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CONSCIENTIOUS OBJECTION: PROCEDURES GOVERNING THE IN-SERVICE OBJECTOR

I. INTRODUCTION

Dating back to the colonial days, and continuing to the present, statutory provisions have existed recognizing the status of conscientious objectors.¹ Despite a consistent national policy of exempting conscientious objectors from the demands of the draft,² similar recognition has not always been afforded to those who become conscientious objectors after entering service in the armed forces.³ It is clear that the statute which provides for exemption from induction to those who are classified as conscientious objectors⁴ was not meant to apply to personnel already in the armed forces.⁵ As a result, until 1962 there were no procedures giving recognition to the in-service objector.⁶ However, in that year the Secretary of Defense, pursuant to statutory authority,⁷ issued Department of Defense Directive 1300.6 (August 21, 1962),⁸ which provided for discharge of servicemen who qualified as conscientious objectors. This article will examine the nature and extent of the procedures which govern the discharge of the in-service objector, not only to acquaint the reader with a subject which

1. See *Hammond v. Lenfest*, 398 F.2d 705, 708 (2d Cir. 1968). For a brief review of the history concerning special treatment of conscientious objectors see *United States v. Gearey*, 368 F.2d 144, 147-48 (2d Cir. 1966).

2. *Hammond v. Lenfest*, 398 F.2d 705, 708 (2d Cir. 1968). See generally Mansfield, *Conscientious Objection—1964 Term*, 1965 RELIGION & THE PUBLIC ORDER 3.

3. *Hammond v. Lenfest*, 398 F.2d 705, 708 (2d Cir. 1968).

4. Selective Service Act of 1948 § 6 (j), ch. 625, 62 Stat. 612 (1948), as amended 50 U.S.C. App. § 456 (j) (1970), as amended, (Supp. 1972) provides that if a registrant is found by the local selective service board to be conscientiously opposed to participation in war in any form by reason of religious training and belief, he shall, in lieu of induction, be ordered to perform civilian work which contributes to the maintenance of the national health, safety or interest.

5. *Hammond v. Lenfest*, 398 F.2d 705, 708 (2d Cir. 1968); *Crane v. Hedrick*, 284 F. Supp. 250, 254 (N.D. Cal. 1968); *Brown v. McNamara*, 263 F. Supp. 686, 691 (D.N.J.), *aff'd* 387 F.2d 150 (3d Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968).

6. Before 1962 it was sometimes possible for an in-service objector to get a discharge from the armed services, but the discharge would be couched in such terms as inadaptability or lack of ability for military service instead of for reasons of conscientious objection. Whether such a discharge would be granted to the objector, however, was largely dependent upon the individual's commanding officer. In some cases commanders were willing to grant such discharges, while in others they were not. In most cases the decision of the commanding officer was upheld. See M. SIBLEY & P. JACOB, CONSCRIPTION OF CONSCIENCE 106 (1952).

7. Armed Forces Act, 10 U.S.C. § 133 (b) (1970) provides:

The Secretary [of Defense] is the principal assistant to the President in all matters relating to the Department of Defense. Subject to the direction of the President and to this title and section 401 of title 50, he has authority, direction, and control over the Department of Defense.

8. This Directive has continued in existence with revisions since its inception in 1962. A major revision occurred in 1968 and, more recently, in the promulgation of the present Department of Defense Directive 1300.6 (Aug. 20, 1971) [hereinafter cited as D.O.D. DIRECTIVE 1300.6]. This Directive and all implementing regulations by the various services are found in 1 SSLR 2325 and following.

has in recent years assumed increasing importance, but also to determine the adequacy and fairness of these procedures.

II. DEPARTMENT OF DEFENSE DIRECTIVE 1300.6 AND IMPLEMENTING REGULATIONS

A. *Nature and Scope of Coverage*

The present Department of Defense Directive 1300.6 [hereinafter referred to as Directive 1300.6 or Directive] governs all members of the Army, Navy, Air Force, and Marine Corps, and all reserve components of these services.⁹ Pursuant to this Directive each service has promulgated its own regulations to implement its provisions.¹⁰ It should be noted that although the Directive and the implementing regulations are not of statutory origin, as is the provision exempting conscientious objectors from induction,¹¹ they are just as binding,¹² and give recognition to the fact that this nation has historically respected valid conscientious objection.¹³ Furthermore, failure to have procedures which extend the benefit of section 6(j) of the Military Selective Service Act of 1967¹⁴ to servicemen who become conscientious objectors after entry into the armed forces would appear to create a substantial equal protection problem.¹⁵

9. D.O.D. DIRECTIVE 1300.6, § II.

10. Each of the military services has had implementing regulations in effect following the issuance of Directive 1300.6 in 1962, with changes being made as necessary. Due to the recent revision of the Directive, the services have also had to revise their regulations governing the disposition of conscientious objectors. The following regulations are presently in effect:

ARMY: ARMY REGULATION (AR) 635-20 (July 31, 1970), *as revised* Oct. 18, 1971. AR 635-20 applies equally to commissioned officers, warrant officers, and enlisted personnel (volunteers and inductees). The procedures governing disposition of conscientious objectors in the Army National Guard and Army Reserve are found in AR 135-25 (Sept. 2, 1970), *as revised* Oct. 18, 1971.

NAVY: BUREAU OF NAVAL PERSONNEL NOTICE (BUPERSNOTE) 1900 (Oct. 1971), *effective* Oct. 20, 1971 (cancelled July 1972 but treated as effective until replaced). This notice updates Navy procedures formerly contained in Bureau of Naval Personnel Manual (BUPERSMAN) 1860120. This regulation applies to active and reserve members of the Navy.

AIR FORCE: AIR FORCE REGULATION (AFR) 35-24 (Oct. 18, 1971). This regulation superseded AFR 35-24 (May 1, 1970), and applies to all personnel in the Air Force and Air Force Reserve.

MARINE CORPS: MARINE CORPS ORDER (MCO) 1306.16C (Nov. 19, 1971). This order superseded MCO 1306.B, and applies to all personnel in the Marine Corps and Marine Corps Reserve.

11. *See* note 4 *supra*.

12. In *Hammond v. Lenfest*, 398 F.2d 705, 715 (2d Cir. 1968), the court, in reviewing an in-service conscientious objector claim, stated:

We recognize, of course, that on this appeal we are dealing with Department of Defense Regulations rather than a statute. We reach the same result, however, because a validly promulgated regulation binds the government as much as the individuals subject to the regulation . . .

13. *Parisi v. Davidson*, 92 S. Ct. 815, 822 (1972).

14. *See* note 4 *supra*.

15. *See* Hansen, *Judicial Review of In-Service Conscientious Objector Claims*, 17 U.C.L.A. L. REV. 975 (1970). *But see* *Brown v. McNamara*, 263 F. Supp. 686, 691 (D.N.J., *aff'd*, 387 F.2d 150 (3d Cir. 1967)), where the court (in dictum) indicated that the Secretary of Defense could, without violating any constitutional

B. *Submission and Review of Application*

Any member of the armed services seeking discharge¹⁶ by reason of conscientious objection must submit a written application.¹⁷ The applicant is then personally interviewed by a chaplain,¹⁸ examined by a psychiatrist,¹⁹ and afforded the opportunity to appear before an investigating officer²⁰ in the grade of O-3²¹ or higher. The application, along with all supporting documents—which include the written results of the chaplain's interview, the psychiatric evaluation, and the investigating officer's report—is then forwarded through the applicant's chain of command.²² Each commander reviewing the application enters his recommendation of approval or disapproval and the reasons for his conclusion. The final decision as to approval or disapproval is then made by the headquarters of the military service concerned.²³ The services have established a Conscientious

rights, totally deny a procedure for dealing with in-service conscientious objector claims.

16. Directive 1300.6 also governs servicemen seeking assignment to non-combat duty by reason of conscientious objection. Servicemen who are classified as non-combatants by the military correspond to the I-A-O classification of the Selective Service System. This article is concerned only with those in-service objectors requesting discharge from the service based on their conscientious objection to participation of any kind in war in any form, including non-combatant service. Servicemen so classified by the military correspond to the I-O classification of the Selective Service System.

17. The application is submitted to the immediate commanding officer of the applicant. *See* AR 635-20, para. 4a (July 31, 1970). To a large extent the regulations of the various services are reproductions of the provisions contained in the Directive, but in certain instances they are more detailed in order to implement its broader provisions. When appropriate, reference will be made to these implementing regulations to illustrate how they effectuate the provisions of the Directive.

18. D.O.D. DIRECTIVE 1300.6, § VI.C. Although it is not required either by the Directive or implementing regulations, some military installations attempt to afford those objectors whose beliefs are founded on traditional religious training an interview with a chaplain who is of the same faith or denomination. After this interview the chaplain must submit a written opinion as to the nature of the applicant's beliefs, as well as to his sincerity and depth of conviction. He must include reasons for his conclusion. *Id.*

19. The purpose of this psychiatric examination is to make certain the applicant is free from any psychiatric disorders warranting treatment or disposition through medical channels. If a psychiatrist is not reasonably available the applicant will be examined by a medical officer. *See* D.O.D. DIRECTIVE 1300.6, § VI.C.

20. *Id.* § VI.D. This officer must not be in the applicant's chain of command. If the applicant is an officer, the investigating officer must be his senior in rank. *Id.*

21. *Id.* AFR 35-24, para. 10 (Oct. 18, 1971) requires the investigating officer to be in the grade of O-4 (Major) or higher, except for staff judge advocates, who may be in the grade of O-3 (Captain) or higher. The Navy also requires the investigating officer to be in the grade of O-4 (Lieutenant Commander) or above. The provision which requires the hearing to be conducted by an officer outside the applicant's chain of command is in contrast to the 1962 Directive, which provided that the applicant's immediate commanding officer was to act as the hearing officer. *See* United States *ex rel.* Mankiewicz v. Ray, 399 F.2d 900, 902 (2d Cir. 1968). In 16 AM. JUR. TRIALS *Selective Service Litigation* 326-27 (1969) it is stated that in the larger military installations these hearing officers have been "fair-minded men with none of the visceral resentment and distaste toward conscientious objectors often felt by commanding officers."

22. D.O.D. DIRECTIVE 1300.6, § VI.E.

23. *Id.* § VI.F.

Objector Review Board (CORB)²⁴ to review each application and to make a recommendation to the appropriate decision-making authority concerning the proper disposition of each application. The decision of the CORB is ordinarily considered final but, in cases where a United States attorney so requests, the decision-making authority can conduct a de novo review of all prior proceedings.²⁵ After the final decision is made the applicant is given written notification and, if found to be a conscientious objector, will be discharged for the convenience of the government.²⁶ If the decision is adverse, however, reasons must be given to support such denial.²⁷ It should be noted that an applicant may, in case an adverse decision is rendered, seek further review in military channels by appealing to the appropriate board for correction of military records.²⁸ It appears, however, that because few applicants have had success in appealing to the correction boards,²⁹ and because federal courts do not require the appeal as an exhaustion requirement,³⁰ few in-service objectors make such appeal before resorting to the courts for judicial review.

24. The Army CORB is composed of a senior officer, an officer in the Judge Advocate General Corps, a chaplain, and a Medical Corps officer. Only two votes are required to approve an application. See *Ehlert v. United States*, 402 U.S. 99, 107 n.11 (1971).

25. See *Morrison v. Larsen*, 446 F.2d 250, 252 (9th Cir. 1971).

26. D.O.D. DIRECTIVE 1300.6, § VII.A. Even if the military finds the in-service applicant to be a bona fide conscientious objector entitled to discharge, it appears that such discharge prior to completion of an obligated term of service is discretionary, and thus could be denied if not "consistent with the effectiveness and efficiency of the Military Service," or not found to be "practicable and equitable." See D.O.D. DIRECTIVE 1300.6, § IV.A. In *Silberberg v. Willis*, 420 F.2d 662, 666 (1st Cir. 1970), the court, in reviewing an in-service claim brought under the similar provisions of Directive 1300.6 (May 10, 1968), stated that discharge was to be granted in the absence of abnormal or extraordinary circumstances such as military necessity. Since the inception of Directive 1300.6 in 1962 there appears to have been no instance where an in-service applicant was found to be a bona fide conscientious objector and then denied discharge on the grounds of military "effectiveness," or because a discharge would not be "practicable and equitable." The policy of the Department of Defense is to discharge those applicants who are found to be genuine objectors. Needless to say, such a policy benefits the services because the bona fide objector will likely remain true to his beliefs and, if not discharged, will only hinder military effectiveness and efficiency.

27. D.O.D. DIRECTIVE 1300.6, § VI.F.

28. These boards were established as the result of legislation by Congress in 1946 which authorized the secretaries of the various services, acting through boards of civilian officers, to alter military records when necessary to prevent injustice. As a result of this legislation each service has established a board for correction of military records whose function is (when requested by a serviceman) to review his records, and correct errors or remove injustice when found necessary. See *Parisi v. Davidson*, 92 S. Ct. 815, 818 n.4 (1972).

29. Hansen, *supra* note 15, at 988 n.65.

30. See *Pitcher v. Laird*, 421 F.2d 1272 (5th Cir. 1970); *United States ex rel. Brooks v. Clifford*, 409 F.2d 700, rehearing denied, 412 F.2d 1137 (4th Cir. 1969). Although the Ninth Circuit, in *Craycroft v. Ferrall*, 408 F.2d 587 (9th Cir. 1969), vacated, 397 U.S. 335 (1970), held that an appeal to the appropriate board for correction of military records was an exhaustion requirement, it appears that this position has now been abandoned. See *Bratcher v. McNamara*, 448 F.2d 222, 224 (9th Cir. 1971). In *Packard v. Rollins*, 307 F. Supp. 1388, 1392 (W.D. Mo. 1969), *aff'd*, 422 F.2d 525 (8th Cir. 1970), the court held that appeal to the Army Board for Correction of Military Records was not required in order for a serviceman to

C. Procedural Rights Afforded the In-Service Objector

The directive in effect prior to the present Directive 1300.6 was subjected to criticism for its failure to provide the minimum requirements of administrative due process to the in-service applicant.³¹ It appears that when the present Directive was revised it took into consideration many of these previous criticisms, for the Directive now provides the necessary procedural rights to an applicant while at the same time insuring that the system is not abused by an insincere applicant who asserts a fraudulent claim. These rights will now be examined.

It should be noted at the outset that a potential in-service objector, as soon as he makes his objections known to responsible military officials, has the right to be informed and advised concerning the submission of his application for discharge as a conscientious objector.³² During the time his application is being processed and until a final decision is made by the appropriate authority, the applicant is to be assigned to duties which will conflict as little as possible with his asserted beliefs.³³ It should also be noted that a serviceman who applies for discharge before being placed on orders for reassignment will be retained at his old duty station pending final decision on his application.³⁴ However, if a serviceman makes such application after being placed on orders he may be required to comply with the orders and submit his application upon arrival at his new duty station.³⁵

Once the serviceman has supplied the minimum information required for an application,³⁶ he has the right to appear in person at a hearing

exhaust his administrative remedies. On appeal the government abandoned its claim that such appeal was required. It appears the decision of the military is "ripe" for judicial review after final decision is made by the Adjutant General of the Army, the Chief of the Bureau of Naval Personnel, or the Adjutant General of the Air Force. Both the Army and Air Force correction boards will accept jurisdiction to review the claims of in-service objectors, but such a procedure is not insisted upon by the government as a precondition for judicial review. It appears the Naval Board for Correction of Military Records rejects review of these claims for want of jurisdiction. U.S. DEPT OF JUSTICE, MEMO. No. 652, at 2 (Oct. 23, 1969).

31. In Brahms, *They Step to a Different Drummer: A Critical Analysis of the Current Department of Defense Position Vis-A-Vis In-Service Conscientious Objectors*, 47 MIL. L. REV. 1 (1970), the author criticized Directive 1300.6 (May 10, 1968) for its failure to provide adequate provisions regarding evidentiary standards, right to cross-examination and presentation of documentary evidence or witnesses, as well as for its failure to require that the claimant be informed of the decision reached at each level of consideration and the basis or reasons for such decision. See also Ward, *In-Service Conscientious Objectors: Suggested Revisions in Present Procedures of Processing*, 25 JAG J. 113 (1971).

32. *Epstein v. Commanding Officer*, 327 F. Supp. 1122 (E.D. Pa. 1971).

33. D.O.D. DIRECTIVE 1300.6, § VI.H. It has been this author's experience to find that many commanding officers in the Army today appear to be sincere and cooperative in their efforts to assign conscientious objector applicants to duties which provide minimum conflict with their beliefs. In many instances commanders who have doubts will seek legal advice from the local staff judge advocate as to the propriety of a proposed duty assignment.

34. See M.C.O. 1306.16C, para. 7 m (Nov. 19, 1971).

35. D.O.D. DIRECTIVE 1300.6, § VI.H.

36. *Id.* enclosure 1. This minimum required information includes general information concerning the applicant, a description of his training and beliefs

conducted by an investigating officer.³⁷ The hearing is informal in nature but all oral testimony is under oath or affirmation.³⁸ The purpose of the hearing is

[t]o afford the applicant an opportunity to present any evidence he desires in support of his application; to enable the investigating officer to ascertain and assemble all relevant facts; to create a comprehensive record; and to facilitate an informed recommendation by the investigating officer and an informed decision on the merits by higher authority.³⁹

It is not mandatory that the applicant appear before the investigating officer, but if he does fail to appear he is deemed to have waived his appearance and the investigating officer may proceed in his absence.⁴⁰ If the applicant does appear but refuses or fails to submit to questioning under oath or affirmation, this fact may properly be considered by the investigating officer in making his decision and recommendation on the applicant's claim.⁴¹ The applicant is afforded the right to have counsel present to represent him at the hearing and to assist him in the presentation of his case.⁴² This right to have counsel present during the hearing is one of vital importance to the applicant, not only because the hearing is in the nature of a cross-examination by the investigating officer,⁴³ but also because the applicant is subordinate in rank.⁴⁴ Although the applicant does not have the right to subpoena witnesses, the local commander is required to render all reasonable assistance in order to make military members requested by the applicant available as witnesses.⁴⁵ Also, the applicant is afforded the opportunity to present witnesses on his behalf, as well as the right to cross-examine any witnesses who appear.⁴⁶

Although a verbatim record of the hearing is not required, an applicant who desires it has the right to have a verbatim record made at his own expense.⁴⁷ In absence of such a choice, the investigating officer will

and participation in military and religious organizations, and letters of references which the applicant desires to be considered.

37. *Id.* § VI.D.2.

38. *Id.* § VI.D.2.b. This hearing is not governed by the rules of evidence in courts-martial and any relevant evidence may be received. *Id.*

39. D.O.D. DIRECTIVE 1300.6, § D.2.

40. *Id.*

41. *Id.*

42. *Id.* § D.2.a. The applicant must bear this expense himself, however. It is interesting to note that a Selective Service registrant, when appearing before his local board to present his conscientious objector claim, has no right to have counsel present. It has been said that thousands of draft registrants have been denied due process of law as a result of erroneous action by local boards which has gone unchecked because of this lack of assistance of counsel. 117 CONG. REC. S14,222 (daily ed. Sept. 13, 1971).

43. In *Champ v. Seamans*, 330 F. Supp. 1127, 1134 (M.D. Ala. 1971), the court stated that the proper purpose of the hearing is to cross-examine the applicant and, where legitimately suspicious circumstances are found, to pursue them to a proper determination.

44. See note 20 *supra*.

45. D.O.D. DIRECTIVE 1300.6, § D.2.c.

46. *Id.*

47. *Id.* § D.2.d.

summarize the testimony of witnesses and give the applicant and his counsel the opportunity to examine the summary and note their differences for the record.⁴⁸ The applicant is entitled to receive a copy of the record⁴⁹ at the time it is forwarded through the chain of command for review and, if the record is adverse, is notified of his right to submit a rebuttal to the investigating officer's report.⁵⁰ Upon review by the headquarters of the military service concerned, any additional information (other than the applicant's official service record) which is considered and which the applicant has not had the opportunity to rebut or comment upon is made a part of the record—with the applicant afforded the opportunity to rebut or comment upon it before a final decision is reached.⁵¹

Finally, the in-service objector who has applied for and been denied discharge as a conscientious objector is given the right to submit subsequent applications.⁵² Before such an application will be processed and forwarded for review, however, it must appear that it is not based on essentially the same grounds as the previous application.⁵³ This provision apparently recognizes that bases and beliefs underlying and supporting conscientious objection claims can change significantly over a period of time through the influences of such factors as "reading, dialogue with others, continued introspection, and the influences of life's experiences."⁵⁴ As a result, a claim that was at one time properly diagnosed as insincere could later develop into a sincere and genuine claim because of subsequent influences upon the applicant.⁵⁵

D. *Establishing a Prima Facie Case*

In order to qualify for discharge as a conscientious objector it is necessary that the applicant first establish a prima facie case.⁵⁶ To establish a prima facie case, the applicant must show: (1) that he is conscientiously opposed to participation in war in any form;⁵⁷ (2) that his opposition

48. *Id.* One criticism of the previous Directives was that they did not require any record of the hearing to be kept. See Ward, *supra* note 31, at 116.

49. The record consists of the investigating officer's report, the serviceman's written application, the report of the interview with the chaplain, the psychiatrist's evaluation, evidence received as a result of the hearing, and any other items submitted by the applicant in support of his claim. D.O.D. DIRECTIVE 1300.6, § VI.D.3.f.

50. *Id.*

51. *Id.* § VI.F.

52. *Id.* § V.G.

53. *Id.* The decision whether or not a second or subsequent application is based upon essentially the same grounds or supported by essentially the same evidence is usually made by the installation commander's designated official. If the application is found to be essentially the same it is returned to the applicant without action. If not essentially the same, the application will be processed in accordance with the procedures followed in the first application—including an interview with a new chaplain, psychiatrist, and investigating officer.

54. Morrison v. Larsen, 446 F.2d 250, 254-55 (9th Cir. 1971).

55. *Id.* at 255.

56. Peckat v. Lutz, 451 F.2d 366 (4th Cir. 1971).

57. D.O.D. DIRECTIVE 1300.6, §§ V.A.I., V.D.(1). Section V.B.I. interprets the clause "war in any form" as follows:

[A]n individual who desires to choose the war in which he will participate is not a conscientious objector under the law. His objection must be to all wars rather than a specific war.

is by reason of "religious training and belief";⁵⁸ and (3) that his belief is sincere and deeply held.⁵⁹ It should be noted that the requirements for establishing a prima facie case by the in-service objector under Directive 1300.6 are the same as for the Selective Service registrant seeking exemption from the draft as a conscientious objector.⁶⁰ Furthermore, the judicial precedents involving claims to exemption from induction are applicable to those already in the service seeking discharge for like reasons.⁶¹ Directive 1300.6 has incorporated in its definition of "religious training and belief"⁶² the decisions in both *United States v. Seeger*⁶³ and *United States v. Welsh*.⁶⁴ Furthermore, in defining "war in any form"⁶⁵ the Directive incorporates *Gillette v. United States*,⁶⁶ which established the requirement that a conscientious objector be opposed to all war and not to a select or single war. However, a belief by the applicant in a theocratic war does not come within

58. *Id.* § V.A.2. Section III.B. sets forth an elaborate definition of "religious training and belief":

Belief in an external power or being or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being. The external power or being need not be of an orthodox deity, but may be a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of another, or, in the case of deeply held moral or ethical beliefs, a belief held with the strength and devotion of traditional religious conviction. The term "religious training and belief" may include solely moral or ethical beliefs even though the applicant himself may not characterize these beliefs as "religious" in the traditional sense, or may expressly characterize them as not religious. The term "religious training and belief" does not include a belief which rests solely upon considerations of policy, pragmatism, expediency, or political view.

59. *Id.* § V.A.3. Section V.C.2. provides:

Great care must be exercised in seeking to determine whether asserted beliefs are honestly and genuinely held. Sincerity is determined by an impartial evaluation of the applicant's thinking and living in its totality, past and present . . . Information presented by the claimant should be sufficient to convince that the claimant's personal history reveals views and actions strong enough to demonstrate that expediency or avoidance of military service is not the basis of his claim.

60. See *Clay v. United States*, 403 U.S. 698, 700 (1971).

61. *United States ex rel. Sheldon v. O'Malley*, 420 F.2d 1344, 1348 (D.C. Cir. 1969). See also *Gillette v. United States*, 401 U.S. 437, 442 (1971).

62. See note 58 *supra*.

63. 380 U.S. 163 (1965). This case stands for the proposition that exemption on religious grounds is not limited merely to those who hold an orthodox belief in God but includes as well a sincere and meaningful belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." *Id.* at 165-66.

64. 398 U.S. 333 (1970). In *Welsh* the Court enunciated a broad test for conscientious objection, which includes "those whose consciences, spurred by deeply held moral, ethical or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war." *Id.* at 344 (emphasis added). For a discussion of *Welsh*, see Davis, *Conscientious Objection on "Deeply Held" Moral and Ethical Grounds*, 36 Mo. L. Rev. 256 (1971).

65. See note 57 *supra*.

66. 401 U.S. 437 (1971).

the definition of "war in any form" and thus does not preclude an applicant from being classified as a conscientious objector.⁶⁷

E. Grounds for Denial of Conscientious Objection Claims

1. Waiver and Res Judicata

An in-service applicant can of course be denied his request for discharge as a conscientious objector if he fails to establish a prima facie case as required by Directive 1300.6.⁶⁸ Furthermore, a serviceman can establish by clear and convincing evidence the necessary elements of a prima facie case and still find himself ineligible for classification as a conscientious objector and subsequent discharge. Directive 1300.6 specifically recognizes two grounds for such a denial of eligibility, both of which concern servicemen who possessed conscientious objector beliefs before entering military service. The first ground is based on the theory of waiver. Under this theory if the applicant's beliefs were such that he satisfied the requirements for classification as a conscientious objector under the Selective Service Act, and he failed to request such classification from the Selective Service System before entering the military, he is deemed to have waived his conscientious objection claim, and is thus ineligible for discharge from the military based on such objection.⁶⁹

The second ground is based on the concept of res judicata. This theory involves individuals who sought conscientious objector classification with the Selective Service System before entering the military, and had their requests denied on the merits. If such an individual's later request for discharge as a conscientious objector is "based upon essentially the same ground, or supported by essentially the same evidence, as the request which was denied by the Selective Service System,"⁷⁰ he is likewise ineligible for discharge. In essence, the military defers to the judgment of the Selective

67. D.O.D. DIRECTIVE 1300.6 § V.B.2. provides that "a belief in a theocratic or spiritual war between the powers of good and evil does not constitute a willingness to participate in 'war' within the meaning of this Directive." This provision is apparently based on the authority of such decisions as *Sicurella v. United States*, 348 U.S. 385 (1955) and *Kretchet v. United States*, 284 F.2d 561 (9th Cir. 1960). It should be noted that the mere fact an applicant is willing to use force in the defense of himself and his family does not mean that he is not opposed to war in any form. *Thomas v. Salatch*, 328 F. Supp. 18 (E.D. La. 1971). Uncertainty by the applicant as to how much force he would be willing to use in self-defense will also not derogate from his claim to universal objection to war. *Solomen v. Seamans*, 331 F. Supp. 1099 (D. Mass. 1971).

68. D.O.D. DIRECTIVE 1300.6, §§ V.A., D. Thus, if the evidence disclosed that his conscientious objection to war was limited only to the war in Vietnam or that his objection actually stemmed from political considerations and not from "religious training and belief," either ground would be a proper reason to deny the claim. *Davenport v. Laird*, 440 F.2d 380 (4th Cir. 1971). But if the reason for denying the claim is based on the fact that the applicant's beliefs rest upon political views, it must appear that his views rest *solely* upon such political considerations. *Packard v. Rollins*, 422 F.2d 525, 527 (8th Cir. 1970). The fact that the applicant has political objections to a particular war does not prevent him from being classified as a bona fide conscientious objector so long as his objection is also by reason of his "religious training and belief." *Browning v. Laird*, 323 F. Supp. 661, 665 (N.D. Cal. 1971).

69. D.O.D. DIRECTIVE 1300.6, § IV.A.1. (a).

70. *Id.* § IV.A.1. (b).

Service, which has already considered the same claim on the merits. However, the determination as to whether the in-service claim is essentially the same as the pre-service request must be made by the military.⁷¹

It is important to note that special recognition has been given to conscientious objectors whose beliefs crystallized or became fixed after receipt of induction notice from the Selective Service but prior to induction. If an individual could not, under Selective Service regulations, seek classification as a conscientious objector with the Selective Service System, then he may, after induction, submit his claim and have it considered on the merits by the military.⁷² This provision apparently was included in Directive 1300.6 as a result of *Ehlert v. United States*.⁷³ In that case the government assured the Supreme Court that individuals whose beliefs became fixed or crystallized after receipt of induction notice but before induction would have a forum available in the military in which to secure a review of their claim on the merits.⁷⁴ This procedure, which requires the *Ehlert* objector to submit his claim in the military after induction instead of to the Selective Service before induction, does place a burden on the military. The military is required to expend time and money in feeding, clothing, and training individuals in this category while their claims are being processed through military channels. In many cases these individuals will be found to be bona fide conscientious objectors and will be discharged. Not only is such a procedure wasteful but the presence of conscientious objectors in training units is detrimental to military discipline and efficiency.⁷⁵

2. Insincerity

Sincerity of belief is a fundamental requirement for an in-service ap-

71. In *Slaughter v. Birdsong*, No. 6335 (M.D. Tenn., Nov. 22, 1971), the court reviewed a military determination which had found the applicant's in-service request to be essentially the same as his pre-service request denied by the Selective Service System. The court disagreed with the military determination, holding that the applicant's claim that he had had a religious experience in the military and had decided to become a priest made his request essentially a different one.

72. D.O.D. DIRECTIVE 1300.6, § IV.A.

73. 402 U.S. 99 (1971). In *Ehlert*, the claimant asserted that his conscientious objector beliefs became fixed subsequent to receipt of induction notice and before induction into the military. Under the Selective Service regulations the local board could not entertain his claim at this late stage (after induction notice had been sent), and military procedures then in effect apparently excluded review of requests based on beliefs which were fixed before induction. Thus *Ehlert* was in a "no-man's" land without a forum in which he could assert his claim.

74. *Id.* at 107.

75. In his dissenting opinion in *Ehlert*, Justice Douglas stated why he felt pre-induction review was better:

Moreover, proof of a conscientious objector's claim will usually be much more difficult after induction than before. Military exigencies may take him far from his neighborhood, the only place where he can find the friends and associates who know him. His chance of having a fair hearing are therefore lessened when the hearing on the claim is relegated to in-service procedures. For these reasons I would resolve any ambiguities in the law in favor of pre-induction review of his claim and not relegate him to the regime where military philosophy, rather than the First Amendment, is supreme.

Id. at 113 (dissenting opinion of Douglas, J.).

plicant to be granted conscientious objector status.⁷⁶ Even though an applicant establishes a prima facie case and appears to qualify for discharge, the military may determine that he is not sincere in his beliefs and deny his claim.⁷⁷ The military officials who are of primary importance in making this determination of sincerity are the investigating officer and the chaplain. Both of these officials are required to make a special finding on the issue of the applicant's sincerity, including the reasons for their conclusions.⁷⁸ Great weight is given to these determinations because they are made on the basis of a personal interview with the serviceman.⁷⁹ It appears that the finding of insincerity is seldom based on actual demeanor evidence or objective contradictory evidence. Rather, it is more often based upon conjecture that the applicant is asserting his claim to avoid unpleasant duty.⁸⁰ The courts have held that mere speculation as to the applicant's insincerity is not sufficient grounds for denial of his claim.⁸¹ Instead, such a determination of insincerity must be based on provable and reliable facts.⁸² Therefore, a conscientious objector review board, in examining an application, is not at liberty merely to disbelieve the applicant.⁸³ The following are grounds which courts have held *insufficient* to establish insincerity: (1) the fact that the serviceman did not submit his claim until being confronted with the prospect of service in Vietnam;⁸⁴ (2) the fact that the applicant had abandoned his faith during college when at the time of his application he held different religious beliefs;⁸⁵ and (3) the fact that the applicant did not attend church frequently when he claimed his beliefs grew out of his own personal Bible study and not from any church affiliation.⁸⁶

On the other hand, grounds apparently *sufficient* to establish insincerity are: (1) the fact that the applicant submitted his claim sub-

76. *Kaye v. Laird*, 442 F.2d 440 (3d Cir. 1971).

77. *Lovallo v. Resor*, 443 F.2d 1262, 1264 (2d Cir. 1971); Hansen, *Judicial Review of In-Service Conscientious Objector Claims*, 17 U.C.L.A. L. REV. 975, 998 (1970).

78. D.O.D. DIRECTIVE 1300.6, §§ VI.C., VI.3.d.

79. *Rastin v. Laird*, 445 F.2d 645, 649 (9th Cir. 1971).

80. Hansen, *supra* note 77, at 998. It appears that a disproportionate number of conscientious objector claims are asserted shortly before departure for Vietnam. Such applications cannot avoid creating suspicions as to the applicant's sincerity. Cusick, *In-Service Conscientious Objection: Problems of the Growing Privilege*, 25 JAG J. 35, 38 (1970). However, as will be noted later, the courts look upon such impending service as a catalyst for crystallization of beliefs and thus the mere timing of the claim is not of itself enough to deny an otherwise valid claim.

81. *See Bates v. Commander*, 413 F.2d 475 (1st Cir. 1969).

82. *Helwick v. Laird*, 438 F.2d 959, 963 (5th Cir. 1971).

83. *Id.*

84. *See Bortree v. Resor*, 445 F.2d 776 (D.C. Cir. 1971); *United States ex rel. Tobias v. Laird*, 413 F.2d 936 (4th Cir. 1969); *Alley v. Ryan*, 319 F. Supp. 981 (E.D.N.C. 1970); *Ross v. McLaughlin*, 308 F. Supp. 1019 (E.D. Vir. 1970). In *Rothfuss v. Resor*, 443 F.2d 554, 558 (5th Cir. 1971), the court held that although timing of an application which comes on the eve of deployment is a fact which casts doubt on the sincerity and veracity of an applicant, this fact alone, without other support in the record, was insufficient to warrant denial of the application.

85. *See Alley v. Ryan*, 319 F. Supp. 981 (E.D.N.C. 1970).

86. *See Peckat v. Lutz*, 451 F.2d 366 (4th Cir. 1971).

sequent to receiving orders for Vietnam when coupled with other facts;⁸⁷ (2) the demeanor of the applicant;⁸⁸ and (3) the fact that the applicant stated his beliefs in a way which clearly indicated he was not familiar with them⁸⁹ or that they were merely reproductions of the statements of others.⁹⁰

III. JUDICIAL REVIEW OF MILITARY CONSCIENTIOUS OBJECTOR DETERMINATIONS

It appears that the great majority of applications for discharge from the service based on conscientious objection are denied by the military.⁹¹ However, merely because the military has denied his request does not mean a serviceman will be unsuccessful in his quest for a conscientious objector discharge. It is clear that the in-service objector whose claim has been denied by the military may seek judicial review by petitioning for a writ of habeas corpus in federal district court.⁹² The scope of review followed by the federal courts in such cases is the "basis in fact" test established for review of Selective Service classifications.⁹³ Thus, if the applicant has established a prima facie case, and the court can find no "basis in fact" to support the denial of the request, the court will grant the writ of habeas corpus and order the military service concerned to discharge the

87. See *Frey v. Larsen*, 448 F.2d 811 (9th Cir. 1971) (other facts: applicant's inconsistent statements); *Cohen v. Laird*, 439 F.2d 866, 868 (4th Cir. 1971) (other facts: applicant's claim consisted largely of reproductions of statements of others).

88. See *Frey v. Larsen*, 448 F.2d 811, 813 n.3 (9th Cir. 1971).

89. In *Bortree v. Resor*, 445 F.2d 776, 783-84 (D.C. Cir. 1971), the court (in dictum) stated that although an inference of insincerity could logically be drawn from the fact that a conscientious objector applicant expressed his beliefs in a manner which indicated that he was not familiar with them, the military must be careful in drawing such an inference due to the fact that many sincere applicants use language which they have gotten from their spiritual advisors and their own study, thus tending to give the impression that their thoughts are not their own.

90. See *Cohen v. Laird*, 439 F.2d 866, 868 (4th Cir. 1971). *But see* *Champ v. Seamans*, 330 F. Supp. 1127, 1132 (M.D. Ala. 1971), where the court held that the mere fact an applicant copies material from a book is not enough to establish insincerity since the use of the best words he can find does not detract from his sincerity.

91. For the six-year period beginning in 1962 and ending in 1968, Army statistics showed that out of some 804 conscientious objector applications reviewed only 145 were approved. The Navy approved a somewhat higher rate, and the Air Force a considerably higher rate. See *Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 48 *MIL. L. REV.* 91, 117 n.131 (1970).

92. See *United States ex rel. Brooks v. Clifford*, 409 F.2d 700 (4th Cir. 1969); *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968). Such review is not to be stayed by the court where the in-service objector has court-martial action pending against him as a result of his conscientious objection. *Parisi v. Davidson*, 92 S. Ct. 815 (1972).

93. The "basis in fact" test was apparently established in *Estep v. United States*, 327 U.S. 114 (1946), and reaffirmed in conscientious objector cases in *United States v. Seeger*, 380 U.S. 163 (1965). It has subsequently been applied by the courts in reviewing in-service conscientious objector claims. See *Helwick v. Laird*, 438 F.2d 959, 962-63 (5th Cir. 1971); *Hammond v. Lenfest*, 398 F.2d 705, 716 (2d Cir. 1968). This test is said to be the "narrowest known to the law." *Negre v. Larsen*, 418 F.2d 908, 909 (9th Cir. 1969), *aff'd sub nom. Gillette v. United States*, 401 U.S. 437 (1971).

serviceman.⁹⁴ This illustrates the importance of the requirement that the military give reasons for its conclusion in each case, and that such reasons be based on facts contained in the record. A mere decision without supporting reasons based on facts in the record will not amount to a "basis in fact" so as to uphold a military determination.⁹⁵

IV. CONCLUSION

The procedures adopted by the Department of Defense and the implementing regulations of the various services are adequate to give procedural protection to the in-service objector. Directive 1300.6 has incorporated the major decisions of the Supreme Court dealing with the subject of conscientious objection. This has modernized military procedures, and has helped military personnel responsible for handling conscientious objector claims to become more knowledgeable on a subject previously misunderstood by many. Perhaps the most important reform contained in the Directive and the one most needed by the services is the provision dealing with the responsibilities of the investigating officer and the conduct of the hearing and preparation of the record. These procedures are not only designed to provide safeguards for the applicant but also to help detect those servicemen who only seek such classification in order to avoid further military service. One apparent weakness in these procedures lies in the fact that the hearing is not mandatory for the applicant.⁹⁶ It is submitted, however, that few applicants will choose not to appear and present their cases orally in light of the provision which permits the investigating officer to take into account the applicant's waiver of appearance and his failure to submit to questioning under oath or affirmation. In addition, the applicant is required to appear personally before the chaplain and at that time his demeanor and credibility will be tested in a face-to-face dialogue.

How much influence the courts have had upon the evolution of the present Directive is difficult to determine. It cannot be doubted that judicial review of military determinations in habeas corpus proceedings, through application of the "basis in fact" test, has had significant influence—in that it has caused the Department of Defense to re-examine and update its procedures governing the in-service objector. Furthermore, continued willingness by the courts to review military conscientious objector determinations will tend to insure that pre-service and in-service objectors are judged by the same standards.

Due to the relative ease with which a prima facie case for conscientious objection can be enunciated by an applicant, it is essential for the governing procedures to insure that a thorough and adequate investigation of each claim will be made and a complete and accurate record prepared. At the same time these procedures must insure that the applicant will receive a full and fair hearing. Directive 1300.6 accomplishes these objectives.

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94. See, e.g., *Frisby v. Larsen*, 330 F. Supp. 545 (N.D. Cal. 1971); *United States ex rel. Confield v. Tillson*, 312 F. Supp. 831, 834 (S.D. Ga. 1970).

95. See *Bortree v. Resor*, 445 F.2d 776, 785 (D.C. Cir. 1971).

96. The previous Directive 1300.6 (May 10, 1968) was criticized for the same reason. See *Ward, In-Service Conscientious Objectors: Suggested Revisions in Present Procedures of Processing*, 25 JAG J. 113, 116 (1971).

IMPEACHING ONE'S OWN WITNESS IN MISSOURI

I. INTRODUCTION: NATURE AND SCOPE OF THE PROBLEM

Witnesses, being human, sometimes fail to perform on the stand as well as the parties who put them there might hope. Generally, a witness may disappoint the party calling him in one of two ways: (1) he may fail to testify to facts to which the calling party had expected he would testify, or (2) he may testify to facts positively favorable to the adverse party.¹ The purpose of this comment is to examine, under present Missouri law and particularly in view of the rule against impeaching one's own witness, what remedies are available in various situations to the party disappointed by the testimony of his own witness and, further, to examine how the law in this area might be changed so that the goal of our system of litigation—the ascertainment of the truth—might be more closely approached.

II. THE RULE AGAINST IMPEACHING ONE'S OWN WITNESS

The rule that looms largest to the litigant disappointed by his witness is the familiar one that prohibits impeachment of one's own witness. Scholars have advanced theories as to the likely origins of this ancient rule,² but whatever its beginnings the rule against impeaching one's own witness is very much with us today in Missouri. In order to understand the rule, three questions must be asked and, hopefully, answered. First, what are the theoretical justifications for the rule and what is the validity of each? Second, what witnesses are a party's own for purposes of the application of the rule? Finally, what is "impeachment" for purposes of the rule's application?

A. *Theoretical Justifications for the Rule and Criticisms of the Validity of Each*

There are three more or less logical theories advanced today by those attempting to justify the rule against impeaching one's own witness.³ A fourth possible rationale supporting the rule, that a party is morally bound by the testimony of a witness he produces, has been abandoned.⁴

The theory most often cited by Missouri courts as the basis for the rule is that a party by calling a witness vouches for his veracity and will not be heard to question it.⁵ The flaws in this rationale have been pointed out so clearly by leading writers in the field that it is hard to believe that it would have any currency were it not reinforced by centuries of repetition. Except for character and expert witnesses, a party usually has no choice

1. *State v. Bowen*, 263 Mo. 279, 282, 172 S.W. 367, 368 (1915).

2. See 3 J. WIGMORE, EVIDENCE § 896 (3d ed. 1940) [hereinafter cited as WIGMORE]; Ladd, *Impeaching One's Own Witness: New Developments*, 4 U. CHI. L. REV. 69 (1936).

3. Ladd, *supra* note 2, at 76.

4. 3 WIGMORE § 897.

5. *State v. Hulbert*, 299 Mo. 572, 575, 253 S.W. 764, 766 (1923); *Dunn v. Dunnaker*, 87 Mo. 597, 600 (1885); *Detjen v. Moerschel Brewing Co.*, 157 Mo. App. 614, 617, 138 S.W. 696, 697 (K.C. Ct. App. 1911); *Joyce v. St. Louis Transit Co.*, 111 Mo. App. 565, 568, 86 S.W. 469, 470 (St. L. Ct. App. 1905); *Creighton v. Modern Woodmen of America*, 90 Mo. App. 378, 383 (K.C. Ct. App. 1901).

as to whom to call as a witness, but is limited to those who observed first-hand the event, transaction, or condition in question.⁶ Thus, a party cannot choose from among potential witnesses the most trustworthy, and therefore he should not be charged with the consequences of having so chosen.⁷ Further, common experience tells us that persons are not divided into two classes: the completely trustworthy and the completely untrustworthy. Therefore, it seems rather harsh to say that a party, by calling a witness, represents him as reliable in all that he says.⁸ Finally, it is sometimes said that a party stands sponsor to his witness' testimony as a result of the adversary system of litigation. In answer to this contention, Professor Ladd points to the replacement of common law pleading by code pleading as an instance of the relaxation of the strict adversary system of litigation to fit modern trial realities, and suggests that a similar relaxation would be in order in the area of impeachment of a party's own witness.⁹

The second theory advanced in support of the rule against impeaching one's own witness is that a party ought not to have the means of coercing favorable testimony from his witness.¹⁰ This justification is recognized in at least two Missouri cases as the true reason for the rule,¹¹ and is recognized by Professor Wigmore as having at least some validity.¹² Its validity is minimal, however. First, the threat of coercion is present only with regard to certain forms of impeachment, *i.e.*, impeachment by evidence of bad character or of corruption, which involves exposing disgraceful conduct in open court.¹³ Even where the impeachment contemplated is of a type capable of being used to coerce, the witness probably can be made to fear its use only in very limited circumstances.¹⁴ Finally, even in situations in which the witness fears impeachment, and can be controlled by the threat, the coercion theory is based on the false premise that "all witnesses who give destructive testimony to the party who calls them, are testifying to the truth."¹⁵

The final justification advanced for the rule applies only to situations involving impeachment by prior inconsistent statement. It is a general rule of evidence in Missouri that a witness' prior inconsistent statements are hearsay and therefore incompetent as substantive evidence; they are admitted only because of their relevance to the witness' credibility.¹⁶ Given

6. C. McCORMICK, LAW OF EVIDENCE § 38 (1954); Ladd, *supra* note 2, at 77.

7. 3 WIGMORE § 898; Ladd, *supra* note 2, at 77; May, *Some Rules of Evidence*, 11 AM. L. REV. 264 (1877).

8. 3 WIGMORE § 898.

9. Ladd, *supra* note 2, at 79-80.

10. C. McCORMICK, *supra* note 6, at 70; 3 WIGMORE § 899; Ladd, *supra* note 2, at 80-81.

11. *State v. Kinne*, 372 S.W.2d 62, 67 (Mo. 1963); *Crabtree v. Kurn*, 351 Mo. 628, 646-47, 173 S.W.2d 851, 858-59 (1943).

12. 3 WIGMORE § 899.

13. *Id.*

14. *Id.*; Ladd, *supra* note 2, at 82, 85.

15. Ladd, *supra* note 2, at 85.

16. *E.g.*, *State v. Gordon*, 391 S.W.2d 346, 349 (Mo. 1965); *Foster v. Aines Farm Dairy Co.*, 263 S.W.2d 421, 427 (Mo. 1953); *State v. Pflugradt*, 463 S.W.2d 566, 571 (K.C. Mo. App. 1971); C. McCORMICK, *supra* note 6, at 73; 3 WIGMORE § 1018.

this restriction, and the policies behind it, a party can have no legitimate reason for wanting to prove *his own witness'* prior inconsistent statements unless he is harmed and entrapped.¹⁷ If a party is not harmed by the testimony, he has no interest in causing the jury to disbelieve it. If a party is harmed by his witness' testimony, but he called the witness expecting his testimony to be harmful, the only logical explanation of such a course of action would be that the party intended to prove his witness' prior favorable statements, ostensibly for impeachment purposes, but actually in the hope that the jury would consider them as substantive evidence. Therefore, absent an entrapment of the party calling the witness, the rule against impeaching one's own witness serves to prevent a party from taking undue advantage of the courts' willingness to admit, for impeachment purposes, evidence of the prior inconsistent statements of a witness.¹⁸

It is submitted, then, that of the three possible rationales here considered, only the last justifies retention of the rule against impeaching one's own witness. The vouching concept is based on an outmoded view of the nature of the trial. The threat of coercion operates only in extremely limited circumstances. However, the rule serves a valid and practical purpose insofar as it prevents a party, who has not been entrapped, from offering the favorable prior inconsistent statements of his witness, not so much for impeachment purposes, as to tempt the jury to use them as substantive evidence.

B. *Who Is One's Own Witness?*

Obviously, before the rule prohibiting a party from impeaching his own witness can apply it must be determined that the person on the stand is the party's own witness. Questions in this area arise most frequently in three contexts: (1) What is the first point in time during the dealings with a witness at which the witness becomes one's own? (2) What are the consequences (with regard to making a witness one's own) of going beyond the scope of the direct examination in the cross-examination of a witness? And (3) whose witness is one who has been called by both parties?

In Missouri, a party by making a witness his own at one trial does not make the witness his own at a later trial, even though the parties and the subject matter are identical in both trials.¹⁹

The Missouri Supreme Court has identified clearly those acts which will or will not suffice to make a person whom a litigant has put on the stand the witness of that litigant:

Nor does one make a witness his own within the rule limiting the right of impeachment by summoning the witness; nor by

17. See pt. III, § A of this comment for a discussion of the elements of entrapment.

18. *State v. Harvey*, 449 S.W.2d 649, 651 (Mo. 1970); *State v. Kinne*, 372 S.W.2d 62, 67 (Mo. 1963); *State v. Bowen*, 263 Mo. 279, 283, 172 S.W. 367, 369 (1915); *State v. Burks*, 132 Mo. 363, 371, 34 S.W. 48, 49 (1896); *Hughes v. Patriotic Ins. Co.*, 193 S.W.2d 958, 959 (St. L. Mo. App. 1946); *In re Largue's Estate*, 198 Mo. App. 261, 273, 200 S.W. 83, 86 (St. L. Ct. App. 1918); McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEXAS L. REV. 573, 587 (1947).

19. *State v. Hulbert*, 299 Mo. 572, 575, 253 S.W. 764, 766 (1923).

simply putting him on the witness stand and causing him to be sworn; nor by only asking him immaterial questions when put on the stand. The test as to whether a witness is one's own or not, so as to limit the right of cross-examination for the purpose of impeachment, is, was he called and examined upon a material issue by the party seeking to impeach him²⁰

Missouri also takes the generally accepted position²¹ that

the introduction of a deposition or a part thereof by a party for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party, unless the deponent is the adverse party.²²

Thus, a party does not make a person his witness merely by taking his deposition.²³ Nor, where one party introduces only part of a deposition and the adverse party introduces other relevant testimony from the deposition, does the adverse party thereby make the deponent his witness.²⁴

A problem arises with regard to the rule against impeaching one's own witness in the situation where one party calls and examines a witness and then the other party does not confine his cross-examination to matters brought out on direct examination.²⁵ This raises the issue of whether by going beyond the scope of direct examination the cross-examining party has made the witness his own and, if so, what are the consequences.

In jurisdictions following the so-called federal rule, which limits cross-examination to matters within the scope of direct examination, it is often held that where a cross-examining party violates the limited cross-examination rule he thereby makes the witness his own.²⁶ Wigmore criticizes this position, pointing out that the limited cross-examination rule serves merely to regulate the order of proof and bears no relation to the justifications stated for invoking the rule against impeaching one's own witness.²⁷

In those jurisdictions such as Missouri²⁸ which allow cross-examination to go beyond the scope of direct examination, some courts have held that by going beyond the scope of direct examination the cross-examiner

20. *Id.* at 575, 253 S.W. at 766 (citations omitted).

21. C. McCORMICK, *supra* note 6, at 71; 3 WIGMORE § 912.

22. *Conner v. Neiswender*, 360 Mo. 1074, 1081, 232 S.W.2d 469, 473 (1950); *accord*, *Hayes v. Kansas City S. Ry.*, 260 S.W.2d 491 (Mo. 1953); *Gosney v. May Lumber & Coal Co.*, 352 Mo. 693, 179 S.W.2d 51 (1944); *Black v. Epstein*, 221 Mo. 286, 120 S.W. 754 (1909); *Edwards v. Metropolitan Life Ins. Co.*, 137 S.W.2d 591 (St. L. Mo. App. 1940); *Woelfle v. Connecticut Mut. Life Ins. Co.*, 234 Mo. App. 135, 112 S.W.2d 865 (St. L. Ct. App. 1938); *State ex rel. Wilkinson v. Central Surety & Ins. Corp.*, 232 Mo. App. 748, 112 S.W.2d 607 (K.C. Ct. App. 1937); *In re Largue's Estate*, 198 Mo. App. 261, 200 S.W. 83 (St. L. Ct. App. 1918).

23. *King v. Phoenix Ins. Co.*, 195 Mo. 290, 310, 92 S.W. 892, 898 (1906); *Gilchrist v. Stark*, 41 S.W.2d 888, 893 (K.C. Mo. App. 1931).

24. *Conner v. Neiswender*, 360 Mo. 1074, 1081, 232 S.W.2d 469, 473 (1950).

25. *See* 3 WIGMORE § 914.

26. *Id.* at 427 & n.1; *e.g.*, *Zumwalt v. Gardner*, 160 F.2d 298, 302 (8th Cir. 1947).

27. 3 WIGMORE § 914.

28. § 491.070, RSMo 1969.

makes the witness his own.²⁹ Wigmore is even more critical of this application of the rule, pointing out that it cannot even be justified, as it might be in a "federal" rule jurisdiction, as a sanction for violating the "federal" limited cross-examination rule.³⁰ Unfortunately, this appears to be the law in Missouri, at least to the extent that a cross-examiner who goes beyond the scope of direct examination thereby makes the witness his own and may not thereafter impeach him.³¹

When a party has made a witness his own by cross-examining him on subjects not covered in the original proponent's direct examination, the question arises whether the original proponent may thereafter impeach the witness. Although the original proponent in this situation may examine the witness in the manner of cross-examination as to new subject matter brought out in his opponent's cross-examination,³² he may not impeach the witness by introducing extrinsic evidence of the witness' prior inconsistent statements nor of his unfavorable reputation for truth and veracity.³³

When both parties to a suit call a witness, the questions arise (1) whether the party subsequently calling the witness thus makes him his own, and (2) if so, whether the witness thereafter ceases to be the witness of the party originally calling him.³⁴ The party subsequently calling the witness can examine him in the manner of cross-examination even if such

29. 3 WIGMORE § 914, at 427 & n.2.

30. *Id.* § 914.

31. *Ayers v. Wabash R.R.*, 190 Mo. 228, 236, 88 S.W. 608, 609 (1905) (dictum); *Anderson v. Union Terminal R.R.*, 161 Mo. 411, 421, 61 S.W. 874, 877 (1900); *Reding v. Reding*, 143 Mo. App. 659, 673, 127 S.W. 936, 940 (Spr. Ct. App. 1910) (*semble*); *King v. Phoenix Ins. Co.*, 101 Mo. App. 163, 172, 76 S.W. 55, 58 (St. L. Ct. App. 1903).

The question whether a party makes a witness his own by cross-examining beyond the scope of direct examination is considered here only for purposes of the rule against impeaching one's own witness. The same question may come up in other contexts, *i.e.*, in determining whether a party has waived the incompetency of a witness (*Nichols v. Nichols*, 147 Mo. 387, 403, 48 S.W. 947, 951 (1898); *Hume v. Hopkins*, 140 Mo. 65, 75, 41 S.W. 784, 786 (1897)) or whether a party is somehow "bound" by the testimony of a witness (*Greffet v. Dowdall*, 17 Mo. App. 280, 281 (St. L. Ct. App. 1885)). *See* note 52 *infra*.

It is submitted that the reasons behind the rule against impeaching one's own witness bear no necessary relationship to the questions of waiver of incompetency or whether one is "bound" by his witness, and therefore that determination of who is one's witness for purposes of the impeachment rule should be made only in view of the various rationales for the impeachment rule, and not by analogy to the other questions, as is sometimes done. *See Ayers v. Wabash R.R.*, 190 Mo. 228, 236, 88 S.W. 608, 609 (1905); *King v. Phoenix Ins. Co.*, 101 Mo. App. 163, 172, 76 S.W. 55, 58 (St. L. Ct. App. 1903).

32. *State ex rel. Hospes v. Branch*, 151 Mo. 622, 639, 52 S.W. 390, 396 (En Banc 1899); *Neuhoff Bros. Packers v. Kansas City Dressed Beef Co.*, 340 S.W.2d 193, 196 (K.C. Mo. App. 1960).

33. *Vernon v. Rife*, 294 S.W. 747, 749 (St. L. Mo. App. 1927) (dictum); *Creighton v. Modern Woodmen of America*, 90 Mo. App. 378, 385 (K.C. Ct. App. 1901); *but see Neuhoff Bros. Packers v. Kansas City Dressed Beef Co.*, 340 S.W.2d 193, 196 (K.C. Mo. App. 1960) (stating that as to testimony given on cross-examination the witness becomes the cross-examiner's, and is subject to cross-examination and impeachment by the original proponent).

34. 3 WIGMORE §§ 911, 913.

examination damages the witness' credibility.³⁵ Further, in *Hutchinson v. Richmond Safety Gate Co.*,³⁶ where defendant called and examined Pletz as part of its case in chief and plaintiff called Pletz in rebuttal, it was held not to be error to allow plaintiff to impeach Pletz with extrinsic evidence of his prior inconsistent statements because "whenever a party to a suit introduces a witness in a cause, he is, under the laws of this State, the witness of that party for all purposes throughout the case."³⁷

The question whether, in the situation where both parties call a witness, the party originally calling the witness may impeach him after the other party has called him has apparently never been decided in Missouri. However, in view of the language quoted from the *Hutchinson* case³⁸ and by analogy to the scope of cross-examination cases,³⁹ it would seem that the party who first called the witness could not later seek to impeach him.

C. What Is "Impeachment" for Purposes of the Rule?

Assuming that a party has made a witness his own, the question then becomes: What sort of evidence is excluded by the rule against impeaching one's own witness? The rule clearly prohibits a party from presenting certain types of evidence because of its adverse effect on the witness' credibility, but it does not exclude all types of evidence which might be said to damage the credibility of the witness.

It is certain in Missouri that the rule means at least that a party cannot prove the bad moral character of his witness⁴⁰ or, subject to exceptions,⁴¹ that his witness has made out-of-court statements contradictory of his testimony.⁴²

While impeachment by evidence of bias, interest or corruption is not mentioned in the usual Missouri formulation of the rule against impeaching one's own witness,⁴³ such impeachment apparently is forbidden by the rule. Two cases tend to confuse the area. In *State v. Duestrow*,⁴⁴ the prosecution was held to have been properly allowed to ask leading questions of its recalcitrant witness, notwithstanding the fact that the questions tended to show the bias of the witness in favor of defendant, which may

35. *Luzzadder v. McCall*, 198 S.W. 1144, 1145 (K.C. Mo. App. 1917); *State v. Jones*, 64 Mo. 391, 397 (1877).

36. 247 Mo. 71, 152 S.W. 52 (1912).

37. *Id.* at 104, 152 S.W. at 62.

38. See text accompanying note 37 *supra*.

39. See cases cited and text accompanying note 33 *supra*.

40. While the only Missouri case involving attempted impeachment by proof of bad moral character dealt exclusively with evidence of bad reputation for truth and veracity (*City of Gallatin ex rel. Dixon v. Murphy*, 217 S.W.2d 400 (K.C. Mo. App. 1949)) and the rule is sometimes stated only in terms of reputation for truth and veracity (see, e.g., *Joyce v. St. Louis Transit Co.*, 111 Mo. App. 565, 86 S.W. 469 (St. L. Ct. App. 1905)), evidence of the prior convictions of one's own witness arguably would also be excluded by the rule. See 3 WIGMORE § 900, at 390 & n.1.

41. See pt. III, § A of this comment.

42. E.g., *Beier v. St. Louis Transit Co.*, 197 Mo. 215, 235, 94 S.W. 876, 882 (1906); *Dunn v. Dunnaker*, 87 Mo. 597, 600 (1885); *Luzzadder v. McCall*, 198 S.W. 1144, 1145 (K.C. Mo. App. 1917).

43. See text accompanying note 42 *supra*.

44. 137 Mo. 44, 38 S.W. 554 (1897).

have tended to impeach the witness. According to the Missouri Supreme Court, "[c]ourts should not be averse to letting in the light of day on such reprehensible transactions."⁴⁵ *Duestrow* may be explained, however, as a situation fitting the "entrapment" exception⁴⁶ to the general rule against impeaching one's own witness, rather than as one to which the general rule does not apply, because the court noted that it was manifest that the prosecution had been surprised or misled.⁴⁷ A similar situation existed in *Humes v. Salerno*,⁴⁸ where it was held that the trial court had not abused its discretion by allowing plaintiff to examine his witness concerning certain gestures made by defendant to the witness while the latter was testifying and to inquire into a conversation between defendant and the witness immediately before the witness took the stand. Such examination was allowed because plaintiff's counsel had been "surprised" or "shocked" by the witness' change in testimony after receiving defendant's hand signals.⁴⁹ Other Missouri cases clearly hold that

a party cannot put a witness on the stand, and ask him questions showing that he had been guilty of some improper conduct, without showing surprise or entrapment, for this would violate the well-known rule that a party may not impeach his own witness . . .⁵⁰

Thus it seems that—notwithstanding the contrary suggestions in *Duestrow* and *Humes*—the rule against impeaching one's own witness generally forbids inquiry into the bias, interest, or corruption of one's own witness.

Missouri courts, along with the vast majority in other jurisdictions,⁵¹ hold that, although a party supposedly vouches for his witness' veracity, he is not "bound" by his witness' testimony in that he is not precluded from proving by other witnesses that the facts are different from those to which his witness testified. Thus, "[i]f *A.* put *B.* on the stand, and prove by him a certain state of facts, this does not preclude *A.* from putting *C., D.,* or *E.* on the stand, and proving a different state of facts . . ."⁵² It is clear that, when *A.* by *C., D.,* and *E.* proves the fact to be different than as stated by *B.*, there is distinct damage to *B.*'s credibility both as to the testimony which

45. *Id.* at 85, 38 S.W. at 565.

46. See pt. III, § A of this comment.

47. 137 Mo. at 85, 38 S.W. at 565.

48. 351 S.W.2d 749 (Mo. 1961).

49. *Id.* at 754.

50. *Gallagher v. S. Z. Schutte Lumber Co.*, 273 S.W. 213, 220-21 (K.C. Mo. App. 1925); accord, *Conner v. Neiswender*, 360 Mo. 1074, 1081-82, 232 S.W.2d 469, 473 (1950); *Baker v. Metropolitan St. Ry.*, 181 Mo. App. 392, 393, 168 S.W. 842, 843 (K.C. Ct. App. 1914).

51. 3 WIGMORE § 907, at 417 & n.7.

52. *Rodan v. St. Louis Transit Co.*, 207 Mo. 392, 408, 105 S.W. 1061, 1066 (1907); accord, *State v. Shapiro*, 216 Mo. 359, 115 S.W. 1022 (1909); *Brown v. Wood*, 19 Mo. 475 (1854); *Martin v. Manzella*, 298 S.W.2d 453 (St. L. Mo. App. 1957); *Krause v. Laverne Park Ass'n*, 240 S.W.2d 724 (St. L. Mo. App. 1951); *Vanausdol v. Bank of Odessa*, 222 Mo. App. 91, 5 S.W.2d 109 (K.C. Ct. App. 1928).

It is often stated that for purposes of ruling on a motion for directed verdict a party is "bound" by the testimony of his witnesses. This means that where a witness called by a party gives testimony on a certain point, in the absence of other evidence on that point tending toward a different conclusion, the party will not be allowed to invite the trier of fact to disregard his witness' testimony by asking

was directly contradicted as well as to the remainder of his testimony.⁵³ However, casting doubt on the veracity of a witness' testimony in this manner is not proscribed by the rule that one may not impeach his own witness.⁵⁴

While a party generally cannot prove his witness' prior inconsistent statement by extrinsic evidence, he may use the prior inconsistent statement to cross-examine the witness, even though such cross-examination may damage the credibility of the witness.⁵⁵ This matter is treated in some detail later in this comment.⁵⁶

III. EXCEPTIONS TO THE RULE AGAINST IMPEACHING ONE'S OWN WITNESS

Given the questionable soundness of the various rationales for the rule against impeaching one's own witness,⁵⁷ the courts have been willing to find exceptions to its application in certain situations in which to apply the rule would produce especially harsh results. Missouri courts recognize two such exceptions: (1) where a party has been entrapped into calling the witness,⁵⁸ and (2) where the witness is the adverse party.⁵⁹ The entrapment exception allows impeachment by evidence of the witness' prior inconsistent statements,⁶⁰ and by evidence of bias, interest, or corruption as well.⁶¹ The adverse party-witness exception applies only, at the present time, to impeachment by evidence of prior inconsistent statements.⁶² Neither exception allows a party to impeach his own witness by proof of bad moral character.⁶³

A. *The Entrapment Exception*

Missouri joins the majority of jurisdictions⁶⁴ in allowing a party "entrapped" into calling a witness to impeach the witness by extrinsic evidence

the trier to draw an inference contrary to the witness' testimony. *E.g.*, Silberstein v. Berwald, 460 S.W.2d 707, 710 (Mo. 1970); Campbell v. Fry, 439 S.W.2d 545, 549 (K.C. Mo. App. 1969). The concept of a party's being "bound" by his own witness should not be confused with the problem of impeaching one's own witness.

53. 3 WIGMORE § 907; May, *supra* note 7, at 263.

54. Lolordo v. Lacy, 337 Mo. 1097, 1101, 88 S.W.2d 353, 355 (1935); Schumacher v. Kansas City Breweries Co., 247 Mo. 141, 155-56, 152 S.W. 13, 16 (1912); Black v. Epstein, 221 Mo. 286, 304, 120 S.W. 754, 760 (1909); Imhoff & Co. v. McArthur, 146 Mo. 371, 377, 48 S.W. 456, 457 (1898); State v. Burks, 132 Mo. 363, 372, 34 S.W. 48, 49 (1896); Dunn v. Dunnaker, 87 Mo. 597, 601 (1885); Brown v. Wood, 19 Mo. 475, 476 (1854); Detjen v. Moerschel Brewing Co., 157 Mo. App. 614, 618, 138 S.W. 696, 697 (K.C. Ct. App. 1911); Brosius v. Sunflower Lead & Zinc Co., 149 Mo. App. 181, 186, 130 S.W. 134, 135 (Spr. Ct. App. 1910); Joyce v. St. Louis Transit Co., 111 Mo. App. 565, 568-69, 86 S.W. 469, 470 (St. L. Ct. App. 1905); Edwards v. Crenshaw, 30 Mo. App. 510, 515 (St. L. Ct. App. 1888); Helling v. United Order of Honor, 29 Mo. App. 309, 317 (St. L. Ct. App. 1888).

55. See cases cited note 111 *infra*.

56. See pt. IV of this comment.

57. See pt. II, § A of this comment.

58. See cases cited note 65 *infra*.

59. See cases cited and text accompanying note 100 *infra*.

60. See cases cited note 65 *infra*.

61. See case cited and text accompanying note 50 *supra*.

62. See case cited and text accompanying note 100 *infra*.

63. Beier v. St. Louis Transit Co., 197 Mo. 215, 235, 94 S.W. 876, 882 (1906).

64. 3 WIGMORE § 905, at 404 & n.4.

of his prior inconsistent statements.⁶⁵ Thus, it may become important for the disappointed party armed with the prior statement of his witness to determine what constitutes entrapment.

The situation in which entrapment is present is described generally as one where

the witness, or the adverse party to the cause, has entrapped or misled the party calling the witness by some artifice, so as to induce him to call the witness, and thereby to gain an advantage in the case over the party calling him which the adverse party would not have had if he had called the witness.⁶⁶

One writer aptly describes such conduct as a "double-cross."⁶⁷ However, a mere showing that he has been "double-crossed" or entrapped will not suffice to enable a party to impeach his own witness under the entrapment exception. The party further must have been *harmed* by the witness' testimony.⁶⁸

65. *Randazzo v. United States*, 300 F. 794 (8th Cir. 1924); *State v. Kinne*, 372 S.W.2d 62 (Mo. 1963); *State v. Turner*, 272 S.W.2d 266 (Mo. 1954); *State v. Castino*, 264 S.W.2d 372 (Mo. 1954); *Malone v. Gardner*, 362 Mo. 569, 242 S.W.2d 516 (1951); *Conner v. Neiswender*, 360 Mo. 1074, 232 S.W.2d 469 (1950); *Mooney v. Terminal R.R. Ass'n*, 352 Mo. 245, 176 S.W.2d 605 (1944); *Crabtree v. Kurn*, 351 Mo. 628, 173 S.W.2d 851 (1943); *State v. Gregory*, 339 Mo. 133, 96 S.W.2d 47 (1936); *McDaniel v. Sprick*, 297 Mo. 424, 249 S.W. 611 (1923); *State v. Drummins*, 274 Mo. 632, 204 S.W. 271 (1918); *State v. Booth*, 186 S.W. 1019 (Mo. 1916); *State v. Bowen*, 263 Mo. 279, 172 S.W. 367 (1915); *Beier v. St. Louis Transit Co.*, 197 Mo. 215, 94 S.W. 876 (1906); *Clancy v. St. Louis Transit Co.*, 192 Mo. 615, 91 S.W. 509 (1906); *State v. Burks*, 132 Mo. 363, 34 S.W. 48 (1896); *Dunn v. Dunninger*, 87 Mo. 597 (1885); *Meredith v. Terminal R.R. Ass'n*, 257 S.W.2d 221 (St. L. Mo. App. 1953); *Hughes v. Patriotic Ins. Co. of America*, 193 S.W.2d 958 (St. L. Mo. App. 1946); *Dauber v. Josephson*, 209 Mo. App. 531, 237 S.W. 149 (K.C. Ct. App. 1922); *Deubler v. United Rys.*, 195 Mo. App. 658, 187 S.W. 813 (St. L. Ct. App. 1916); *Creighton v. Modern Woodmen of America*, 90 Mo. App. 378 (K.C. Ct. App. 1901); *Spurgin Grocer Co. v. Frick*, 73 Mo. App. 128 (K.C. Ct. App. 1898); *State ex rel. Guthrie v. Martin*, 52 Mo. App. 511 (St. L. Ct. App. 1893); *Thomas, The Rule Against Impeaching One's Own Witness: A Reconsideration*, 31 Mo. L. Rev. 364, 368 (1966).

66. *Clancy v. St. Louis Transit Co.*, 192 Mo. 615, 646, 91 S.W. 509, 519 (1906).

67. *Thomas, supra* note 65, at 369.

68. *Malone v. Gardner*, 362 Mo. 569, 582, 242 S.W.2d 516, 523 (1951); *Crabtree v. Kurn*, 351 Mo. 628, 647, 173 S.W.2d 851, 859 (1943); *State v. Drummins*, 274 Mo. 632, 647, 204 S.W. 271, 276 (1918); *State v. Bowen*, 263 Mo. 279, 282, 172 S.W. 367, 368 (1915); *Beier v. St. Louis Transit Co.*, 197 Mo. 215, 235, 94 S.W. 876, 882 (1906); *State v. Burks*, 132 Mo. 363, 373, 34 S.W. 48, 50 (1896); *Meredith v. Terminal R.R. Ass'n*, 257 S.W.2d 221, 227 (St. L. Mo. App. 1953); *Hughes v. Patriotic Ins. Co. of America*, 193 S.W.2d 958, 959 (St. L. Mo. App. 1946); *Dauber v. Josephson*, 209 Mo. App. 531, 542, 237 S.W. 149, 153 (K.C. Ct. App. 1922); *Deubler v. United Rys.*, 195 Mo. App. 658, 669, 187 S.W. 813, 815 (St. L. Ct. App. 1916).

Technically, the fact of harm is a condition precedent to the permissibility of attempting to show entrapment. See cases cited *supra*.

Beier v. St. Louis Transit Co., 197 Mo. 215, 236, 94 S.W. 876, 882 (1906), seems to require an additional element of collusion between the witness and the adverse party, but none of the other above cited cases do and it is doubtful whether it is a requirement.

1. The Nature of Harm

A party is not harmed if his witness merely fails to relate on the stand favorable facts which the party expected him to relate.⁶⁹ Thus, there is no harm where one's witness fails to testify because of a faulty memory,⁷⁰ claims his privilege against self-incrimination,⁷¹ or simply refuses to testify.⁷² Nor is there any harm where the witness testifies, but the content of his testimony is of no value to the party who called him.⁷³ For example, in *State v. Drummins*,⁷⁴ a prosecution for seduction under promise of marriage, the defendant was held not to have been harmed when his witness, called to disprove prosecutrix' prior chaste character by testifying to specific acts of intercourse with prosecutrix, testified that he had never had intercourse with the prosecutrix.⁷⁵

On the other hand, a party is harmed if his witness turns coat completely and by testifying to facts positively favorable to his opponents cause "becomes in effect a witness for the adverse side."⁷⁶ *State v. Booth*,⁷⁷ a

69. *Randazzo v. United States*, 300 F. 794, 797-98 (8th Cir. 1924); *State v. Harvey*, 449 S.W.2d 649, 651 (Mo. 1970); *State v. Kinne*, 372 S.W.2d 62, 67 (Mo. 1963); *State v. Walker*, 357 Mo. 394, 402, 208 S.W.2d 233, 237 (1948); *State v. Hogan*, 352 Mo. 379, 383, 177 S.W.2d 465, 466 (1944); *State v. Gregory*, 339 Mo. 133, 147, 96 S.W.2d 47, 55 (1936); *State v. Drummins*, 274 Mo. 632, 647, 204 S.W. 271, 276 (1918); *State v. Bowen*, 263 Mo. 279, 282, 172 S.W. 367, 368 (1915); *Clancy v. St. Louis Transit Co.*, 192 Mo. 615, 649, 91 S.W. 509, 519 (1905); *State v. Burks*, 132 Mo. 363, 373, 34 S.W. 48, 49 (1896); *Hughes v. Patriotic Ins. Co. of America*, 193 S.W.2d 958, 959 (St. L. Mo. App. 1946); *Woelfle v. Connecticut Mut. Life Ins. Co.*, 234 Mo. App. 135, 148, 112 S.W.2d 865, 872 (St. L. Ct. App. 1938).

70. *State v. Harvey*, 449 S.W.2d 649, 650 (Mo. 1970); *State v. Bowen*, 263 Mo. 279, 281, 172 S.W. 367, 368 (1915).

71. *State v. Gordon*, 391 S.W.2d 346, 348 (Mo. 1965).

72. *State v. Gregory*, 339 Mo. 133, 147, 96 S.W.2d 47, 55 (1936).

73. *Randazzo v. United States*, 300 F. 794, 797 (8th Cir. 1924); *State v. Kinne*, 372 S.W.2d 62, 67 (Mo. 1963); *State v. Walker*, 357 Mo. 394, 402, 208 S.W.2d 233, 237 (1948); *State v. Drummins*, 274 Mo. 632, 647, 204 S.W. 271, 276 (1918); *State v. Burks*, 132 Mo. 363, 373, 34 S.W. 48, 49 (1896); *Hughes v. Patriotic Ins. Co. of America*, 193 S.W.2d 958, 959 (St. L. Mo. App. 1946); *Woelfle v. Connecticut Mut. Life Ins. Co.*, 234 Mo. App. 135, 148, 112 S.W.2d 865, 872 (St. L. Ct. App. 1938).

74. 274 Mo. 632, 204 S.W. 271 (1918).

75. *Id.* at 646-47, 204 S.W. at 276.

Drummins illustrates that "harm" does not describe accurately this element of entrapment, but is used only as a convenient shorthand term. It would seem that when in *Drummins* several of defendant's witnesses on the issue of prosecutrix' prior chaste character denied intercourse with prosecutrix, defendant's case was "harmed," at least in the ordinary sense of the word. The courts, however, focus not upon how harmful the witness' testimony is to his proponent, but rather upon how favorable it is to the opponent. Thus, there was no "harm" in *Drummins* because the testimony of defendant's witnesses that they had not had intercourse with prosecutrix on certain specific occasions was not helpful to the state on the issue of prior chaste character.

For other cases demonstrating that "harm" consists not of mere damage to the proponent but rather of aid to the opponent, see *State v. Walker*, 357 Mo. 394, 208 S.W.2d 233 (1948); *State v. Burks*, 132 Mo. 363, 34 S.W. 48 (1896); *Hughes v. Patriotic Ins. Co. of America*, 193 S.W.2d 958 (St. L. Mo. App. 1946).

76. *State v. Drummins*, 274 Mo. 632, 647, 204 S.W. 271, 276 (1918); *accord*, *State v. Booth*, 186 S.W. 1019 (Mo. 1916); *Deubler v. United Rys.*, 195 Mo. App. 658, 187 S.W. 813 (St. L. Ct. App. 1916); cases cited note 69 *supra*.

77. 186 S.W. 1019 (Mo. 1916).

prosecution for obtaining money under false pretenses, provides an example of such harm. Defendant, having pleaded the defense of insanity, put Quinn on the stand with the apparent expectation that Quinn would testify that defendant was "crazy" at the time he did the act complained of. Instead, Quinn swore that defendant was a "shrewd, cool, calculating scoundrel . . ." who "had this whole thing worked out, planned, and systematized . . ." ⁷⁸ The court held that the testimony by Quinn was positively favorable to the state so that an entrapment could be found. ⁷⁹

Harm may be found in more than the content of a witness' testimony. In *Deubler v. United Rys.*, ⁸⁰ an action for damages for assault, defendant called Scherzinger, who testified that plaintiff's reputation for peacefulness was "all right." Scherzinger's testimony was in itself harmful to defendant, but the appellate court noted further that defendant previously had allowed otherwise inadmissible evidence of plaintiff's good character to come in without objection, apparently in reliance that he would have Scherzinger's testimony of plaintiff's reputation for violence to rebut plaintiff's character evidence. Therefore, defendant was said to have been harmed. ⁸¹

2. The Nature of Entrapment

Generally, to establish entrapment a party must first show that he was caused to put the witness on the stand by his justifiable reliance on some conduct of the witness, the adverse party, or a third person. ⁸² Then, when the witness' testimony varies from that expected by the calling party, there is entrapment. ⁸³ The Missouri courts appear to recognize at least two broad categories of cases in which the calling party is justified in expecting his witness' testimony to be favorable.

First, a litigant in carrying out his pre-trial discovery may become convinced that a prospective witness' testimony will be favorable to his cause. If the witness' testimony proves harmful, the litigant then must be able to show that he has taken certain discovery steps for the purpose of ascertaining what the witness' testimony would be before a court will find justified reliance and therefore entrapment. It appears that the calling party's reliance is not justified when he has only taken the witness' favorable written statement, at least when the statement was taken at a time

78. *Id.* at 1020.

79. *Id.* at 1021.

80. 195 Mo. App. 658, 187 S.W. 813 (St. L. Ct. App. 1916).

81. *Id.* at 667, 187 S.W. at 815.

82. *Crabtree v. Kurn*, 351 Mo. 628, 647, 173 S.W.2d 851, 859 (1943); *Beier v. St. Louis Transit Co.*, 197 Mo. 215, 235, 94 S.W. 876, 882 (1906); *Clancy v. St. Louis Transit Co.*, 192 Mo. 615, 646, 91 S.W. 509, 520 (1905); *Feary v. O'Neill*, 149 Mo. 467, 473, 50 S.W. 918, 919 (1899); *Dunn v. Dunnaker*, 87 Mo. 597, 601 (1885); *Zips v. Mutual Ben. Health & Accident Ass'n*, 169 S.W.2d 62, 69 (St. L. Mo. App.), *modified sub nom State ex rel. Mutual Ben. Health & Accident Ass'n v. Hughes*, 351 Mo. 1081, 174 S.W.2d 859 (1943); *Woelfle v. Connecticut Mut. Life Ins. Co.*, 234 Mo. App. 135, 148, 112 S.W.2d 865, 872 (St. L. Ct. App. 1938); *Dauber v. Josephson*, 209 Mo. App. 531, 542, 237 S.W. 149, 153 (K.C. Ct. App. 1922); *Deubler v. United Rys.*, 195 Mo. App. 658, 669, 187 S.W. 813, 816 (St. L. Ct. App. 1916); *Spurgin Grocer Co. v. Frick*, 73 Mo. App. 128, 133 (K.C. Ct. App. 1898); *Thomas, supra* note 65, at 369; *Wallace, Direct Impeachment of an Adverse Party*, 35 Mo. L. Rev. 271, 273 (1970).

83. *See* cases cited note 82 *supra*.

remote from the time of trial⁸⁴ or when the statement is equivocal and conflicts with other statements by the witness.⁸⁵ However, when the calling party has obtained the witness' favorable statement immediately before trial⁸⁶ or has taken a deposition of the witness which is consistent with the witness' earlier favorable statements,⁸⁷ the courts have found the party's reliance to be justified.

The second category is comprised of cases where the calling party expects favorable testimony as a result of his own pre-trial discovery, but in addition the witness, the adverse party, or some other person has made some affirmative gesture which causes the calling party to put the disappointing witness on the stand. Thus if the prospective witness, after making a statement, expressly⁸⁸ or impliedly⁸⁹ assures the calling party that he will testify in conformity therewith, there is entrapment if he fails so to testify. The adverse party may also take a hand in perpetrating the entrapment. In *Clancy v. St. Louis Transit Co.*,⁹⁰ an action for damages for personal injuries, the motorman on the streetcar which struck plaintiff had given two statements and a deposition, all favorable to defendant. However, unknown to the defendant, the motorman had also given plaintiff's counsel a statement favoring plaintiff's cause. A change of venue was had from St. Louis to Columbia, and the motorman went to Columbia for the trial in the company of plaintiff, who paid the motorman's rail fare and hotel bills. When defendant called and examined the motorman, his testimony proved positively favorable to plaintiff. According to the court, "[n]o stronger case of trick or artifice . . . could be imagined than is presented in this case."⁹¹

One situation in which it is clear that there can be no entrapment is where a party makes a person his witness by introducing that person's desposition into evidence.⁹² The offering party may not argue that he was entrapped by the testimony at the time the deposition was *taken*. The relevant point in time at which to determine entrapment is when the deposition is *introduced*.⁹³ Further, there can be no entrapment at the time a deposition is introduced into evidence because the offering party

84. See *Beier v. St. Louis Transit Co.*, 197 Mo. 215, 94 S.W. 876 (1906) (statement made two years before trial); *Dauber v. Josephson*, 209 Mo. App. 531, 237 S.W. 149 (K.C. Ct. App. 1922) (testimony given at coroner's inquest held more than one year before trial).

85. See *Creighton v. Modern Woodmen of America*, 90 Mo. App. 378 (K.C. Ct. App. 1901).

86. *Deubler v. United Rys.*, 195 Mo. App. 658, 187 S.W. 813 (St. L. Ct. App. 1916) (statement made the day before trial).

87. *Malone v. Gardner*, 362 Mo. 569, 242 S.W.2d 516 (En Banc 1951).

88. See *State v. Booth*, 186 S.W. 1019 (Mo. 1916).

89. *Crabtree v. Kurn*, 351 Mo. 628, 173 S.W.2d 851 (1943) (witness 11 months before trial gave deposition containing plaintiff-favoring statements, signed the deposition the day before trial).

90. 192 Mo. 615, 91 S.W. 509 (1905).

91. *Id.* at 650, 91 S.W. at 520.

92. See text accompanying note 22 *supra*.

93. *Woelfle v. Connecticut Mut. Life Ins. Co.*, 234 Mo. App. 135, 150, 112 S.W.2d 865, 873 (St. L. Ct. App. 1938).

will have had ample time and means to have apprised himself of the import of the deposition testimony.⁹⁴

B. *The Adverse Party-Witness Exception*

It is particularly indefensible to apply the rule against impeaching one's own witness to the situation where a litigant calls the adverse party as his witness.⁹⁵ To say that a party, by placing his opponent on the stand, represents him as reliable in all that he says "is to mock him with a false formula."⁹⁶ It is unlikely that a party could coerce his opponent into testifying falsely against himself by the threat of impeachment.⁹⁷ Finally, there is no danger of getting inadmissible hearsay before the jury⁹⁸ in this situation because a party's prior inconsistent statements generally come in as admissions.⁹⁹

Accordingly, in 1969 in *Wells v. Goforth*,¹⁰⁰ the Missouri Supreme Court held that a party calling his opponent as a witness under the Missouri statute authorizing such a procedure¹⁰¹ may impeach his opponent by proving his prior inconsistent statements. The court specifically repudiated dictum to the contrary in *Chandler v. Fleeman*,¹⁰² which Missouri cases had been following.¹⁰³

Because the prior inconsistent statements of a party are usually admissible as admissions, the *Wells* adverse party-witness exception to the impeachment rule is of limited practical significance.¹⁰⁴ *Wells* seems to indicate, however, an impatience on the part of the Missouri courts with the rule against impeaching one's own witness and a possible willingness to re-examine critically the propriety of applying the rule in situations in which its invalidity is especially evident.¹⁰⁵

IV. CROSS-EXAMINING ONE'S OWN WITNESS

A. *Use of the Witness' Prior Inconsistent Statement to Refresh Recollection and to Awaken Conscience*

In Missouri, the party who is disappointed with the testimony of his

94. *Hayes v. Kansas City S. Ry.*, 260 S.W.2d 491, 494 (Mo. 1953); *Conner v. Neiswender*, 360 Mo. 1074, 1081, 232 S.W.2d 469, 473 (1950); *Gosney v. May Lumber & Coal Co.*, 352 Mo. 693, 697, 179 S.W.2d 51, 53 (1944); *Woelfle v. Connecticut Mut. Life-Ins. Co.*, 234 Mo. App. 135, 148, 112 S.W.2d 865, 872 (St. L. Ct. App. 1938); *State ex rel. Wilkinson v. Central Surety & Ins. Corp.*, 232 Mo. App. 748; 752; 112 S.W.2d 607, 610 (K.C. Ct. App. 1937); *In re Largue's Estate*, 198 Mo. App. 261, 273, 200 S.W. 83, 86 (St. L. Ct. App. 1918).

95. See 3 WIGMORE § 916.

96. *Id.* at 431.

97. *Id.*

98. See text accompanying note 18 *supra*.

99. C. McCORMICK, LAW OF EVIDENCE 74 (1954).

100. 443 S.W.2d 155, 160 (Mo. En Banc 1969), noted in Wallace, *supra* note 82.

101. § 491.030, RSMo 1969.

102. 50 Mo. 239, 240 (1872).

103. See Wallace, *supra* note 82, at 271 & cases cited n.3.

104. Wallace, *supra* note 82, at 274, 275.

105. *Wells v. Goforth*, 443 S.W.2d 155, 159-60 (Mo. En Banc 1969). See also *Luzzadder v. McCall*, 198 S.W. 1144, 1145 (K.C. Mo. App. 1917), where the court says in dictum that the rule against impeaching one's own witness does not apply to a witness put on the stand to prove his own fraud because a party cannot be held to have vouched the veracity of such a witness.

witness¹⁰⁶ but who may not impeach the witness¹⁰⁷ may still have a remedy for his disappointment. It is sometimes stated that a party may not impeach or cross-examine his own witness,¹⁰⁸ thus implying that both prohibitions apply in identical situations. However, Missouri courts have made it clear that the allowability of cross-examination of one's own witness is subject to a different standard than that of impeaching one's own witness. Thus,

[t]he cross-examination of one's own witness for the purpose of refreshing his recollection, or even for the purpose of laying the foundation for a proper claim of surprise, is quite a different matter than the introduction of his prior contradictory extrajudicial statements in evidence. The one is proper within reasonable limits and subject to the sound discretion of the trial court, but the other is permitted only when those circumstances of surprise, entrapment, and prejudice exist which serve to take the case from within the application of the general rule which prohibits the impeachment of one's own witness.¹⁰⁹

Particularly, a party may cross-examine his own witness (subject to restrictions imposed in criminal cases to protect the accused's right to confrontation)¹¹⁰ by using the prior inconsistent statement of the witness "for the purpose of probing his recollection, recalling to his mind statements he has previously made, and drawing out an explanation of his apparent inconsistency."¹¹¹ The discretion of the trial court in allowing such cross-examination will not be questioned on appeal if it appears that the witness' variance from his prior statement was unexpected by his proponent,¹¹² or that the witness demonstrated forgetfulness,¹¹³ unwilling-

106. See text accompanying note 1 *supra*.

107. See pt. III of this comment.

108. *State v. Castino*, 264 S.W.2d 372, 375 (Mo. 1954); *Mooney v. Terminal R.R. Ass'n*, 352 Mo. 245, 260, 176 S.W.2d 605, 611 (1944).

109. *Woelfle v. Connecticut Mut. Life Ins. Co.*, 234 Mo. App. 135, 152, 112 S.W.2d 865, 874 (St. L. Ct. App. 1938).

110. See pt. IV, § B of this comment.

111. *Creighton v. Modern Woodmen of America*, 90 Mo. App. 378, 384 (K.C. Ct. App. 1901); *accord*, *Brown v. Chicago, R.I. & P. Ry.*, 315 Mo. 409, 419, 286 S.W. 45, 50 (1926); *Beier v. St. Louis Transit Co.*, 197 Mo. 215, 234-35, 94 S.W. 876, 882 (1906); *Coats v. Old*, 237 Mo. App. 353, 369, 167 S.W.2d 652, 655 (K.C. Ct. App. 1942); *Dixon v. Western Tablet & Ticket Co.*, 246 S.W. 619, 621 (K.C. Mo. App. 1922); *Detjen v. Moerschel Brewing Co.*, 157 Mo. App. 614, 617-18, 138 S.W. 696, 697 (K.C. Ct. App. 1911); *Ashby v. Elsberry & N.H. Gravel Road Co.*, 111 Mo. App. 79, 83, 85 S.W. 957, 958 (St. L. Ct. App. 1905).

The Missouri courts recognize that this practice may well damage a witness' credibility, but hold that this does not forbid its use by the witness' proponent. *Brown v. Chicago, R.I. & P. Ry.*, 315 Mo. 409, 419, 286 S.W. 45, 50 (1926); *Hinds v. Chicago, B. & Q.R.R.*, 85 S.W.2d 165, 172 (St. L. Mo. App. 1935); *Detjen v. Moerschel Brewing Co.*, 157 Mo. App. 614, 618, 138 S.W. 696, 697 (K.C. Ct. App. 1911); *Creighton v. Modern Woodmen of America*, 90 Mo. App. 378, 384 (K.C. Ct. App. 1901).

112. *State v. McKinney*, 475 S.W.2d 51, 54 (Mo. 1971); *Beier v. St. Louis Transit Co.*, 197 Mo. 215, 234-35, 94 S.W. 876, 882 (1906); *Luzzadder v. McCall*, 198 S.W. 1144, 1145 (K.C. Mo. App. 1917); *Detjen v. Moerschel Brewing Co.*, 157 Mo. App. 614, 618, 138 S.W. 696, 697 (K.C. Ct. App. 1911); *Creighton v. Modern Woodmen of America*, 90 Mo. App. 378, 385 (K.C. Ct. App. 1901).

113. *Coats v. Old*, 237 Mo. App. 353, 359, 167 S.W.2d 652, 655 (K.C. Ct.

ness,¹¹⁴ hostility,¹¹⁵ or an interest adverse to that of his proponent.¹¹⁶ The courts are especially willing to allow the direct examiner to cross-examine a hostile or adverse witness that the party was compelled by the circumstances to call.¹¹⁷

*B. Restrictions on the Use of Prior Inconsistent
Statements to Cross-Examine in Criminal Cases*

The practice of using the prior inconsistent statements of one's own witness to refresh recollection and to awaken conscience is susceptible to abuse as a vehicle for causing the jury to hear the witness' prior statements in hope that the jury will use the statements improperly as substantive evidence.¹¹⁸ In Missouri, for the jury in a criminal case to consider a witness' prior statements as substantive evidence not only violates the hearsay rule but also violates the confrontation clauses¹¹⁹ of the federal and state constitutions.¹²⁰ Therefore, in 1914 in *State v. Patton*,¹²¹ the Missouri Supreme Court held that, absent entrapment,¹²² it was a denial of the accused's right to confront the witnesses against him for the state to identify a writing containing the prior statement of its witness as a true copy of the witness' statement and then to read or give the writing to the jury or to read it in the jury's presence.

In *Patton*, the court carefully prescribed the procedure to be followed

App. 1942); *Ashby v. Ellsberry & N.H. Gravel Road Co.*, 111 Mo. App. 79, 83, 85 S.W. 957, 958 (St. L. Ct. App. 1905).

114. *State v. McKinney*, 475 S.W.2d 51, 54 (Mo. 1971); *Bingaman v. Hannah*, 270 Mo. 611, 628, 194 S.W. 276, 281 (1917); *Stevenson v. A.B.C. Fireproof Warehouse Co.*, 6 S.W.2d 676, 678 (K.C. Mo. App. 1928); *Ashby v. Ellsberry & N.H. Gravel Road Co.*, 111 Mo. App. 79, 83, 85 S.W. 957, 958 (St. L. Ct. App. 1905).

115. *Mooney v. Terminal R.R. Ass'n*, 352 Mo. 245, 260, 176 S.W.2d 605, 611 (1944); *Monsour v. Excelsior Tobacco Co.*, 144 S.W.2d 62, 67 (Mo. 1940); *Schipper v. Brashear Truck Co.*, 132 S.W.2d 993, 999 (Mo. 1939); *Tiede v. Fuhr*, 195 S.W. 1008, 1009 (Mo. 1917); *Bingaman v. Hannah*, 270 Mo. 611, 628, 194 S.W. 276, 281 (1917); *Stevenson v. A.B.C. Fireproof Warehouse Co.*, 6 S.W.2d 676, 678 (K.C. Mo. App. 1928); *Semper v. American Press*, 217 Mo. App. 55, 76, 273 S.W. 186, 191 (K.C. Ct. App. 1925).

116. *Schipper v. Brashear Truck Co.*, 132 S.W.2d 993, 999 (Mo. 1939); *Burnam v. Chicago G.W.R.R.*, 340 Mo. 25, 42, 100 S.W.2d 858, 867 (1936); *Vernon v. Rife*, 294 S.W. 747, 749 (St. L. Mo. App. 1927).

117. *State v. Castino*, 264 S.W.2d 372, 375 (Mo. 1954); *Mooney v. Terminal R.R. Ass'n*, 352 Mo. 245, 260, 176 S.W.2d 605, 611 (1944).

118. See *State v. Gordon*, 391 S.W.2d 346 (Mo. 1965); *State v. Gregory*, 339 Mo. 133, 96 S.W.2d 47 (1936); *State v. Patton*, 255 Mo. 245, 164 S.W. 223 (1914); *Vest v. S.S. Kresge Co.*, 213 S.W. 165 (K.C. Mo. App. 1919).

119. U.S. CONST. amend. VI; Mo. CONST. art. I, § 18 (a).

120. *State v. Harvey*, 449 S.W.2d 649, 652 (Mo. 1970); *State v. Gordon*, 391 S.W.2d 346, 349 (Mo. 1965); *State v. Randolph*, 39 S.W.2d 769, 772 (Mo. 1931); *State v. Patton*, 255 Mo. 245, 254, 164 S.W. 223, 225 (1914).

121. 255 Mo. 245, 254, 164 S.W. 223, 225 (1914). Cases reiterating or giving further support to the *Patton* principle include *State v. Harvey*, 449 S.W.2d 649 (Mo. 1970); *State v. Gordon*, 391 S.W.2d 346 (Mo. 1965); *State v. Kinne*, 372 S.W.2d 62 (Mo. 1963); *State v. Gregory*, 339 Mo. 133, 96 S.W.2d 47 (1936); *State v. Randolph*, 39 S.W.2d 769 (Mo. 1931); *State v. Henson*, 290 Mo. 238, 234 S.W. 832 (1921); *State v. DePriest*, 283 Mo. 459, 232 S.W. 83 (1921).

122. See pt. III, § A of this comment.

by the state in using the prior statement of its own witness to refresh his recollection or to awaken his conscience:

[T]he state . . . may ask the witness, in order to refresh his memory, if he did not testify before the grand jury, and may exhibit the paper (without reading it, and without corporeally offering to the jury the paper, or the contents thereof) to the recalcitrant witness, permit the witness, if he wish, to examine his testimony, his signature, and other insignia of verity, for the purpose of identifying the copy of the testimony as a true copy of what the witness said. Then, when he has identified and examined his testimony, the question upon which he had deviated or was doubtful, before he refreshed his memory, may again be asked the witness. If necessary to prevent the contents of the paper shown to the witness from getting to the jury, the latter may be withdrawn while the witness is examining and identifying his testimony [I]f the witness deny his statements or refuse to identify the paper as a copy of what he said before the grand jury, the state is concluded¹²³

However, where the trial court allows the state to ask its witness about his prior statements in the presence of the jury and the witness adopts his prior statement as his trial testimony, prejudicial error is not committed.¹²⁴ Further, *California v. Green*¹²⁵ may obviate the objection based on federal constitutional grounds to allowing the prosecution to examine its own witness as to his prior inconsistent statements within the hearing of the jury. *Green* involved the admission of the prior inconsistent statements of a state's witness in a criminal prosecution, under a state law provision that allowed the prior inconsistent statements of a witness subject to cross-examination to be admitted as substantive evidence.¹²⁶ The Supreme Court held that the admission of such evidence does not violate the confrontation clause¹²⁷ of the Constitution.¹²⁸ It might be argued, then, that if it does not offend the confrontation clause for the jury to use a witness' prior statement as substantive evidence, the danger that the jury will so use the statements is an insufficient ground for prohibiting the state from questioning its witness about his prior statements in the jury's presence:

V. POSSIBLE SOLUTIONS TO THE PROBLEM CREATED BY THE RULE AGAINST IMPEACHING ONE'S OWN WITNESS

Writers and commentators who have considered the problem created by the rule against impeaching one's own witness have advanced various proposals for its solution, most of which involve doing away with the

123. *State v. Patton*, 255 Mo. 245, 257-58, 164 S.W. 223, 226 (1914).

124. *State v. Tate*, 468 S.W.2d 646, 649 (Mo. 1971) (*semble*); *State v. Harvey*, 449 S.W.2d 649, 652 (Mo. 1970); *State v. Davis*, 400 S.W.2d 141, 147 (Mo.), *cert. denied*, 385 U.S. 87? (1966).

125. 399 U.S. 149 (1970).

126. CAL. EVID. CODE § 1235 (West 1966).

127. U.S. CONST. amend. VI.

128. *California v. Green*, 399 U.S. 149, 167-68 (1970).

rule.¹²⁹ Professor Ladd, for example, recommends the following simple piece of curative legislation: "No party shall be precluded from impeaching a witness because the witness is his own."¹³⁰

However, in view of the validity of the rule as a device for preventing a litigant from using too freely the prior inconsistent statements of his witness where such statements are inadmissible as substantive evidence,¹³¹ it would seem that the rule should be eliminated only in conjunction with a measure allowing the admission as substantive evidence of the prior inconsistent statements of a witness available for full cross-examination.¹³² With the hearsay problem thus obviated, the rule against impeaching one's own witness would have little theoretical basis¹³³ and would remain only as a source of inconvenience to the trial lawyer.

At least one situation exists in Missouri in which the rule against impeaching one's own witness might well be repudiated by judicial action. The Missouri courts have deemed "prior inconsistent sworn statements made by a witness in a deposition in the same case, and used to impeach his testimony at the trial . . ." sufficiently reliable for the trier of fact to consider as substantive evidence of their contents.¹³⁴ There is, therefore, no substantial reason for using the rule against impeaching one's own witness to prevent a litigant from introducing into evidence such statements from his witness' deposition. The Missouri courts have said that a party does not vouch for the witness by calling him.¹³⁵ The possibility of coercion of the witness is extremely slight.¹³⁶ The artificial restraints imposed by the rule against impeaching one's own witness upon the introduction of reliable evidence in this situation should be removed.

In the long run, however, the Missouri courts should not limit their rejection of the rule against impeaching one's own witness to the above

129. See, e.g., Ladd, *Impeaching One's Own Witness: New Developments*, 4 U. CHI. L. REV. 69, 96 (1936); May, *Some Rules of Evidence*, 11 AM. L. REV. 264, 270 (1877); Moidel, *Impeaching One's Own Witness*, 24 J. AM. JUD. SOC'Y 85, 87 (1940).

130. Ladd, *supra* note 129, at 96.

131. See cases cited and text accompanying note 18 *supra*.

132. For examples of such statutory provisions dealing with the rule against impeaching one's own witness and prior inconsistent statements, see CAL. EVID. CODE §§ 785, 1235 (West 1966); MODEL CODE OF EVIDENCE rules 106 (1), 503 (b) (1942); PROP. FED. R. EVID. 607, 801 (d) (1) (i) (Rev. Draft 1971).

133. See pt. II, § A of this comment.

134. In *Pulitzer v. Chapman*, 337 Mo. 298, 85 S.W.2d 400 (En Banc 1935), the Missouri Supreme Court held that

prior inconsistent sworn statements made by a witness in a deposition in the same case, and used to impeach his testimony at the trial, may be accepted as substantive proof of the facts stated . . . *Id.* at 320, 85 S.W.2d at 411.

Accord, *Ridenour v. Duncan*, 291 S.W.2d 900 (Mo. 1956); *Snowwhite v. Metropolitan Life Ins. Co.*, 344 Mo. 705, 127 S.W.2d 718 (1939); *Tate v. Western Union Tel. Co.*, 339 Mo. 262, 96 S.W.2d 364 (1936); *Stottlemire v. Missouri Pac. R.R.*, 358 S.W.2d 437 (K.C. Mo. App. 1962); *Blanks v. St. Louis Pub. Serv. Co.*, 342 S.W.2d 272 (St. L. Mo. App. 1961).

135. See *State v. Kinne*, 372 S.W.2d 62, 67 (Mo. 1963); *Crabtree v. Kurn*, 351 Mo. 628, 646-47, 173 S.W.2d 851, 858-59 (1943) (repudiating the vouching concept and recognizing the coercion theory as the true reason for the rule).

136. See text accompanying notes 13-15 *supra*.

situation, but should do away with it altogether. To accomplish this, it is submitted that the soundest approach is the one taken by the Proposed Federal Rules of Evidence, *i.e.*, one which makes a witness' prior inconsistent statements admissible as substantive evidence and abolishes the rule against impeaching one's own witness.¹³⁷ In this manner a cumbersome, outmoded concept would be made to give way to the realities of the modern trial.

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137. See PROP. FED. R. EVID. 801 (d) (1) (i), 607 (Rev. Draft 1971).