown*, 206 U.S. 240 (1907); *Swaim v. United States*, 165 U.S. 553 (1897); *Runkle v. United States*, 122 U.S. 543 (1887); *Keyes v. United States*, 109 U.S. 336 (1883); *Dynes v. Hoover*, 62 U.S. (20 How.) 65 (1857).

36. 107 Ct. Cl. 650, 69 F. Supp. 205 (1947).

37. Petitioner had been arrested under an article of war for having delayed a court-martial during his defense of a soldier charged with rape. He was arrested at 12:40 p.m., brought to trial at a location 35 to 40 miles from the place of his arrest at 2:00 p.m., and convicted at 5:30 p.m. This was carried out despite the petitioner's request for a continuance in order to secure counsel. *Shapiro v. United States*, 107 Ct. Cl. 650, 652-653, 69 F. Supp. 205, 206 (1947). The court stated, "that a more flagrant case of military despotism would be hard to imagine." *Id.* at 653, 69 F. Supp. at 207.

38. In reaching this decision, the court cited *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938), and indicated that this infringement upon constitutional rights would cause the court-martial to lose jurisdiction during the course of the proceedings; *Shapiro v. United States*, 107 Ct. Cl. 650, 654-655, 69 F. Supp. 205, 207-208. The implication of this reasoning would be to allow the Court of Claims review in back pay suits much similar to that allowed in the civilian area of habeas corpus.

In the 1950's, the Court of Claims appeared to retreat from its position in *Shapiro* by denying relief in every such suit for back pay.³⁹ However, in spite of the narrowness of that court's language in interpreting jurisdiction prior to *Burns v. Wilson*,⁴⁰ and its apparent adoption of the *Burns* test after 1953,⁴¹ the court consistently reviewed the records of courts-martial to determine the validity of the claimants' constitutional allegations.⁴² The court seemed to take the position that at least where the denial of one's constitutional rights had been substantial, the court would be supplied with the proper jurisdiction to review the case.⁴³

Then, in *Shaw v. United States*,⁴⁴ decided in 1966, the Court of Claims not only allowed plaintiff to recover back pay but suggested a scope of review consistent with that enunciated in *Johnson v. Zerbst*. The Court stated:

[W]e think abstinence from review of military convictions is not to be practiced where the serviceman presents pure issues of constitutional law, unentangled with an appraisal of a specific set of facts. That type of unmingled legal question this court has always decided for itself.⁴⁵

A year later, this court in *Augenblick v. United States*,⁴⁶ again suggested that review of military convictions be on a par with the review of civilian decisions

39. *Narum v. United States*, 151 Ct. Cl. 312, 287 F.2d 897 (1960), *cert. denied*, 368 U.S. 848 (1961); *Belgalke v. United States*, 148 Ct. Cl. 397, 286 F.2d 606, *cert. denied*, 364 U.S. 865 (1960); *Griffiths v. United States*, 145 Ct. Cl. 669, 172 F. Supp. 691, *cert. denied*, 362 U.S. 865 (1959); *Krivoski v. United States*, 136 Ct. Cl. 451, 145 F. Supp. 239, *cert. denied*, 352 U.S. 954 (1956); *Graham v. United States*, 136 Ct. Cl. 324, *cert. denied*, 353 U.S. 917 (1956); *Lucas v. United States*, 121 Ct. Cl. 819 (1952); *Fly v. United States*, 120 Ct. Cl. 482, 100 F. Supp. 440 (1951); *Sima v. United States*, 119 Ct. Cl. 405, 96 F. Supp. 932 (1951).

40. *Fly v. United States*, 120 Ct. Cl. 482, 496, 100 F. Supp. 440, 441 (1951), states: "The law is well settled that this court, regardless of error of law committed, cannot grant relief from the consequences of his court-martial sentence if the court-martial had jurisdiction in the case." *Sima v. United States*, 119 Ct. Cl. 405, 425, 96 F. Supp. 932, 937 (1951), states: "The general court-martial, it must be concluded, had jurisdiction of plaintiff and of the offense with which he was charged. Its proceedings and sentence are not open to review or collateral attack in any civil tribunal."

41. *Belgalke v. United States*, 148 Ct. Cl. 397, 401, 403, 286 F.2d 606, 608, 610, *cert. denied*, 364 U.S. 365 (1960).

42. In *Griffiths v. United States*, 145 Ct. Cl. 669, 673, 172 F. Supp. 691, 693, *cert. denied*, 361 U.S. 865 (1959), the court states: "Therefore, it is necessary to consider whether the action of the court-martial . . . had the effect of depriving the plaintiff of his rights under the Constitution to the assistance of counsel for his defense." In *Sima v. United States*, 119 Ct. Cl. 405, 426, 96 F. Supp. 932, 938 (1951), the court states, "From the entire record in this case, we cannot say that plaintiff was deprived of his rights under the Fifth and Sixth Amendments. . . ."

43. See, e.g., *Narum v. United States*, 151 Ct. Cl. 312, 322, 287 F.2d 897, 902 (1960), *cert. denied*, 368 U.S. 848 (1961); *Griffiths v. United States*, 145 Ct. Cl. 669, 677-678, 172 F. Supp. 691, 696, *cert. denied*, 361 U.S. 865 (1959); *Fly v. United States*, 120 Ct. Cl. 482, 498, 100 F. Supp. 440, 442 (1951).

44. 174 Ct. Cl. 899, 357 F.2d 949 (1966).

45. *Shaw v. United States*, 174 Ct. Cl. 899, 905, 357 F.2d 949, 954 (1966).

46. 180 Ct. Cl. 131, 377 F.2d 586 (1967).

found in *Johnson v. Zerbst*.⁴⁷ In *Juhl v. United States*,⁴⁸ which did not deal directly with the allegations of infringement upon constitutional rights, the Court of Claims asserted in dictum the same liberal view of jurisdiction as it had in *Augenblick v. United States*.⁴⁹

The Supreme Court was faced in *Augenblick* and *Juhl* with the same issue that had confronted them in *Burns v. Wilson*: whether the scope of review of courts-martial convictions should be expanded in collateral actions to the same extent as collateral review of civilian convictions. In other words, since no direct appellate review of military courts-martial is available in the federal court system, should these federal courts now be allowed to review constitutional allegations in military convictions through such collateral remedies as mandamus, habeas corpus, and suits for back pay? The Supreme Court, however, refused to deal with this question.⁵⁰ Rather, it assumed *arguendo* the more liberal positions of jurisdiction taken in the Court of Claims and reversed on the ground that the alleged errors in the two courts-martial did not rise to the level of constitutional defects.⁵¹ Thus,

47. The court cites the expanded jurisdiction concept found in *Johnson v. Zerbst* and then claims that the Court of Claims has kept pace with this development. In addition, the court contends that this broadened concept of jurisdiction as applied to the military, has found recognition from the Supreme Court by citing Justice Frankfurter's opinion urging unsuccessfully that the Court grant a rehearing in *Burns v. Wilson*, 346 U.S. 137, *rehearing denied*, 346 U.S. 844, 847-848 (1953). *Augenblick v. United States*, 180 Ct. Cl. 131, 140-144, 377 F.2d 586, 593 (1967).

48. 181 Ct. Cl. 210, 383 F.2d 1009 (1967).

49. The Court of Claims based its decision on the fact that the compliance by the court-martial with a rule of procedure violated by the convicting authority was essential to the power of the court-martial to decide the case. See note 4 *supra*. Failure of the military tribunal to so comply would and did result in the loss of jurisdiction allowing review by the Court of Claims. While concluding in dictum that the Court of Claims had jurisdiction to weigh allegations of constitutional infringement, the court felt that failure of the court-martial to follow the rule in question was an even stronger ground for collateral review. *Juhl v. United States*, 181 Ct. Cl. 210, 228-235, 383 F.2d 1009, 1019-1023 (1967). The Supreme Court, however, did not discuss this question and reversed on the grounds that the violation found by the Court of Claims was not substantial enough to warrant an infringement on constitutional rights; *United States v. Augenblick*, 393 U.S. 348, 351-352 (1969).

50. In addition, the Supreme Court did not decide the question of whether the exceptions to finality clause of the UNIFORM CODE OF MILITARY JUSTICE, art. 76, 10 U.S.C. § 876 (1956), (see note 13 *supra*) were limited to habeas corpus. *United States v. Augenblick*, 393 U.S. 348, 351-352 (1969).

51. *United States v. Augenblick*, 393 U.S. 348, 351-352 (1969).

Noting that the Supreme Court has abstained from deciding the question of the scope of the Court of Claims' jurisdiction to review decisions of courts-martial, the Court of Claims in a case subsequent to *Augenblick* has found that a naval officer had been illegally discharged after a constitutionally defective court-martial and was entitled to back pay. Apparently the Court of Claims reasoned that since the Supreme Court in *Augenblick* had only held that the allegations of respondents did not reach constitutional proportions, the fact that plaintiff's claim here did involve a clear infringement of constitutional rights gave the court jurisdiction. *Gearinger v. U.S.*, 38 U.S.L.W. 2093, ___ F.2d ___ (Ct. Cl. 1969). (Officer Gearinger had been "convicted of 'fail[ing] safely to keep' Navy funds on the basis of his presumed guilt of negligence or fault in the absence of an affirmative demonstration by him that some other person or occurrence (e.g., fire)

although the Court has felt little reluctance to expand and define clearly the scope of collateral review of state court convictions, it is apparently unwilling to do so in the realm of military courts-martial.

Perhaps the most substantial argument against expanding the scope of review in military courts-martial stems from the recognition that military and civilian systems of justice are noticeably different in orientation and purpose. This difference is reflected by the fact that the primary purpose of military justice is to compel affirmative action such as incurring the risk of imminent death, whereas civilian criminal justice is designed almost wholly to deter reprehensible conduct.⁵² Moreover, since the Constitution empowers Congress to create the military,⁵³ the military arguably should be a separate creature subject only to those regulations which Congress formulates.⁵⁴ It has been contended that this separateness and the need of the military, especially in times of national emergency, to maintain good order and discipline require the segregation of a system of jurisprudence controlled almost exclusively within the military establishment.⁵⁵ Accordingly, if the scope of civilian review were expanded beyond that already allowed by Congress through the Court of Military Appeals or by the present limited collateral review, the result could well be a transposition of the concept of civilian due process upon military courts-martial, followed by a breakdown in military discipline.⁵⁶ Moreover, even if federal courts were to attempt to formulate a different standard for military due process, such an attempt arguably would result in an unwanted intrusion of civilian supervision into vital military affairs. Finally, because substantial procedural advances have been made within the military system of justice,⁵⁷ there is some merit to the contention

caused the loss. . . ." Based upon the Supreme Court's holdings in *Tot v. U.S.*, 319 U.S. 463 (1943), and *U.S. v. Romano*, 382 U.S. 136 (1965), the Court of Claims found that there was insufficient connection between the presumed fact and the proven fact and therefore the presumption of loss through Gearinger's negligence or fault was unconstitutional.)

52. See, Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U. L. REV. 861, 868-869 (1959).

53. U.S. CONST. art. I, § 8. For a full discussion of this argument, see W. AYCOCK and S. WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 196-207 (1955).

54. W. AYCOCK and S. WURFEL, *supra* note 53, at 378; G. GLENN and A. SCHILLER, *THE ARMY AND THE LAW* 3 (1943).

55. W. AYCOCK and S. WURFEL, *supra* note 53, at 371, states, "To those in the military or naval service of the United States the military law is due process." See also G. GLENN and A. SCHILLER, *supra* note 53, at 54-85.

56. *Ibid.*

57. In addition to the right to petition the Court of Military Appeals, which is a civilian review court. THE UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801-940 (1956), provides for substantial procedural safeguards prior, during, and after court-martial proceedings. The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (Oct. 24, 1968), in addition to further procedural safeguards, allows the accused professional counsel in situations where he did not previously have a right to counsel.

Labar, *The Military Criminal Law System*, 50 A.B.A.J. 1069 (1964), asserts that "in all stages of the procedure the military accused enjoys greater protection of his rights. . . ." See also Shields, *A Supplement to the Survey of Military Justice*,

that further interference by civilian courts in protecting the soldier's constitutional rights is unwarranted.⁵⁸

On the other hand, the peculiar military aloofness from civilian affairs no longer seems to be the case today because military affairs are closely integrated into our society. Moreover, even if a distinction between military and civilian jurisprudence is conceded, the need for a narrower scope of review in habeas corpus attacks of courts-martial is not logically required. Although a distinction is recognized today between state and federal criminal convictions,⁵⁹ neither that distinction nor the increased federal habeas corpus case load involving state court convictions has prevented the Supreme Court from allowing full determination of constitutional issues through collateral attack on these state convictions.⁶⁰ Rather, the Supreme Court has been able to recognize and evaluate carefully the Constitution as it applies to the states through the Due Process Clause of the fourteenth amendment.⁶¹ Although the relationship of the federal court system to state courts is not completely analogous to that between federal and military courts,⁶² the apparent fear of complete injection of civilian due process into the military system seems ill founded. Expanded review standing alone should not be equated with the creation of a civilian standard of due process in an area where such a standard would not always be feasible.⁶³ Consequently, there is no reason why federal courts could not formulate an acceptable standard of due process for those military situations where such a distinction is necessary. Where the matter is peculiar or necessary to successful military operations, the courts could and should apply a varying standard.

While the task of formulating such a standard in necessary cases would be substantial, the federal courts have not neglected such a task where "state"

41 MIL. L. REV. 109 (1968); *Court of Military Appeals and The Bill of Rights: A New Look*, 36 GEO. WASH. L. REV. 435 (1967). For an historical view of this area see W. AYCOCK and S. WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* (1955); Fratcher, *Appellate Review in American Military Law*, 14 MO. L. REV. 15 (1949).

58. These arguments against substantial expansion of the scope of review of military courts-martial are essentially the ones set forth in Chief Justice Vinson's plurality opinion in *Burns v. Wilson*, 346 U.S. 137, 140-142 (1953). See also *Hiatt v. Brown* 339 U.S. 103 (1950); *In re Grimley*, 137 U.S. 147 (1890).

59. Chief Justice Vinson states in *Burns v. Wilson*, 346 U.S. 137, 140 (1953), "Military law, like state law, is a jurisprudence which exists separate and distinct from the law which governs in our federal judicial establishment."

60. See, e.g., *Sanders v. United States*, 373 U.S. 1 (1963); *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963).

61. E.g., *Klopfert v. North Carolina*, 386 U.S. 213 (1967), right to speedy trial; *Spencer v. Texas*, 385 U.S. 554 (1967), exclusion of evidence of prior convictions; *Pointer v. Texas*, 380 U.S. 400 (1965), right to confrontation with adverse witnesses; *Malloy v. Hogan*, 378 U.S. 1 (1964), freedom from self-incrimination; *Gideon v. Wainwright*, 372 U.S. 335 (1963), right to counsel; *Mapp v. Ohio*, 367 U.S. 643 (1961), freedom from unreasonable search and seizure.

62. A primary distinction is the fact that, unlike state court decisions, there is no appeal to the Supreme Court in military cases. The Court of Military Appeals is the court of last resort in military courts-martial.

63. See *Weiner, Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 303 (1958).

due process was concerned. There has already been judicial recognition by federal courts of the existence of a separate concept of due process applicable to the military. The Court of Claims and those circuit courts taking a liberal view of the federal scope of review in this area have been able to weigh constitutional allegations as they relate particularly to the military.⁶⁴ The consideration by the Supreme Court of the constitutional allegations in the present case, after assuming broad jurisdiction *arguendo*, offers additional evidence of the feasibility of formulating a standard for military due process.⁶⁵ Furthermore, any difficulty in establishing such a standard appears to be lessened when one realizes that certain guidelines are already in existence in the civilian area.⁶⁶ Since an overwhelming majority of the cases considered in these collateral attacks of military convictions are also violations of civilian criminal statutes, the problem areas involved will not be entirely new to the federal courts.⁶⁷

Even if the standard of due process which the federal courts might adopt were much narrower than that found in civilian cases, the soldier would still be in a much better position than at present. There seems little reason why a prisoner should be confronted with an additional hurdle of narrow jurisdiction just because he wears a uniform.⁶⁸ Even though the military judicial system finds its origin through Congressional enactment, this should not place the soldier at a disadvantage in obtaining review of possible infringements of his constitutional rights. This does not suggest that military courts-martial are inherently unfair or their procedures unconstitutional. Rather, it suggests that in a system of judicial review headed by a single Supreme Court, that Court should make all final determinations as to rights arising under the Constitution. Such determinations are required whether these constitutional rights are violated by military or civilian authorities.

The Supreme Court's decision in *United States v. Augenblick* adds little clarification to the question of collateral review of military courts-martial. The decision leaves intact both the narrow and the broad interpretations of the scope of collateral review which have been adopted by different federal courts since

64. Justice Frankfurter recognizes this distinction in *Burns v. Wilson*, 346 U.S. 137, 149 (1953). *Innes v. Hiatt*, 141 F.2d 664, 666 (3d Cir. 1944), states:

We think that this basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court. . . .

This is not to say that members of the military forces are entitled to the procedure guaranteed by the Constitution to defendants in the civil courts. As to them due process of law means the application of procedure of military law.

See also *Burns v. Lovett*, 202 F.2d 335, 352 (1952), dissenting opinion.

65. Although these courts have denied relief in the past (until the more recent decisions in the Court of Claims), they have weighed allegations of infringement upon constitutional rights as they applied to the military.

66. *United States v. Augenblick*, 393 U.S. 348, 351-356 (1969).

67. *Katz and Nelson, The Need for Clarification in Military Habeas Corpus*, 27 OHIO S. L. REV. 193, 216 (1966).

68. See *Katz and Nelson, The Need for Clarification in Military Habeas Corpus*, 27 OHIO S. L. REV. 193, 216-218 (1966).

Burns v. Wilson.⁶⁹ The majority of the courts, which have interpreted *Burns* more narrowly, should find no cause for expansion of review since *Augenblick* offers little reason for overturning sixteen years of established precedent within these circuits. On the other hand, those more liberal courts which appear to apply a *Zerbst* concept of jurisdiction to attacks upon military convictions will not be discouraged from their liberal interpretations since the Supreme Court did not reject this position. If anything, these courts may now be more inclined to grant relief because, unlike *Burns* (in which the Court reversed on jurisdictional grounds), the Supreme Court in *Augenblick* was willing to use an expanded concept of jurisdiction at least for argumentative purposes.⁷⁰

This decision not only perpetuates the confusion in this area but continues to deny to an individual, because he is in uniform, review which is logically and justifiably his. The Supreme Court will probably be faced again with the same type of situation presented in *Augenblick*. That is, one of the lower federal courts will again grant relief based upon an expanded concept of jurisdiction. However, in such a future situation the problem may not be avoided so easily as the petitioner may also present a valid constitutional argument. In any event, it seems that until the Court meets and resolves this problem, the military petitioner's grounds for relief in all types of collateral actions will remain highly uncertain. The Supreme Court in *United States v. Augenblick* has clearly avoided solving the problem only confused in *Burns v. Wilson*. Hopefully, another sixteen years will not pass before a proper solution is forthcoming.

MORRIS J. NUNN

69. See discussion note 22 *supra*.

70. *United States v. Augenblick*, 393 U.S. 348, 351-352 (1969).

THE ZONING VARIANCE: A NEW LOOK IN MISSOURI?

*Rosedale-Skinker Improvement Association v. Board of Adjustment*¹

Southwestern Bell Telephone Company applied to the Building Commissioner of the City of St. Louis for a permit to erect a four-story addition to its building rather than the three-story addition permitted by the zoning ordinance. The permit was refused and the Bell Company appealed to the Board of Adjustment. The Board of Adjustment sustained the Commissioner on the grounds that: (1) the proposed structure would violate the Zoning Code by reducing the off-street parking space below the minimum standard, and (2) no practical difficulty or unnecessary hardship had been shown to allow variation from the specified height limitation. The Bell Company immediately acquired land adjoining its property in order to provide the required parking spaces, and filed a motion for rehearing, which was granted. During the board hearing, the company submitted testimony that technical considerations demanded a four-story addition, that this did not constitute a major change in the appearance of the building, and that refusal of the permit would require the construction of a building at another site, resulting in impairment of service and great expense to the public.² The board then found that a variance in height of the proposed addition was justified because of practical difficulties and unnecessary hardship. Plaintiffs, who were the trustees and two resident owners of a neighboring home, filed a petition for certiorari in the Circuit Court of the City of St. Louis to attack the legality of the Board of Adjustment's decision. Neither party offered additional evidence to the circuit court, and the Board's order was affirmed. Plaintiffs appealed to the St. Louis Court of Appeals, which reversed the judgment and remanded the cause with orders to affirm the Building Commissioner's decision. The case was then transferred to the Missouri Supreme Court to be heard as an original appeal. Plaintiffs contended, among other things, that no practical difficulty or unnecessary hardship was established by Bell. The Court found no merit to any of the plaintiff's contentions and affirmed the Board of Adjustment's decision granting the variance.

The circumstances under which a zoning board of adjustment may legally grant a variance have been a source of confusion in a majority of the states. Missouri is

1. 425 S.W.2d 929 (Mo. En Banc 1968).

2. This was substantiated by testimony and photographic exhibits by the Bell equipment engineer. Evidence was given showing the building entirely full of equipment. Bell Company contended that there was a need for continuation of the building at the present floor levels and height, and that if it was not allowed to increase the number of floor levels, there would be a duplication of facilities which would be a hardship on subscribers. When asked why the equipment could not expand horizontally, Bell's engineer testified that

[I]f you have to expand horizontally there is a possibility we wouldn't have need for the land. To tie the equipment together to have it function, if we have the length of the cables too long there is too much resistance and we cannot function the equipment.

Rosedale-Skinker Improvement Association v. Board of Adjustment, 425 S.W.2d 929, 935 (Mo. En Banc 1968).

no exception. The *Rosedale* case provides an important addition to Missouri case law in this area.

A variance allows a single landowner the right to use his property in a specific manner which is contrary to the strict letter of the zoning ordinance. In essence, it is an exemption from the restrictions.³ The Standard State Zoning Enabling Act provides for a zoning board of adjustment to grant a variance in order to avoid practical difficulties and unnecessary hardship. This provision has been adopted in a majority of the states.⁴ The Missouri Enabling Act follows the Standard Act in this regard.⁵

There are two recognized forms of variance. The use variance allows a use or structure in a district restricted against such a use or structure.⁶ A permit for a commercial building in a residential zone is a typical example of this variance form. The other form, the bulk variance, is used to relieve the particular property from hardship caused by dimensional requirements. This would exist where the landowner makes a conforming use of the property, but does not comply with some bulk regulation as to area, height, setback or parking.⁷ The *Rosedale* case involved a request for a bulk variance.

Beginning with the landmark case of *State ex rel. Nigro v. Kansas City*,⁸ Missouri courts consistently have held that neither a board of adjustment nor a court can grant a use variance. The use variance is regarded as an amendment to the zoning ordinance, which is solely a legislative function.⁹ Consequently when

3. Note, *Zoning Variances*, 74 HARV. L. REV. 1396 (1961).

4. 8 E. McQUILLIN, MUNICIPAL CORPORATIONS, 511, § 25.159 (3rd ed. 1965).

5. § 89.090 (3), RSMo 1959. It is interesting to note that the Missouri phrase speaks of "practical difficulties or unnecessary hardship," not "practical difficulties and unnecessary hardship." While the difference raises the question whether the two terms have different meanings, it appears that the courts use the two terms interchangeably.

6. See *Otto v. Steinhilber*, 282 N.Y. 71, 76, 24 N.E.2d 851, 853 (1939), for one of the best statements on when a use variance based on unnecessary hardship is appropriate. The *Otto* court maintained that before a board may grant a variance, the landowner must show that: (1) the land cannot yield a reasonable return if used for the purpose specified in the zone; (2) the hardship is due to unique circumstances of the particular land owner and not to general conditions in the neighborhood; and (3) the variance will not change the essential character of the locality.

7. Dukeminier and Stapleton, *The Zoning Board of Adjustment: A Case Study In Misrule*, 50 Ky. L. J. 273, 281 (1962).

8. 325 Mo. 95, 27 S.W.2d 1030 (1930). In discussing the use variance the *Nigro* court said:

But the board can in no case relieve from a substantial compliance with the ordinance; their administrative discretion is limited to the narrow compass of the statute; they cannot merely pick and choose as to the individuals of whom they will or will not require a strict compliance with the ordinance. *State ex rel. Nigro v. Kansas City*, *supra* at 101, 27 S.W.2d at 1032.

9. *E.g.*, *State ex rel. Meyer v. Kinealy*, 402 S.W.2d 1 (St. L. Mo. App. 1966); *State ex rel. Sheridan v. Hudson*, 400 S.W.2d 425 (St. L. Mo. App. 1966); *Wilson v. Douglas*, 297 S.W.2d 588 (K.C. Mo. App. 1957); *Adams v. Board of Zoning Adjustment of Kansas City*, 241 S.W.2d 35 (K.C. Mo. App. 1951); *In re Botz*, 236 Mo. App. 566, 159 S.W.2d 367 (1942); *Berard v. Board of Adjustment of City of St. Louis*, 138 S.W.2d 731 (St. L. Mo. App. 1940).

an attempt was made to circumvent this position by showing a practical difficulty or unnecessary hardship as provided in the Enabling Act, it was held that no matter how great the hardship, a use variance could not be granted.¹⁰

Thus, Missouri boards of adjustment now only need to determine the circumstances under which a bulk variance may be granted. In order to obtain such a variance, a Missouri landowner must show that conformity with the zoning requirement would cause "practical difficulties or unnecessary hardship."¹¹ In *Carlyle-Lowell, Inc. v. Ennis*¹² the court held that the existence of hardship was a question of fact which the board was afforded wide discretion in deciding. The appellant's contention that financial considerations could not be given account in determining the hardship issue was rejected. But *Brown v. Beuc*¹³ severely limited the liberal approach of the *Ennis* case. In *Brown*, the court held that a bulk variance could be granted only when there were practical difficulties or unnecessary hardship which were not personal to the owner of the land in question, but which referred to the condition of the particular lot. The hardship had to be unusual or particular to the property involved and different from that suffered throughout the neighborhood. The court explained what this meant by stating that the hardship must have resulted "from the peculiar topography or condition of the land which makes the land unsuitable for the use permitted in the zone in which it lies."¹⁴ This prohibited the board from considering evidence of a landowner's personal hardship when the condition of the land was not the reason for the landowner's failure to comply with the zoning ordinance.

It is understandable why many believed *Brown* to have restricted *Ennis* and formulated new Missouri law. Actually, the liberal language of *Ennis* may have been dicta. Although the *Ennis* court stated that modification of the yard and area requirements was allowed to alleviate expense to the property owner, the grounds for its decision appeared to be that the topography or condition of the land would not allow the property to be feasibly developed in conformity with the zoning ordinance.¹⁵ By viewing the decision in this manner, *Brown* may be

10. *State v. Hudson*, 400 S.W.2d 425 (St. L. Mo. App. 1966). Referring to *State ex rel. Nigro v. Kansas City*, 325 Mo. 95, 27 S.W.2d 1030 (1930), the court states:

Its language that the board can in no case relieve from a substantial compliance with the ordinance, clearly shows that it was holding that regardless of the practical difficulty or unnecessary hardship which might exist, a board of adjustment does not possess the power to grant a variance for a nonconforming use. *State v. Hudson*, *supra* at 430.

11. § 89.090, RSMo 1959.

12. 330 S.W.2d 164 (K.C. Mo. App. 1959).

13. 384 S.W.2d 845 (St. L. Mo. App. 1964).

14. *Id.* at 853.

15. *Carlyle-Lowell, Inc. v. Ennis*, 330 S.W.2d 164 (K.C. Mo. App. 1959). The court illustrated the hardship resulting from the topography of the land when it stated:

The lot is irregular in shape, with the front thereof being narrower than the rear. Moreover, the east line is irregular, containing an angle. In addition, the grades of this lot are irregular, with the grade sloping

said to have tightened the loose language of *Ennis*.¹⁶

Rosedale, however, expressly rejects the language of the *Brown* case. The *Rosedale* opinion states that the limitation to hardships resulting from the land's topography "was not necessary to the [*Brown*] decision and was not based on any specific provision in the St. Louis ordinance or the enabling act."¹⁷ The court not only dismissed the limitation as mere dicta, but also as not supported by the statutes. This approach allowed the court to return to a "common sense conclusion"¹⁸ that is much more flexible in considering variance applications.

Rosedale does raise an additional question concerning the circumstances under which a variance may be granted. It has been said that a variance is only authorized when "the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done. . . ."¹⁹ This does not mean that the variance must benefit public interest, but that public interest must not be harmed by the granting of the variance.

It is difficult to formulate a general rule as to what constitutes a sufficient hardship to justify a variance, for each case rests upon its own facts. To a great extent, the final decision remains within the board's discretion. But following *Rosedale*, the landowner will be assured of more latitude in presenting hardship evidence. The result should be an increased number of variances.

THOMAS N. STERCHI

downward from north to south and with a rolling slope from west to east.
Carlyle-Lowell, Inc. v. Ennis, *supra* at 165.

16. *Cf. State ex rel. Weinhardt v. Ladue Professional Building, Inc.*, 395 S.W.2d 316 (St. L. Mo. App. 1965). The court did not affirm the board's decision on hardship, but instead affirmed the decision on grounds that the respondent complied with the minimum parking space requirements of the zoning ordinance. This seemed to be avoiding the issue of hardship, and recognizing the fact that there was no hardship due to topography. The case appeared to add weight to the *Brown* "limitation."

17. *Rosedale-Skinker Improvement Association v. Board of Adjustment*, 425 S.W.2d 929, 932 (Mo. En Banc 1968).

18. *Carlyle-Lowell, Inc. v. Ennis*, 330 S.W.2d 164, 169 (K.C. Mo. App. 1959).

19. *In re Botz*, 236 Mo. App. 566, 572, 159 S.W.2d 367, 370 (1942).