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Recent Cases

CIVIL RIGHTS—EXPANSION OF REMEDIES UNDER 42 U.S.C. SECTION 1985(3)

*Action v. Gannon*¹

This case involved the use of 42 U.S.C. section 1985 (3)² as the basis for enjoining the disruption of predominantly white church services in St. Louis, Missouri, by two human rights groups seeking to assert demands on behalf of the black community.

Specifically, the defendants had disrupted four services at the St. Louis Cathedral during June and July of 1969. On each occasion the members of the defendant group entered the church building to present demands and demonstrate.³ At the first demonstration, 29 members of defendant Action entered the cathedral, passed out a notice of their demands, and read the demands over an amplifier.⁴ The notice warned the parishioners of Action's intention to conduct unannounced demonstrations for a six-month period and warned those who did not want "to become involved [to] take a six month leave-of-absence from the church."⁵

Based on these facts the district court issued a permanent injunction against continued demonstrations that would deny the parishioners their constitutional rights to exercise freedom of religion, assembly, and the use of parish property.⁶ Defendants appealed to the United States Court of Appeals for the Eighth Circuit, where the decision was affirmed, with some narrowing of the injunction to protect the defendants' first amendment rights.⁷

On appeal, the main contention of the defendants was that 42 U.S.C. section 1985 (3) could not be the basis of an injunction in this situation because it does not apply to private conspiracies such as the one in issue, but rather applies only to those conspiracies involving state action.⁸ The court rejected this interpretation and held as follows:

1. 450 F.2d 1227 (8th Cir. 1971).

2. The pertinent provisions of 42 U.S.C. § 1985 (3) (1970) are as follows:

If two or more persons in any State . . . conspire or go in disguise . . . on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for damages, occasioned by such injury or deprivation, against any one or more conspirators.

3. 450 F.2d at 1229-30.

4. *Id.* at 1229.

5. *Id.* at 1229 n.4.

6. *Gannon v. Action*, 303 F. Supp. 1240 (E.D. Mo. 1969).

7. 450 F.2d at 1238 n.17.

8. *Id.* at 1231.

1. Section 1985 (3) applies to private conspiracies motivated by a racial animus.⁹

2. The defendants' first amendment rights were not violated by the injunction, as narrowed on appeal, because these rights lose their protection when their exercise results in the "intolerable violation of the rights of those engaged in worship."¹⁰

3. Injunctive relief was proper even though section 1985 (3) specifically provides for an action for damages.¹¹

4. Section 1985 (3) could constitutionally be applied because a source of congressional power to legislate in the area exists. The court stated that the Supreme Court's interpretation of section 1985 (3) in *Griffin v. Breckenridge*¹² required that a source of congressional power to legislate be found in each case. This source was found in section five of the fourteenth amendment.¹³ The court reasoned that since the fourteenth amendment extended protection to first amendment rights that are threatened, *i.e.*, freedom of worship,¹⁴ the statute was constitutional in this situation because section five of the fourteenth amendment allows Congress to enforce this protection against private conspiracies.¹⁵

The *Action* court's interpretation of section 1985 (3) as applying to private conspiracies to deprive a party of his civil rights is based on the unanimous decision of the Supreme Court in *Griffin v. Breckenridge*.¹⁶ That case overruled *Collins v. Hardyman*,¹⁷ which had expressed the previously prevailing view that section 1985 (3) should be construed to apply only to conspiracies involving state action. *Griffin* reversed the dismissal of a suit for damages brought by black petitioners who alleged that the white respondents had conspired to assault them while they were traveling through Mississippi in a car. The complaint alleged that the conspiracy was to deprive petitioners of their constitutional rights, "including rights to free speech, assembly, association, and movement, and the right not to be enslaved."¹⁸ The Court held that section 1985 (3) reaches private conspiracies that are based on a racially discriminatory animus.¹⁹ The Court felt that this element of intent to deprive others of "equal enjoyment or rights secured by the law to all"²⁰ was added by the draftsmen to prevent the statute from being interpreted as a "general federal tort law,"²¹ and eliminated any constitutional obstacle to applying the statute where

9. *Id.*

10. *Id.* at 1233.

11. *Id.* at 1237.

12. 403 U.S. 88 (1971).

13. Section five of the fourteenth amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

14. Section one of the fourteenth amendment protects the rights covered by the first eight amendments to the Constitution, and at any rate, the first amendment rights to freedom of religion and worship. 450 F.2d at 1233-34.

15. *Id.* at 1235.

16. 403 U.S. 88 (1971).

17. 341 U.S. 651 (1951).

18. 403 U.S. at 88.

19. *Id.* at 102.

20. *Id.*

21. *Id.*

no state action was involved. The Court summarized its position that state action was not required by stating: "It is thus evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985 (3)'s coverage of private conspiracies."²²

To support further its construction of the section, the Court pointed out that other civil rights statutes enacted in the same period had been broadly interpreted in recent decisions, and that the criminal counterpart of the section, 18 U.S.C. section 241, had been interpreted to reach private action in several cases.²³ The Court also pointed out that various parts of the Civil Rights Act of 1871,²⁴ the parent statute of section 1985 (3), other than the part of section 1985 (3) under consideration, explicitly require some form of state action. Therefore, the Court considered it unlikely that section 1985 (3) was intended "simply to duplicate the coverage of one or more of them."²⁵

Based on this interpretation of section 1985 (3), the Court in *Griffin* found the requisite power of Congress to enact legislation in this area in the constitutional prohibition against involuntary servitude, and in the constitutional right to travel interstate, neither of which applies only to state action.²⁶ The Court continued its discussion of congressional power by pointing out that it was not implying that there were no other bases; since the power of Congress under section five of the fourteenth amendment (the crucial question in *Action*) was not in issue, "there [was] no occasion . . . to trace out its constitutionally permissible periphery."²⁷ Thus *Griffin* indicated that section 1985 (3) can reach private conspiracies if a congressional power to legislate is found in each situation. The court in *Action* held that section five of the fourteenth amendment provided that power.

The basis of the *Action* court's holding is twofold. First, the court placed reliance on the recent Supreme Court decision in *United States v. Guest*,²⁸ which it interpreted as authority for construing section five of the fourteenth amendment as giving Congress the power to pass legislation concerning racially motivated, private conspiracies.²⁹ Second, the court adopted the view that the history surrounding the drafting and adoption of the fourteenth amendment indicated that the rights encompassed by its provisions³⁰ were intended to be protected not only from state action but from private action as well.³¹

The opinion of the Court in *Guest* did not reach the issue of the state action limitation but two concurring opinions which were embraced by

22. *Id.* at 101.

23. *Id.* at 104. *E.g.*, *In re Quarles*, 158 U.S. 532 (1895); *Logan v. United States*, 144 U.S. 263, 293-95 (1892); *United States v. Waddell*, 112 U.S. 76, 77-81 (1884); *Ex parte Yarborough*, 110 U.S. 651 (1884).

24. Act of Apr. 20, 1871, ch. 22, §§ 1, 2, 17 Stat. 13.

25. 403 U.S. at 99.

26. *Id.* at 105.

27. *Id.* at 107.

28. 383 U.S. 745 (1966).

29. 450 F.2d at 1235.

30. *See id.* at 1233-34.

31. *Id.* at 1236-37.

a majority of the Court³² went on to discuss the issue and, apparently, to some opaque degree reject it. In 1883, *The Civil Rights Cases*³³ interpreted congressional power under section five and held that congressional action based on the section had to be aimed at "State laws or State proceedings, and be directed to the correction of their operation and effect."³⁴ This interpretation, with some later erosions,³⁵ had previously prevailed. However, the opinions in *Guest* are to some extent a repudiation of this position. Justice Clark stated that "there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights."³⁶ Justice Brennan's opinion also appeared to reject some aspects of the state action requirement, although he appeared to qualify this by finding the necessary power in Congress when its aim is to reach private activities that deny equal use of and access to state facilities.³⁷ This fairly limited view of Justice Brennan's position is expounded by most commentators on the *Guest* case.³⁸ It has been pointed out that Justice Clark must not have intended completely to reject a state action requirement in his *Guest* opinion because he joined the majority the same day in *United States v. Price*,³⁹ which recognized a state-action requirement.⁴⁰

The court in *Action* took the position that *Guest* stands for more than the limited view above, which is only another dilution of the state action and corrective legislation interpretation of section five of the fourteenth amendment, and that a close reading of Justice Brennan's opinion offers support to that position. In a passage of that opinion, quoted in *Action*, it is stated:

Although the Fourteenth Amendment itself, according to established doctrine, "speaks to the State or to those acting under color of its authority," legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate.⁴¹

Could not this passage be read as recognizing an extinguishment of the state action requirement when Congress is seeking to protect constitutional

32. *United States v. Guest*, 383 U.S. 745, 762 (1966) (Clark, J., concurring, joined by Black, J., and Fortas, J.); *id.* at 782-83 (Brennan, J., concurring in part, dissenting in part, joined by Warren, C. J., and Douglas, J.).

33. 109 U.S. 3 (1883).

34. *Id.* at 11-12.

35. See Note, *Fourteenth Amendment Congressional Power to Legislate Against Private Discriminations: The Guest Case*, 52 CORNELL L.Q. 586, 594-96 (1967).

36. 383 U.S. at 762 (Clark, J., concurring).

37. *Id.* at 784 (Brennan, J., concurring).

38. See Buchanan, *Federal Regulation of Private Racial Prejudice: A Study of Law in Search of Morality*, 56 IOWA L. REV. 473, 497-98 (1971); Feuerstein, *Civil Rights Crimes and the Federal Power to Punish Private Individuals for Interference with Federally Secured Rights*, 19 VAND. L. REV. 641, 674 (1966); Note, *supra* note 35, at 589.

39. 383 U.S. 787 (1966).

40. Note, *supra* note 35, at 589.

41. 383 U.S. at 782 (Brennan, J., concurring).

rights such as the first amendment right to worship?⁴² The mention of "the right to equal utilization of state facilities" preceded by the term "such as" then would be only an example of rights that Congress can protect from racially motivated conspiracies under section five of the fourteenth amendment.

While the decision of the court in *Action* can be supported credibly by the position adopted by a majority of the Supreme Court in *Guest*, it can also be supported by the legislative history surrounding the adoption of the fourteenth amendment. The court pointed out that this history has been "examined and reexamined by legal scholars,"⁴³ and concluded that the history indicated that Congress was to have the power to legislate under section five to protect fourteenth amendment rights from individual and state conspiracies.⁴⁴

The Supreme Court had restricted Congress' power to require a state officer to perform a duty, apparently including those based on constitutional rights,⁴⁵ during the period in which the amendment was being debated. Because of this, it has been suggested by one writer that "the congressional debates probably centered around the policy which would operate to protect civil rights should the state fail to do so."⁴⁶ The majority of writers on the subject support the view that the court in *Action* adopted. For example, tenBroek, on whose analysis the court placed reliance,⁴⁷ states that "the protection intended [by the fourteenth amendment] was not merely against state action."⁴⁸ His rationale for this view is that prior to the adoption of the amendment there were widespread acts of violence being committed against Negroes by individuals, and evidence of this was purposefully included in the record of the committee drafting the amendment. He suggests that this positive effort to include such testimony in the committee's record would be pointless if the amendment was not intended to deal with this problem.⁴⁹

Less conclusive support for the court's position can be found in various statements of legislators involved in the debate over the amendment, and a viable argument also can be made for a conflicting view.⁵⁰ It has been pointed out that any theory based on the congressional debates is inconclusive due to the fact that there were two and possibly three factions debating the amendment's scope and, as a result, "the intent of the framers . . . was not clearly expressed in the course of the discussion."⁵¹

42. See 450 F.2d at 1233-34.

43. *Id.* at 1236.

44. *Id.* at 1237.

45. Note, *supra* note 35, at 590.

46. *Id.*

47. 450 F.2d at 1236 n.15.

48. J. TENBROEK, *EQUAL UNDER LAW* 203 (rev. ed. 1965).

49. *Id.* at 204; see also Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 *YALE L.J.* 1353, 1355 (1964).

50. See Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 *ST. L. L.J.* 331 (1967). As the court in *Action* pointed out, the author's argument that the legislative history indicates that state action is a requirement was made to the Supreme Court in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). As a result, the Court was aware of his position when *Guest* was handed down. 450 F.2d at 1236 n.15.

51. Note, *supra* note 35, at 591.

The court in *Action*, after stating its interpretation of section 1985 (3), held that injunctive relief was proper under the statute.⁵² This holding appears justified; however, it should be pointed out that there is an absence of case authority supporting this proposition. Furthermore, the granting of an injunction under section 1985 (3) is arguably only an expedient to circumvent the state action requirement expressed in 42 U.S.C. section 1983, which otherwise fits a situation of this type and by its terms provides for injunctions.

*Bell v. Hood*⁵³ does appear to support the court's position. However, that case also involved the question whether to grant federal jurisdiction over a complaint, rather than just the question whether a cause of action was stated by the complaint. The language relied on by the court in *Action* appears to refer to the grant of jurisdiction. Additionally, the statement from *Bell* that

[i]t is also well settled that where legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done . . .⁵⁴

was apparently in reference to broad interpretations placed on the Tucker Act,⁵⁵ which was the statute giving the Court of Claims jurisdiction to hear claims based on contracts with the United States. Only in the broadest sense of indicating a philosophy of granting relief to those harmed under federal law can this be considered authority for granting an injunction under section 1985 (3). Paradoxically, *Bell* and the cases it cited all involve the provision of remedies for violations of law by government officials.⁵⁶ Another case cited by the court in *Action* seems to justify injunctive relief only in this broad sense. *Brewer v. Hoxie School District No. 46*,⁵⁷ in which such relief was granted, was brought under section 1983, which expressly allows suits in equity, as well as under section 1985 (3).

Taken as a whole these cases are authority for an injunction, but they are noticeably weak. Furthermore, another factor bearing on the question makes the court's position even more questionable. Section 1983, which expressly provides for injunctive relief, and section 1985 (3), which expressly provides for the recovery of damages, were originally enacted as one statute⁵⁸ with section 1983 roughly corresponding to section one and section 1985 (3) contained within section two. It seems odd that the statute would have expressly provided for different remedies for the respective sections unless the intent of the legislators was to do just that. Based on this reason, and those previously given, the holding in *Action* that injunctive relief was proper under section 1985 (3) is open to some question.

52. 450 F.2d at 1237.

53. 327 U.S. 678 (1946).

54. *Id.* at 684.

55. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505.

56. *Bell* involved a suit against F.B.I. agents for violation of the fourth and fifth amendments, and the cases cited in *Bell* involve actions of government officials and agencies. See 327 U.S. at 684 n.7.

57. 238 F.2d 91 (8th Cir. 1956).

58. Act of Apr. 20, 1871, ch. 22, §§ 1, 2, 17 Stat. 13.

Despite this, *Action* is clearly authority for seeking relief under section 1985 (3) from conspiracies involving state action, or private individuals motivated by racial or class discrimination, when the aim of the conspiracy is to violate rights based on national citizenship or rights guaranteed by the Bill of Rights that have been found to apply to the states through the fourteenth amendment. It also indicates a broadened interpretation of the Supreme Court's opinion in the *Guest* case that could lead to a new source of power in Congress, under section five of the fourteenth amendment, to enact legislation dealing with private action (as long as the qualifying factor of racially motivated discrimination is included). Although Congress has not yet treated the *Guest* case as granting it this power,⁵⁹ there is some indication from *Action* that it would be justified in doing so. The new life that has been given section 1985 (3) by decisions such as *Griffin* and *Action* is evidenced by the increasingly widespread inclusion of the statute in civil rights complaints.⁶⁰ If the *Action* interpretation is followed its use as a remedy in these cases should be further expanded.

WILLIAM D. CALKINS

CORPORATIONS—INTERESTED DIRECTORS DEALING WITH THE CORPORATION— THE FAIRNESS DOCTRINE

*Ruetz v. Topping*¹

The Mound City Screw Products Company, a Missouri corporation, had as its stockholders Lewis Ruetz, Adolph Weber, Alex Topping, Robert Topping and Donald Topping. At one time or another, all the stockholders served as directors, officers and employees of the corporation (a common practice in closely held corporations). For a time, Alex Topping's wife also served on the company's board of directors.

The stockholders agreed informally that those stockholders who actively participated in the daily operations of the business should receive a fixed salary, plus a pro rata share of the company's net profits. However, the president began to make the determination as to the division of net profits among the active stockholders. The continuance of the latter practice was approved several times by the board of directors.

59. See 18 U.S.C. § 245 (1970). This statute apparently is based on the Supreme Court's decision in *Guest*, because all violations of the statute are tied to activities that involve the use of or access to state or federal facilities, and therefore indicates that Congress has not read *Guest* as a total abolishment of the state action requirement, as the court in *Action* has done.

60. See, e.g., *Sinclair v. Spatocco*, 452 F.2d 1213 (9th Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3514 (U.S. Apr. 6, 1972) (No. 71-1279); *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971); *Place v. Shepherd*, 446 F.2d 1239 (6th Cir. 1971); *Harrison v. Brooks*, 446 F.2d 404 (1st Cir. 1971).

1. 453 S.W.2d 624 (St. L. Mo. App. 1970).

In 1964, Alex and Robert were in control of the board of directors and allegedly forced Lewis Ruetz to resign as an officer and employee of the corporation. Subsequently, Ruetz instituted an action against the corporation and Alex, Robert and Donald Topping to have the corporation liquidated; to recover sums allegedly due him under a termination of employment agreement; and to recover, for the benefit of the corporation, allegedly excessive compensation paid to the defendant-stockholders. Apparently, after receiving notice of the action, the defendants changed the method of remuneration by increasing fixed salaries paid to active stockholders and terminating the president's authority to distribute bonuses from the net profits of the business.

The lower court rendered a judgment in favor of the defendants on the issues of corporate liquidation and excessive compensation. The action on the termination of employment contract was dismissed without prejudice. Ruetz appealed only from the adverse judgment on the shareholder's derivative action to recover excessive compensation paid to the defendants.

On appeal, the plaintiff contended that the defendant-stockholders were paid excessive compensation after 1962. The St. Louis Court of Appeals held that the plaintiff was not barred by laches from bringing the cause of action to recover excessive compensation paid to defendants after 1964, the year in which the plaintiff resigned as an officer and employee of the company. Furthermore, the court held that the outcome of the case was controlled by its holding in *Binz v. St. Louis Hide & Tallow Co.*² The *Binz* court discarded the traditional rule that an officer-director's contract with his corporation, when approved by an interested board,³ is voidable⁴ regardless of fairness,⁵ and instead stated:

[T]he modern rule is that such acts are only voidable and that in a suit by a minority stockholder to set aside a salary set by a self-dealing officer director, the officer director has an opportunity to prove that the salary set was reasonable and justified by the services performed. Yet it is clear that when it appears the salary was set by self-dealing, then the burden of proof in justifying this salary is upon the officer director.⁶

2. 378 S.W.2d 228 (St. L. Mo. App. 1964), noted in Grimm, *Corporations—Directors' Contracts with the Corporation—Burden of Proof*, 30 Mo. L. REV. 628 (1965).

3. An interested board exists either when an interested director's presence is necessary to constitute a quorum or the interested director's vote is necessary to pass the resolution. When either occurs, the director is considered to be dealing with himself. *Hill v. Rich Hill Coal Mining Co.*, 119 Mo. 9, 22, 24 S.W. 223, 226 (1893).

4. A number of decisions state that the contracts are "void". However, it is clear that the courts mean "voidable" and not "void" *ab initio*. See *Kitchen v. St. Louis, K.C. & N. Ry.*, 69 Mo. 224, 254 (1878). This is so in nearly all jurisdictions following the majority rule. 3 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 917 (rev. vol. M. Wolf ed. 1965).

5. This is apparently the rule followed in a majority of jurisdictions. 3 W. FLETCHER, *supra* note 4, § 924. *But see* Marsh, *Are Directors Trustees?*, 22 BUS. LAW. 35, 43 (1966), which states that since 1960 the majority view has been that such contracts can only be avoided if unfair. See generally 19 C.J.S. *Corporations* § 781 (1940); 19 AM. JUR. 2d *Corporations* § 1291 (1965).

6. *Binz v. St. Louis Hide & Tallow Co.* 378 S.W.2d 228, 230 (St. L. Mo. App. 1964).

Thus, the court remanded the case for a determination of the reasonableness of the defendants' salaries.

Three alternative theories can explain the holding in *Binz*. First, even though the traditional approach of voiding the contract is followed, the self-dealing director can prevail on the theory of quantum meruit if he can show that his services were of sufficient benefit to the corporation to justify his compensation.⁷ However, in Missouri, for an officer or director to recover for services rendered, he would have to overcome the presumption that services of a director or an officer are gratuitously performed.⁸ This presumption is difficult to overcome because the director or officer must show the existence of a charter provision, or, in the alternative, a by-law or resolution legally passed before any services are rendered,⁹ which generally provides for payment of salaries to officers or directors.¹⁰ Thus, in Missouri it is practically impossible for a self-dealing director to recover on the theory of quantum meruit. To say that *Binz* allows recovery on a quantum meruit theory would either be a complete renunciation of the presumption against compensation of officers and directors or, at least, an exception thereto.

The second theory to explain *Binz* is Fletcher's analysis that *Binz* is one of the few cases which supports a narrow exception to the presumption against compensation of officers and directors.¹¹ The exception is that officers and directors of small, closely held corporations can recover on a quantum meruit theory even though the corporation has made no provision for compensation.¹² This exception is based on the minimal risk of injury to third parties (e.g., inactive shareholders), and other practical considerations, such as

a tendency in modern times toward the formulation of small business corporations and, realizing that those most interested and holding practically all the stock will in all probability become the directors and officers thereof¹³

The corporations in *Ruetz* and *Binz* fit within this exception and its underlying policy. In both corporations virtually all the stock was held by a small group whose members were actively involved in the day-to-day business of the corporation.

7. *Id.* at 230-31 and cases cited therein.

8. See *Pfeiffer v. Lansberg Brake Co.*, 44 Mo. App. 59, 67-68 (St. L. Ct. App. 1891); 5 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2109 (rev. vol. M. Wolf ed. 1967) and Missouri cases cited therein. However, if it can be shown that a director or officer renders services outside the line and scope of duty, such director or officer can recover for the reasonable value of services rendered. *Bell v. Peper Tobacco Warehouse Co.*, 205 Mo. 475, 490-91, 103 S.W. 1014, 1018 (1907).

9. See *Ferrenbach v. Edward Fehlig & Co.*, 80 S.W.2d 705 (St. L. Mo. App. 1935).

10. *Id.* This rule is followed in most states as to directors, but there is some split in the cases with respect to services rendered by officers as such. Under certain circumstances there may be an implied agreement to provide reasonable payment for services of the officer. 5 W. FLETCHER, *supra* note 8, §§ 2111-13. But see *Kinsella v. Marquette Fin. Corp.*, 16 S.W.2d 619, 620 (St. L. Mo. App. 1929).

11. See 5 W. FLETCHER, *supra* note 8, § 2113.

12. *Id.*

13. *Id.*

The final and broadest explanation of the *Binz* decision is that it adopts the "fairness" doctrine, the so-called enlightened minority position on self-dealing directors' contracts;¹⁴ that is, although the interested director's participation gives life to the contract between the director and his corporation, the corporation cannot avoid the contract unless the contract is unfair.¹⁵ But, the director has the burden of proving fairness,¹⁶ and thus, the contract is presumed to be unfair until the director sustains that burden.¹⁷ If the court in *Binz* did adopt the "fairness" doctrine, it is unclear whether its adoption was an *in toto* renunciation of the traditional rule or merely an exception to it, relevant only when the contract is for the payment of personal services.¹⁸

Until the *Binz* and *Ruetz* decisions, Missouri followed the traditional rule on directors' contracts with their corporation, upholding them only when the contract was approved by a disinterested board and was fair.¹⁹ If the contract was approved by an interested board it was held to be voidable at the option of the corporation,²⁰ regardless of the contract's fairness,²¹ harm to the corporation, or the director's "utmost good faith."²² In other words, the corporation could elect to avoid the contract once self-dealing on the part of the director could be shown. This, coupled with the difficulty of recovering on a quantum meruit theory, yielded the harsh result that a self-dealing officer-director could not recover anything even if his services as an officer were of great value to the corporation. Theoretically, this inability to recover would deter self-dealing,²³ and, as a practical matter, the courts were relieved of the intellectually perplexing task of determining a contract's fairness.²⁴

14. See Grimm, *supra* note 2, at 629.

15. 3 W. FLETCHER, *supra* note 4, § 931; 19 AM. JUR. 2D Corporations § 1291 (1965); 19 C.J.S. Corporations § 781 (1940).

16. Grimm, *supra* note 2, at 630.

17. 5 W. FLETCHER, *supra* note 8, § 2129.

18. See generally *Schufeldt v. Smith*, 131 Mo. 280, 31 S.W. 1039 (1895), in which the court created another exception to the majority rule by upholding, based on fairness, the preferences of director-creditors approved by an interested board. *But see Pitman v. Chicago Lead Co.*, 93 Mo. App. 592, 67 S.W. 946 (K.C. Ct. App. 1902).

19. *Kitchen v. St. Louis, K.C. & N. Ry.*, 69 Mo. 224, 254 (1878).

20. *Hill v. Rich Hill Coal Mining Co.*, 119 Mo. 9, 24 S.W. 223 (1893); *Keokuk N. Line Packet Co. v. Davidson*, 95 Mo. 467, 8 S.W. 545 (1888); *Ward v. Davidson*, 89 Mo. 445, 1 S.W. 846 (1886).

21. *Hill v. Rich Hill Coal Mining Co.*, 119 Mo. 9, 24 S.W. 223 (1893).

22. *Bromschwig v. Carthage Marble & White Lime Co.*, 334 Mo. 319, 324, 66 S.W.2d 889, 892 (1933).

23. In *Hill v. Rich Hill Coal Mining Co.*, 119 Mo. 9, 23-24, 24 S.W. 223, 226 (1893), the court stated:

[Munson] stood in the attitude of selling as owner and purchasing as trustee. The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be, impossible, knowing that real motives often elude the most searching inquiry. . . .

24. *Id.*

The underlying theory of this traditional rule is that a corporate director is analogous to a trustee²⁵ (because both are fiduciaries) and, as such, is prohibited from using that which he holds in trust for his own benefit. The extent to which the director is characterized as a trustee is a matter of judicial discretion.²⁶

However, even before *Binz* and *Ruetz*, the Missouri Supreme Court had chipped away at this traditional rule. Construing its holding in *Kitchen v. St. Louis, Kansas City & Northern Ry.*,²⁷ the court in *Foster v. Mullanphy Planing-Mill Co.*²⁸ stated: "[W]hile sometimes voidable, on timely and direct application to set them aside, the contracts were not absolutely void as to such participating directors."²⁹

Thus, having backed away from a blind application of the traditional rule, the court in *Schufeldt v. Smith*, when faced with one type of self-dealing, held that the decisive question was the "fairness" of a preference given to a creditor-director by an interested board.³⁰ Basing this decision on the best interests of the corporation, the court stated:

But it cannot be said, as a direct proposition of law, that officers of a corporation cannot themselves and in their own names contract with it. To so hold would virtually deny corporations the credit upon which so much of the business of the country is transacted, and which is so essential to success. . . . A corporation naturally looks to those interested in its affairs for accommodation.³¹

The Missouri Supreme Court has not created any other exception to the traditional rule.³² Thus, until *Binz* and *Ruetz*, the rule had been applied strictly in cases involving self-dealing officer-directors' contracts for compensation.³³ Moreover, the Missouri courts of appeals, until now, never backed away from applying the traditional rule in any situation.³⁴ However, in *Yax v. Dit-Mco, Inc.*,³⁵ the supreme court, in dictum, evaluated the fairness of a contract for sale of stock, notwithstanding the essential

25. 3 W. FLETCHER, *supra* note 4, § 924.

26. Compare *Hill v. Rich Hill Coal Mining Co.*, 119 Mo. 9, 22, 24 S.W. 223, 226 (1893) with *Schufeldt v. Smith*, 131 Mo. 280, 289, 31 S.W. 1039, 1041 (1895) and *Frankford Exch. Bank v. McCune*, 72 S.W.2d 155, 158 (St. L. Mo. App. 1934).
27. 69 Mo. 224 (1878).

28. 92 Mo. 79, 4 S.W. 260 (1887).

29. *Id.* at 87, 4 S.W. at 269 (emphasis added).

30. *Schufeldt v. Smith*, 131 Mo. 280, 289, 31 S.W. 1039, 1041 (1895).

31. *Id.* at 291, 31 S.W. at 1040.

32. *Glassburn v. Lakeland Dev. Co.*, 340 S.W.2d 641 (Mo. 1960); *Bromschwig v. Carthage Marble & White Lime Co.*, 334 Mo. 319, 66 S.W.2d 889 (1933).

33. *Keokuk N. Line Packet Co. v. Davidson*, 95 Mo. 467, 473, 8 S.W. 545, 546 (1888); *Funsten v. Funsten Comm'n Co.*, 67 Mo. App. 559 (St. L. Ct. App. 1896); *Davis Mill Co. v. Bennett*, 39 Mo. App. 460 (K.C. Ct. App. 1889); *Bennett v. St. Louis Car Roofing Co.*, 19 Mo. App. 349 (St. L. Ct. App. 1885).

34. See *Johnson v. Duensing*, 340 S.W.2d 758 (K.C. Mo. App. 1960); *Frankford Exch. Bank v. McCune*, 72 S.W.2d 155 (St. L. Mo. App. 1934); *Central Mfg. Co. v. Montgomery*, 144 Mo. App. 494, 129 S.W. 460 (Spr. Ct. App. 1910); *Pitman v. Chicago Lead Co.*, 93 Mo. App. 592, 67 S.W. 946 (K.C. Ct. App. 1902); *Patrick v. Boonville Gas Light Co.*, 17 Mo. App. 462 (St. L. Ct. App. 1885).

35. 366 S.W.2d 363 (Mo. 1963), noted in *Brauninger, Corporations—Interested Directors Dealing with the Corporation*, 29 Mo. L. Rev. 90 (1964).

participation of an interested director in approving the resolution, and the fact that his presence was necessary to constitute a quorum at the board meeting.³⁶ Obviously, if it were not this dictum, the *Binz* and *Ruetz* decisions would find little support in the strong line of Missouri cases following the traditional rule as to directors' contracts with the corporation. Because the "fairness" of interested directors' contracts may now be considered by at least some Missouri courts, the *Ruetz* case is of particular importance because it defines criteria with which to measure the "fairness" of service contracts.³⁷

Both *Fletcher*³⁸ and relevant tax cases³⁹ provided the *Ruetz* court with a multi-factor test for judging the fairness of a service contract: (1) salaries paid to similar employees in similar businesses or, if the business is unique, previous salaries paid in the same business; (2) time devoted by the employee to the business; (3) size and complexity of the business; (4) difficulty of the work performed; (5) profitability of the business; (6) dividend policy of the business; and (7) the employee's qualifications for the position.⁴⁰

These factors identify "fairness" at two points in time—the time the contract is entered into and the time after the service is performed. Fairness of the contract at the time of making is measured by the prevailing conditions in the labor market, qualifications of the employee, difficulty of the work to be performed, dividend policy of the business, and size and complexity of the business. On the other hand, a quantum meruit approach is used to measure fairness after the services have been performed. Corporate profitability, time devoted to work, and difficulty of work performed identify the fairness of the compensation paid relative to services actually rendered to the corporation. Since the issue under a quantum meruit approach is the fairness of the value placed on the services performed, only the factors which measure the actual "benefit" of the services rendered to the corporation would be relevant.⁴¹ Obviously, the factors measuring the fairness of the contract at the time of making would be irrelevant. The *Ruetz* court did not recognize this distinction.

However, the true test of fairness should be: Did the directors place the interests of the corporation first?⁴² If the board's judgment was in the

36. See *id.* at 367.

37. Different factors are used to measure fairness depending on whether the contract involves services, property, or loans. Often, the judicial test for fairness is the "chancellor's foot". Note, *The Fairness Test of Corporate Contracts with Interested Directors*, 61 HARV. L. REV. 335, 337 (1948).

38. 5 W. FLETCHER, *supra* note 8, at 2133.

39. Reasonable compensation paid may be deducted by the corporation as a business expense. When salaries have been approved by an interested board the reasonableness of the compensation is examined. See, e.g., *Palmetto Pump & Irrig. Co. v. Tomlinson*, 9 Am. Fed. Tax R.2d 1136 (S.D. Fla. 1962), *aff'd*, 313 F.2d 220 (5th Cir. 1963).

40. *Ruetz v. Topping*, 453 S.W.2d 624, 628-29 (St. L. Mo. App. 1970). The case was remanded to the lower court for a determination on the merits, based on these factors.

41. See Annot., 27 A.L.R. 300, 305 (1927). But see *Palmetto Pump & Irrig. Co. v. Tomlinson*, 9 Am. Fed. Tax R.2d 1136 (S.D. Fla. 1962), in which all the factors are viewed as having relevance to the reasonableness of the services actually rendered.

42. Note, *supra* note 37.

best interests of the corporation at the time the contract was made, the contract should be enforced just as a disinterested board's judgment would be enforced.⁴³ Only the factors measuring fairness at the time the contract was made would be determinative under this approach.

The factor of "corporate profitability" was emphasized by the *Ruetz* court.⁴⁴ However, this factor, as suggested above, should be irrelevant because it does not measure fairness at the time of the contract's making. Indeed, this factor should be de-emphasized because other variables (e.g., governmental manipulation of the economy) may substantially influence the profitability of any company. Moreover, when a corporation is profitable the courts could have a propensity towards generosity and allow everyone to recover since there is plenty of money to go around. But, when profits are low the interested directors may be discriminated against.

In conclusion, the trend in Missouri, although ambiguous as in other jurisdictions, is toward an acceptance of the "fairness" doctrine.⁴⁵ Because of the dictum in the *Yax* decision, the *Ruetz* and *Binz* decisions are supported in their adoption of a new approach in dealing with interested directors. Also, credence is given to this new approach by the cases which uphold self-dealing director-creditor's preferences based on the "fairness" doctrine.

There is no reason to distinguish between the types of interested directors' contracts to which the "fairness" doctrine should apply. The rationale underlying the acceptance of the "fairness" doctrine in the *Schufeldt* case is persuasive, not only in cases involving creditor preferences, but also in cases involving services and property. As a practical matter, directors are just as likely to be called on to provide services to the corporation as they would be to lend money.

There are two basic reasons why the traditional rule should give way to the "fairness" doctrine.⁴⁶ First, the traditional rule is based on the fallacious analogy⁴⁷ that a director is a trustee.⁴⁸ This analogy leads to the cynical conclusion that an interested director is unlikely or unable to

43. When a contract with a director is approved by a disinterested board and is fair, it cannot be avoided by the corporation. *Hill v. Rich Hill Coal Mining Co.*, 119 Mo. 9, 22, 24 S.W. 223, 226 (1893).

44. 453 S.W.2d at 632.

45. Marsh, *supra* note 5, at 43.

46. Grimm, *supra* note 2, at 629.

47. In *In re Dissolution of E.C. Warner Co.*, 232 Minn. 207, 212, 45 N.W.2d 388, 392 (1950), the court stated:

Confusion has resulted from a failure to recognize that the position of a director of a corporation, though fiduciary in many respects, is *sui generis* and is not to be confused with the position of that of a trustee, *quasi* trustee, or agent.

See Hancock, *The Fallacy of the Transplanted Category*, 37 CAN. B. REV. 535, 574-75 (1959), where the author describes the "fallacy of the transplanted category" as the giving of a word or concept in one context the same meaning in a different context. Thus, because a fiduciary can be either a trustee or director does not mean they are the same.

48. See generally Garner, *Directors as Trustees*, 92 L.J. 293 (1942); and Marsh, *supra* note 5, at 25. For a famous debate on this subject compare Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932), with Berle, *For Whom Corporate Managers are Trustees: A Note*, 15 HARV. L. REV. 1365 (1932).

represent the corporation's best interests. As Professor Lattin has observed: "[T]here has been the surprising discovery in some quarters that directors, for the most part, are not bent on skulduggery."⁴⁹ Second, the traditional rule can be used to the detriment of those it is designed to protect. For example, under the traditional rule, a disenchanted minority shareholder can wield coercive power by threatening to bring an action to void an interested director's contract even when the contract serves the best interests of the corporation, its stockholders, and its creditors.

If the new approach is followed by other Missouri courts, the *Ruetz* case provides criteria for determining fairness, at least in cases concerned with personal service contracts. On the other hand, should it turn out that the St. Louis Court of Appeals merely adopted a quantum meruit approach, then the *Ruetz* case provides criteria for analysis of the actual value of services performed by interested directors. Clearly, the Missouri Supreme Court needs to provide leadership in the area of interested directors' contracts with their corporation.

C. THOMAS WESNER, JR.

EVIDENCE—SEARCH AND SEIZURE—PROBABLE CAUSE WHEN AN INFORMER'S TIP IS USED TO OBTAIN A SEARCH WARRANT

*United States v. Harris*¹

Harris was convicted by a federal district court in Kentucky for possessing several jugs of whiskey upon which no federal tax had been paid. The Sixth Circuit Court of Appeals reversed on the grounds that the federal tax investigator's affidavit, which supported the evidence-producing search warrant, was insufficient to establish probable cause.² The affidavit stated that: (1) Harris had a reputation with the affiant for the last four years as a trafficker in non-taxpaid distilled spirits; (2) during this period the affiant had received considerable information from a number of people concerning Harris' illicit whiskey activities; (3) once during these four years the local constable had located illicit whiskey in an abandoned house under Harris' control; (4) an informer told affiant that he had purchased illicit whiskey from Harris a number of times over the last two years, most recently within two weeks; (5) the informer knew of another who had purchased whiskey on Harris' premises within the past two days; (6) the informer had seen whiskey consumed in Harris' dance hall and many times had seen Harris go to a building 50 yards from the dance hall to obtain illicit whiskey for the informer and other persons; and (7) the affiant had interviewed the informer and found him to be a prudent person. The Supreme Court reversed and reinstated the conviction,³ but delivered no majority opinion.

49. N. LATTIN, *THE LAW OF CORPORATIONS* 290-91 (2d ed. 1971).

1. 403 U.S. 573 (1971).

2. 412 F.2d 796 (6th Cir. 1969), *rev'd*, 403 U.S. 573 (1971).

3. 403 U.S. at 573.

To understand the significance of *United States v. Harris*, one must first understand previous case law which has dealt with the question of what is required in an affidavit to sufficiently establish probable cause for obtaining a search warrant when part or all of the affidavit is based upon hearsay evidence from an unnamed informer.⁴ To protect citizens from unreasonable searches and seizures, the fourth amendment prohibits the issuance of search warrants⁵ except on probable cause.⁶ Generally, the courts require probable cause to be based on facts and circumstances, either within the affiant's own knowledge or of which he has reasonably trustworthy information, that are sufficient in themselves to warrant a man of reasonable caution to believe that items subject to seizure are in a specified location.⁷ The Supreme Court has said the determination of probable cause should be based upon probabilities—the "factual and practical considerations of everyday life"⁸—and not on legal technicalities or a prima facie showing of guilt.⁹ In *United States v. Ventresca*,¹⁰ the Court stated that affidavits should be interpreted in a "commonsense and realistic fashion."¹¹ Reviewing courts, in determining if probable cause had been sufficiently established for a warrant to issue, may consider only information that was presented to the magistrate.¹²

In *Jones v. United States*,¹³ the Supreme Court expressly approved the

4. For additional background and articles on this subject and comments on the important cases, see: Burnett, *Search Warrants: Impact and Application of Chimel and Spinelli and Related Problems*, 29 FED. B.J. 170, 179-84 (1970); Comment, *Criminal Procedure—Search Warrants—For Informant's Tips to Establish Probable Cause Such Tips Must Meet Aguilar Standards Even When Partially Corroborated by Independent Investigation*, 21 S.C. L. REV. 246 (1969); Note, *The Informer's Tip as Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958 (1969); Note, *Spinelli v. United States: Searching for Probable Cause*, 30 U. PITT. L. REV. 735 (1969).

5. A probable cause determination by a neutral magistrate is preferred over that of a police officer acting on his own; therefore, a reviewing court will usually accept less persuasive and competent evidence in sustaining a magistrate's determination than would be required to establish probable cause for an officer acting on his own without a warrant. *Jones v. United States*, 362 U.S. 257, 270 (1960); *Aguilar v. Texas*, 378 U.S. 108, 111 (1964).

6. Evidence is inadmissible when obtained in violation of the fourth amendment. This rule is applied to the states via the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). *Kerr v. California*, 374 U.S. 23, 34 (1963), held warrants on all levels (local, state, and federal) must be based on the same standard of probable cause.

7. *Carroll v. United States*, 267 U.S. 132, 162 (1925); accord, *Berger v. New York*, 388 U.S. 41, 55 (1967); *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

This definition of probable cause applies to either searches or arrests. *Draper v. United States*, 358 U.S. 307, 310-11 (1959); *Beck v. Ohio*, 379 U.S. 89, 96 n.6 (1964).

8. *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

9. *Id.* at 174-75; accord, *United States v. Ventresca*, 380 U.S. 102, 107 (1965); *Draper v. United States*, 358 U.S. 307, 311 (1959).

10. 380 U.S. 102 (1965).

11. *Id.* at 108.

12. *Spinelli v. United States*, 393 U.S. 410, 413 n.3 (1969); *Aguilar v. Texas*, 378 U.S. 108, 109 n.1 (1964); *Giordenello v. United States*, 357 U.S. 480, 486-87 (1958).

13. 362 U.S. 257 (1960).

use of hearsay evidence in establishing probable cause,¹⁴ provided the affidavit presented a "substantial basis" for the magistrate to conclude that seizable items were in the specified location.¹⁵ In *Aguilar v. Texas*,¹⁶ the Court articulated the standard to be followed when the affidavit is based solely on a tip from an unnamed informer. In that case, a warrant was issued upon an affidavit which stated that the affiant had received "reliable information" from a "credible" person who believed that narcotics were being kept and sold within a certain apartment in violation of the law.¹⁷ In holding that the warrant had been improperly issued, the Court said that although probable cause may be established by hearsay information alone, the magistrate must be informed of (1) the "underlying circumstances" upon which the informer bases his conclusion that the seizable items are where he claims they are; and (2) the "underlying circumstances" from which the officer concludes that the informant, named or unnamed, is credible (trustworthy), or that his information is reliable.¹⁸

To meet the first requirement of the "two-pronged" *Aguilar* test—that the magistrate be appraised of the informer's basis of knowledge—the affiant must state how the informer gained his information so that the magistrate can determine if the "underlying circumstances" justify the conclusion that seizable items are located in a specified place. A statement that the informer bases his conclusion upon personal observation (if he has) is the easiest way to satisfy the requirement.¹⁹ Or, as the Court in *Spinelli v. United States*²⁰ suggested, if the tip is sufficiently detailed, the magistrate may be justified in believing that the informant received his information in a reliable manner (such as personal observation) and not merely by overhearing a remark at the local tavern.²¹

To meet the second *Aguilar* requirement—that the magistrate be provided with the underlying circumstances from which the officer concludes that the informer is trustworthy—it is well settled that a mere assertion that the informer is "reliable" or "credible" is not sufficient.²² The most common way to show an informer is trustworthy is to include in the affidavit a statement that the informer has previously given information that has proven correct (if he has).²³ The courts have been lenient and

14. Previously, in federal courts hearsay evidence was not allowed when determining the existence of probable cause. Annot., 10 A.L.R.3d 359, 362 (1966).

15. 362 U.S. at 271.

16. 378 U.S. 108 (1964).

17. *Id.* at 109.

18. *Id.* at 114.

19. See, e.g., *Jones v. United States*, 362 U.S. 257 (1960).

20. 393 U.S. 410 (1969).

21. *Id.* at 417. (The Court suggested that *Draper v. United States*, 358 U.S. 307 (1959), is a suitable benchmark by which to measure sufficiency of detail.) See *United States v. Drew*, 436 F.2d 529, 532-34 (5th Cir. 1970), *cert. denied*, 402 U.S. 977 (1971); *Ludwig v. Wainwright*, 434 F.2d 1104, 1106 (5th Cir. 1970); *United States v. Nasse*, 432 F.2d 1293, 1300 (7th Cir. 1970), *cert. denied*, 401 U.S. 938 (1971); *People v. Hamilton*, 71 Cal. 2d 176, 181, 454 P.2d 681, 684, 77 Cal. Rptr. 785, 788 (1969).

22. E.g., *Spinelli v. United States*, 393 U.S. 410, 416 (1969).

23. See *United States v. Nasse*, 432 F.2d 1293, 1300 (7th Cir. 1970), *cert. denied*, 401 U.S. 938 (1971); *United States v. Dunnings*, 425 F.2d 836, 839 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970); *People v. Hamilton*, 71 Cal. 2d 176, 179,

non-technical in this area.²⁴ Courts have also said that named or unnamed informers may be considered sufficiently credible if they are identified as police officers,²⁵ victims,²⁶ or uninvolved eyewitnesses.²⁷ A question the Court raised in *United States v. Harris*, but failed to answer, is: May an informer's trustworthiness be inferred solely from the fact that in giving information he admits to being a participant in the crime? Chief Justice Burger answered affirmatively, stating that "[a]dmissions of crime . . . carry their own indicia of credibility—sufficient at least to support finding of probable cause to search."²⁸ He was joined in this portion of his opinion by Justices White and Blackmun. Justice Harlan, joined by Justices Douglas, Brennan, and Marshall, stated that such a position was against the basic thrust of *Aguilar*—that warrants should not issue upon mere uncorroborated hearsay.²⁹ After pointing out that the government had not even suggested such a theory, Harlan said that informer-participants should not be given the status of "trustworthiness" until more argument is heard on the issue.³⁰ Justices Stewart and Black voiced no opinion in this area; thus, this issue has not been decided.³¹

If the informer has never given information before or cannot otherwise be proved credible,³² then, before his statements can be used, the

454 P.2d 681, 683, 77 Cal. Rptr. 785, 787 (1969); *People v. Tillman*, 238 Cal. App. 2d 134, 138, 47 Cal. Rptr. 614, 617 (1965); *Manley v. Commonwealth —Va.—*, 176 S.E.2d 309, 313 (1970).

24. See, e.g., *Rugendorf v. United States*, 376 U.S. 528, 530 (1964) (the informer was said to be credible when the affidavit merely said the informer had given reliable information in the past); *Jones v. United States*, 362 U.S. 257, 268-69 (1960) (the informer was said to be trustworthy although he had only given information once in the past); *United States v. Stallings*, 413 F.2d 200, 204 (7th Cir.), cert. denied, 396 U.S. 972 (1969); *United States v. Freeman*, 358 F.2d 459, 462 (2d Cir.), cert. denied, 385 U.S. 882 (1966).

25. *United States v. Ventresca*, 380 U.S. 102, 111 (1965); *Travis v. United States*, 362 F.2d 477, 481 (9th Cir.), cert. denied, 385 U.S. 885 (1966); *United States v. Plemmons*, 336 F.2d 731, 734 (6th Cir. 1964); *United States ex rel. Crawley v. Rundle*, 312 F. Supp. 15, 18 (E.D. Pa. 1969); *People v. Tillman*, 238 Cal. App. 2d 134, 140, 47 Cal. Rptr. 614, 618 (1965); *State v. Howard*, 184 Neb. 274, 284-85, 167 N.W.2d 80, 87 (1969); *state v. Skinner*, —Ore.—, 483 P.2d 87, 89 (1971).

26. *McCreary v. Sigler*, 406 F.2d 1264, 1269 (8th Cir.), cert. denied, 395 U.S. 984 (1969); *People v. Griffen*, 250 Cal. App. 2d 545, 550-51, 58 Cal. Rptr. 707, 711 (1967); *State v. Skinner*, —Ore.—, 483 P.2d 87, 89 (1971).

27. *McCreary v. Sigler*, 406 F.2d 1264, 1269 (8th Cir.), cert. denied, 395 U.S. 984 (1969); *Coyne v. Watson*, 282 F. Supp. 235, 237 (S.D. Ohio 1967), aff'd, 392 F.2d 585 (6th Cir.), cert. denied, 393 U.S. 951 (1968); *People v. Lewis*, 240 Cal. App. 2d 546, 550, 49 Cal. Rptr. 579, 582 (1966); *Commonwealth v. Crawley*, 209 Pa. Super. 70, 79, 223 A.2d 885, 890 (1966), aff'd mem., 432 Pa. 622, 247 A.2d 226 (1968).

28. 403 U.S. at 583 (opinion of Burger, C.J.).

29. *Id.* at 594 (opinion of Harlan, J.).

30. *Id.* at 595.

31. *Id.* at 585 (opinion of Stewart, J.). For cases supporting the proposition that incriminating admissions tend to show reliability of the informer's statements, see *Commonwealth v. Stewart*, —Mass.—, 267 N.E.2d 213, 216 (1971); *Commonwealth v. Owens*, 350 Mass. 633, 635-36, 216 N.E.2d 411, 413 (1966); *Gaston v. State*, 440 S.W.2d 297 (Tex. Crim. App.), cert. denied, 396 U.S. 969 (1969); *Manley v. Commonwealth*, —Va.—, 176 S.E.2d 309, 313 (1970).

32. The informer may be of unknown reliability, *United States v. Woodson*, 303 F.2d 49, 50-51 (6th Cir. 1962), or even known as a "pathological liar," *United States v. Irby*, 304 F.2d 280, 282-83 (4th Cir.), cert. denied, 371 U.S. 830 (1962).

magistrate must be informed of "underlying circumstances" from which the affiant could conclude that the information is reliable. This is an alternate method for satisfying the second *Aguilar* requirement. This may be done by presenting corroborating facts which were arrived at by independent investigation or which are within the affiant's own knowledge. *Spinelli v. United States* is considered the leading case in this area.

Spinelli involved an affidavit which stated that the affiant had received a tip from an unnamed "reliable" informant that defendant Spinelli was accepting wagers through telephones with the numbers WY4-0029 and WY4-0136. In the affidavit the affiant also stated that the following facts were within his personal knowledge: (1) the FBI had followed Spinelli on four different occasions and had seen him enter a certain apartment; (2) by checking with the phone company, it had been discovered that the apartment contained telephones with numbers corresponding to the numbers given by the informant; and (3) Spinelli was known to the affiant as a "known gambler" and bookmaker. The Supreme Court, in a 5-3 decision, held the affidavit insufficient to support a finding of probable cause. Justice Harlan's majority opinion held the affidavit inadequate because (1) it failed to explain how the informant acquired his information, and (2) it failed to state why the informer should be considered trustworthy. Further the "corroborating facts" were said to be insufficient to establish the reliability of the tip. Harlan stated that having two phones did not necessarily suggest gambling and certainly visiting an apartment did not. Therefore, these allegations were accorded little weight. He found the incriminating allegation that Spinelli was a "known gambler" to be a "bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision."³³ In short, *Spinelli* followed the *Aguilar* two-pronged test.³⁴ Most importantly, however, in testing the sufficiency of the corroborating facts, Harlan analyzed each fact *individually* to see if there was *sufficient independent corroboration* of the informer's tip to justify a finding of probable cause.

How does *United States v. Harris* fit into this pattern of past case law? In *Harris*, it was not disputed that the first *Aguilar* requirement was met since the affidavit clearly revealed that the source of the informer's information was personal observation. Determining whether or not the second *Aguilar* requirement had been satisfied—that the magistrate be presented with facts sufficient to demonstrate that the informer or the information should be believed—provided the source of disagreement between the Justices. In the affidavit the only corroborating facts presented were that the affiant found the informer to be "prudent," and that Harris had a reputation and past record as a dealer in illicit whiskey. A majority of the Justices found there was sufficient evidence to support a finding of probable cause. Chief Justice Burger delivered the judgment of the Court—there being no majority opinion. Justice Harlan, who had delivered the opinion in *Spinelli*, dissented.

One exception to the requirement of showing the credibility of the informer is tax evasion cases. *Jaben v. United States*, 381 U.S. 214, 224 (1965).

33. 393 U.S. at 415-16.

34. *Id.* at 414.

After interpreting the word "prudent" to mean "truthful," Chief Justice Burger stated:

While a bare statement by an affiant that he believed the informant to be truthful would not, in itself, provide a *factual* basis for crediting the report of an unnamed informant, we conclude that the affidavit in the present case contains an ample factual basis for believing the informant which, when coupled with his own knowledge of the respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant.³⁵

Burger reaffirmed the *Aguilar* test as interpreted by *Spinelli*; but he disagreed with *Spinelli* insofar as it allowed no weight at all to be given to the reputation of the person against whom a warrant is sought. Burger stated that reputation alone is insufficient to support a finding of probable cause, but it is not irrelevant.³⁶ On this point, Burger cited *Jones v. United States*, which had said that the fact that defendant was a known user of narcotics made the statement that he had drugs in his apartment less "subject to scepticism."³⁷ He distinguished *Spinelli* from *Jones* by pointing out that, in *Spinelli*, there had been nothing offered to support the statement that *Spinelli* was a "known gambler," while in *Jones* the affidavit stated that in the past *Jones* had admitted to being a drug user and had displayed needle marks. Burger gave weight to *Harris*' reputation because the *Harris* affidavit included the statements that in the past four years whiskey has been seized from defendant and that affiant had received information from numerous unidentified sources concerning defendant's illicit whiskey activities. In effect, Burger said that if an affidavit based on information supplied by an informer merely states either (1) that the informant is "prudent" or "truthful," or (2) that the person against whom the warrant is sought has a reputation consistent with the informer's statement, the affidavit is insufficient to support a finding of probable cause; but these two factors combined will support a finding of probable cause. Burger apparently gives the most weight to reputation.

Justices Stewart and White joined with the judgment of the Court without any helpful explanation.³⁸ Justice Black agreed with Burger's manner of distinguishing *Harris* from *Spinelli*.³⁹ Black thought *Spinelli* should be overruled since, as he wrote in his dissent in *Spinelli*, he felt that *Aguilar* and *Spinelli* taken together required something akin to a "beyond a reasonable doubt" test to be applied to determine whether a warrant should issue.⁴⁰ Justice Blackmun joined in Burger's opinion, pointing out, in addition, that he felt *Spinelli* was wrongly decided since, in his opinion, there had been sufficient evidence to support a finding of probable cause.⁴¹

In his dissenting opinion, Justice Harlan found nothing in the *Harris* affidavit that could enable the magistrate to independently determine that

35. 403 U.S. at 579-80 (opinion of Burger, C.J.).

36. *Id.* at 582.

37. *Id.* at 581.

38. *Id.* at 585 (opinion of Stewart, J.).

39. *Id.* (opinion of Black, J.).

40. 393 U.S. at 429, 431.

41. 403 U.S. at 585 (opinion of Blackmun, J.).

the informant or his information should be considered truthful. Unlike Burger, Harlan very carefully analyzed the two prongs of *Aguilar*, stressing that the mere fact the informer claims first hand knowledge does not negate the possibility that he lied.⁴² Harlan accorded little or no weight to the affiant's statement that the informer was "prudent." He said that it places no burden on law enforcement organizations to require the affiant to state why he found the informant to be prudent.⁴³ As to the weight to be afforded to Harris' reputation, Harlan stated that the fact that whiskey was seized sometime in the last four years from an abandoned house under Harris' control hardly distinguished this situation from *Spinelli* in any purposeful way.⁴⁴ He said that the conviction for bootlegging certainly could not elevate an otherwise unilluminated anonymous tip suggesting similar activities, four years later, to probable cause for a search. Harlan also stated that the assertion that the affiant had received information from numerous persons as to Harris' activities was no different than asserting that Spinelli was a "known gambler,"⁴⁵ since such assertions were mere "affirmance of belief or suspicion" and offer nothing upon which the magistrate could independently make a finding of probable cause.⁴⁶ Harlan agreed with Burger's statement that reputation standing alone is insufficient,⁴⁷ but challenged Burger's analysis, arguing that

only the respondent's reputation has been seriously invoked to establish the credibility of the informant, an element of probable cause entirely severable from the requirement that the confidant's source be reliable.⁴⁸

In conclusion, Chief Justice Burger's opinion in *Harris* would seem to allow a less demanding standard for determining the reliability of an informant's tip when the tip is corroborated by facts within the affiant's own knowledge. In a careful opinion, Harlan argued that the approval of the Harris affidavit completely ignored the second *Aguilar* requirement. Harlan's methodical approach for examining and weighing each corroborating fact in determining if a finding of probable cause is justified certainly seems to offer more predictability than Burger's less definite approach. The Burger approach may leave the magistrate uncertain as to the weight to be given a particular fact. On the other hand, although Harlan's approach enhances predictability, in practice perhaps it would occasionally lead to the invalidation of a search warrant based on otherwise sufficient underlying circumstances which were not fully presented due to the inadvertance of the affiant or magistrate. Although there is no majority opinion in *Harris*, the mere approval of this affidavit definitely indicates, as Harlan alleged, a trend among the Justices to weaken the spirit of *Spinelli*.

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42. *Id.* at 592 (opinion of Harlan, J.).

43. *Id.* at 599-600.

44. *Id.* at 596.

45. *Id.* at 596-97.

46. *Id.* at 597.

47. *Id.*

48. *Id.*

EVIDENCE—UNLAWFUL SEARCH AND SEIZURE BY A PRIVATE INDIVIDUAL

*State v. Brecht*¹

On May 18, 1967, Robert Brecht was charged with murder in the first degree for the shooting death of his wife, Mary Ann. A material witness for the prosecution was the sister of the deceased, Sandra Brumfield. Sandra testified that the defendant phoned her mother's house, where both she and Mary Ann were staying. Sandra answered the phone, recognized Brecht's voice, and called to Mary Ann to answer. She then went into another room, picked up the extension phone, and listened in on the conversation. She heard Brecht threaten her sister as follows: "I got my shotgun out of hock, I am coming down and I will use it if I have to."² This phone conversation was admitted into evidence in the trial court. The jury returned a verdict of murder in the second degree and Brecht received a 30-year prison term.

In a post-conviction relief proceeding, the defendant contended the admission of Sandra's testimony concerning the threat was prejudicial and reversible error. The Supreme Court of Montana held: (1) that the admission of this testimony violated the defendant's fourth and fourteenth amendment right to privacy against unreasonable searches and seizures; (2) that it also violated his same rights under the Montana Constitution; and (3) that the evidence obtained by the unreasonable invasion was therefore inadmissible under the Montana exclusionary rule.³ The case was reversed and remanded for a new trial excluding the testimony of the overheard conversation.

The *Brecht* decision marks a significant departure from the general rule of admissibility of evidence obtained in a search and seizure by a private individual, and in the application of the fourth amendment exclusionary rule.⁴

Under the common law rule, the admissibility of evidence was not affected by the means through which it was obtained, regardless of whether it was procured by a government agent or a private person.⁵ This common law rule has been changed to a very large extent since the turn of the century, with the advent of the exclusionary rule. The rule had its origin in 1914, when the Supreme Court held that evidence obtained in an unlawful search and seizure by federal officers must be excluded in federal criminal trials.⁶ Later, in 1960, the Supreme Court extended this rule to include unreasonable searches and seizures conducted by state agents.⁷

1. —Mont.—, 485 P.2d 47 (1971).

2. *Id.* at—, 485 P.2d at 50.

3. *Id.* Although the decision turned upon the error in admitting Sandra Brumfield's testimony, the court also dealt with a problem concerning the *Miranda* warning to prevent error on retrial. The discussion of this issue is beyond the scope of this note.

4. See 29 AM. JUR. 2D *Evidence* § 417 (1967); 79 C.J.S. *Search and Seizures* § 5 (c) (1952).

5. 29 AM. JUR. 2D *Evidence* § 408 (1967).

6. *Weeks v. United States*, 232 U.S. 383 (1914).

7. *Elkins v. United States*, 364 U.S. 206 (1960).

Finally, in 1961, the exclusionary rule was imposed on state courts in cases where evidence was unlawfully seized by state agents.⁸

While this great change was taking place in the area of admissibility of evidence obtained in illegal searches conducted by governmental agents, the common law rule concerning illegal searches by private individuals has remained unchanged since 1921, when the Supreme Court decided *Burdeau v. McDowell*.⁹ The *Burdeau* case involved private investigators who broke into a defendant's office, blew open his safe door, and took incriminating papers. The papers were subsequently used as evidence in a criminal trial for fraudulent use of the mails. The Supreme Court affirmed the admission of the papers into evidence, stating that the fourth amendment applied only to sovereign authority and did not restrain unlawful conduct by private individuals.¹⁰ The holding of this case has continued to be the ruling precedent up to the present day.

The most common area where the courts have admitted evidence obtained by private individuals during illegal searches is when the evidence was discovered accidentally by a person not involved in any police investigation. Accidentally found evidence can come up in a number of different ways. For example, in *Duran v. United States*¹¹ a motel room maid cleaning up a room for a new guest found several ounces of heroin, which was later used as evidence in a prosecution for receiving and concealing heroin. Similarly, marijuana discovered in an automobile by a parking lot attendant was used to convict a defendant for possession in *State v. Bryan*.¹² Missouri upheld the admission of evidence obtained in this manner in *State v. Brown*,¹³ where a landlord entered a tenant's apartment and accidentally found parts from stolen cars.

The admissibility of accidentally found evidence is easy to justify. The people who discover the evidence are working at their job and have no motive in trying to incriminate the defendant. As stated in *Elkins v. United States*,¹⁴ "the [exclusionary] rule is calculated to prevent not to repair. Its purpose is to deter. . . ."¹⁵ When dealing with an accidental discovery this deterrent effect is not applicable.

Evidence discovered by private individuals who are actually trying to uncover incriminating evidence has also been held admissible in the majority of jurisdictions. A large number of these cases involve a situation where the searcher is the victim of a crime and is trying to retrieve stolen goods or find the person responsible. Thus, evidence obtained by an employer who searched his employee's car because he was suspected of stealing,¹⁶ and evidence uncovered by a store owner while searching a suspected burglar's car,¹⁷ has been held to be admissible.

8. *Mapp v. Ohio*, 367 U.S. 643 (1961).

9. 256 U.S. 465 (1921).

10. *Id.* at 475.

11. 413 F.2d 596 (9th Cir.), cert. denied, 396 U.S. 917 (1969).

12. 1 Ore. App. 15, 457 P.2d 661 (1969).

13. 391 S.W.2d 903 (Mo. 1965).

14. 364 U.S. 206 (1960).

15. *Id.* at 217.

16. *People v. Johnson*, 153 Cal. App. 2d 870, 315 P.2d 468 (1957).

17. *Colburn v. State*, 175 Miss. 704, 166 So. 920 (1936).

Missouri again follows the majority view and allows evidence discovered in this manner to be used in criminal actions. In *State v. Overby*,¹⁸ evidence obtained from citizens who had made a citizens' arrest was tested as to its admissibility. The Supreme Court of Missouri held that federal and Missouri constitutional protections against unreasonable searches and seizures apply to governmental action only and allowed the evidence to be used.¹⁹

Although most courts admit evidence obtained by private individuals, the exclusionary rule is strictly applied when any kind of governmental assistance is used. It is often very easy for the courts to find such assistance. Examples would be when a federal agent directs an airline employee to open a package in his control,²⁰ or when a detective accompanies a landlady to search a room, directing her where to search.²¹

A much more difficult situation arises when there is very little direct police activity. In *Thacker v. Commonwealth*,²² the police appealed to the citizens of a community to help find a murder suspect. The suspect was found and, pursuant to a citizens' arrest, the man was searched and a pistol was found. The appellate court reversed his conviction for carrying a concealed weapon, stating that the citizens making the arrest were acting for and on behalf of the sovereignty.²³ The search and seizure provisions of the constitution have also been applied when the searcher was paid directly by the police or a government agent.²⁴

The Missouri courts have been similarly strict in enforcing the exclusionary rule when the search was tainted by governmental activity. In a recent supreme court decision the court ruled that a city marshal, outside his jurisdiction, was not a private citizen but was either acting in his official capacity or acting under a *posse comitatus*. Evidence illegally obtained by him was excluded.²⁵

Following this trend in the case law, it is possible that any time the police warn the public concerning a crime which has been committed, or put up a wanted poster offering money for information, the state is actually making the public its agent and thus evidence illegally obtained through private help will be excluded.

Searches conducted by private investigators are not easily classified as either public or private. On one hand, the admission of evidence obtained illegally by private investigators is hard to justify as an exception to the exclusionary rule. The investigator is paid to search for incriminating evidence, and his work may involve searches to find evidence which can later be used in a criminal prosecution. On the other hand, the investigator is normally acting not on behalf of the state but at the request and under

18. 432 S.W.2d 277 (Mo. 1968).

19. *Id.* at 279. See also *State v. Hepperman*, 349 Mo. 681, 162 S.W.2d 878 (1942), where the court said that the constitutional restraint applies only to government action.

20. *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966).

21. *People v. Fierro*, 236 Cal. App. 2d 344, 46 Cal. Rptr. 132 (1965).

22. 310 Ky. 702, 221 S.W.2d 682 (1949).

23. *Id.* at 704, 221 S.W.2d at 683.

24. In *Hajdu v. State*, 189 So. 2d 230 (Fla. Ct. App. 1966), a search by a private detective, paid by the State Board of Medical Examiners, was held unreasonable and the evidence obtained held inadmissible.

25. *State v. Goodman*, 449 S.W.2d 656 (Mo. 1970).

the direction of a private party. Here again the courts have consistently followed the *Burdeau* decision and held evidence illegally obtained by private individuals such as insurance investigators,²⁶ store detectives,²⁷ and security guards²⁸ to be admissible.

In *State v. Brecht* the Montana Supreme Court, instead of finding the evidence obtained by Sandra admissible under the rules just discussed, held the use of her testimony to be reversible error. In reaching this conclusion the Montana court cited the Supreme Court decision of *Katz v. United States*²⁹ as establishing the principle that the search and seizure provision of the fourth amendment protects persons and their right to privacy.³⁰ The court reasoned that Sandra's listening in on the phone extension was a violation of Brecht's right to privacy, a constitutional right, which, when broken, evoked the exclusionary rule. The court said that to hold otherwise would create a "fictional distinction" between classes of citizens: those who are bound to respect the Constitution and those who are not.³¹

The state acknowledged the defendant's right to privacy but contended that he was protected only against violations by law enforcement officers and not violations by private citizens. As the Supreme Court stated in the *Burdeau* case:

The Fourth Amendment gives protection against unlawful searches and seizures. . . . Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. . . .³²

A careful reading of the *Katz* decision does reveal a warning about the constitutional right to privacy. But the Court stated that the fourth amendment cannot be translated into a general right to privacy but only privacy from governmental intrusions, and that the general right to privacy is left to the laws of the state.³³

26. *E.g.*, *State v. Hughes*, 8 Ariz. App. 366, 446 P.2d 472, *cert. denied*, 395 U.S. 940 (1968).

27. *E.g.*, *People v. Randazzo*, 220 Cal. App. 2d 768, 386 P.2d 671, 34 Cal. Rptr. 65, *cert. denied*, 377 U.S. 1000 (1963).

28. *E.g.*, *People v. Trimarco*, 41 Misc. 2d 775, 245 N.Y.S.2d 795 (Sup. Ct. 1963).

29. 389 U.S. 347 (1967).

30. *See id.* at 350-51.

31. —Mont.—, 485 P.2d at 50-51. The majority opinion also stated that a fourth amendment violation offended fifth amendment guarantees against self-incrimination. *Katz* and *Davis v. United States*, 328 U.S. 582 (1946), were cited in support of this proposition. Although no mention of this could be found in *Katz*, the Court in *Davis* stated:

The law of search and seizures as revealed in the decisions of this Court is the product of the interplay of these two constitutional provisions. It reflects a dual purpose—protection of the privacy of the individual, his right to be let alone; protection of the individual against compulsory production of evidence to be used against him.

Davis v. United States, *supra* at 587 (citations omitted). However, here again the Supreme Court was dealing with actions taken by federal agents and made no mention of searches conducted by private individuals.

32. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

33. *Katz v. United States*, 389 U.S. 347, 350-51 (1967).

From the preceding discussion it can be seen that the rule of admissibility of evidence obtained from illegal searches by private individuals is firmly embedded in the case law. The Supreme Court has not changed its position since 1921, and has continually denied certiorari when confronted with similar fact situations.³⁴ It has been argued that the *Burdeau* decision has been greatly weakened or overruled by *Elkins v. United States*, but this argument has not found favor in the courts.³⁵ Additionally, some writers have argued that the exclusionary rule could be applied to the private search area through extension of the fourteenth amendment "state action" theory.³⁶ This argument is based on *Shelly v. Kraemer*,³⁷ which held the enforcement by state courts of racially discriminatory restrictive covenants made between private parties to be an unlawful extension of state action. The theory is that the admission of unconstitutionally seized evidence in a state court is also an unlawful extension of state action under the *Shelly* rationale.³⁸ However, as one writer has pointed out, *Shelly* can be distinguished from a private search and seizure case because the court is not forcing a private party to do an act which the state could not constitutionally perform itself; rather, it is only allowing illegally seized information into evidence.³⁹ In light of this distinction, and the firm establishment of the *Burdeau* precedent, it seems unlikely that the Montana Supreme Court decision in *Brecht*—that the fourth amendment exclusionary rule is applicable to private searches—will be followed in the future in other jurisdictions.

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34. See e.g., *Duran v. United States*, 413 F.2d 596 (9th Cir.), cert. denied, 396 U.S. 917 (1969); *Commonwealth v. Gordon*, 431 Pa. 512, 246 A.2d 325, cert. denied, 394 U.S. 937 (1968).

35. See *United States v. Goldberg*, 330 F.2d 30 (3d Cir.), cert. denied, 377 U.S. 953 (1964), and the text accompanying notes 14-15 *supra*. See also *United States v. McGuire*, 381 F.2d 306 (2d Cir.), cert. denied, 389 U.S. 1053 (1967).

36. See 46 MINN. L. REV. 1119 (1962); see also 19 DRAKE L. REV. 476 (1970).

37. 334 U.S. 1 (1948).

38. 46 MINN. L. REV. 1119, 1124 (1962).

39. *Id.* at 1125.

PRISONS—ESCAPE—NECESSITY AS A DEFENSE

*State v. Green*¹

While serving a three year sentence for burglary, John Charles Green escaped from the Missouri Training Center for Men at Moberly. Green was charged with the offense of escape from a state institution.² By agreement of the parties, defendant made an offer of proof in which he asserted the defense of justifiable escape because of (1) unconstitutional conditions of confinement, and (2) necessity to escape so as to avoid death or serious bodily injury.

Defendant offered to prove that shortly after becoming an inmate at the training center he was attacked and homosexually raped in his cell at night by two inmates who picked the lock to his cell door. Immediately thereafter defendant feigned suicide by injuring himself and was taken to the prison hospital where he reported the assault and requested protection. The Assistant Superintendent of Treatment admonished the defendant to return and defend himself. Upon release, defendant was returned to the same cell. Two weeks later three inmates entered defendant's cell, knocked him unconscious and raped him. Upon regaining consciousness defendant again feigned suicide in order to contact prison officials. This time he was taken before the disciplinary board for attempted self-destruction. He informed the board of the assaults, again requested protection, and was given a cell change. One of the board members, the Assistant Superintendent of Custody, told defendant that the alternatives were to defend himself, submit to the assaults or "go over the fence."

Three months later, during the noon hour on the day of the escape, four or five inmates told defendant they would return to his cell that night to make him a "punk" (a person who plays the female role in homosexual relations) for the remainder of his term at the training center. The inmates threatened to kill or seriously injure defendant if he refused to submit. That evening defendant escaped from the training center. During the three month period between the second assault and the day of the escape, defendant's only other homosexual encounter was a propositioning by a training center guard.

At the conclusion of the offer of proof the trial court ruled that the evidence did not constitute a defense, whereupon defendant waived a jury and was tried and convicted by the court. On appeal, the Missouri Supreme Court affirmed.³

When used as a defense to criminal prosecution, necessity is closely related to two other types of compulsion: coercion and duress. Although both courts and writers often avoid definitions or define these defenses in terms of their requirements, limitations or results, it is possible to extract from the case law and writings some generally accepted definitions.

Traditionally, necessity in the criminal law was said to be compulsion exerted by physical (or natural), as opposed to human forces. Under this definition a state of necessity resulted from an Act of God or unavoidable

1. 470 S.W.2d 565 (Mo. En Banc 1971).

2. See generally § 557.351, RSMo 1969.

3. 470 S.W.2d at 565.

accident accompanied by circumstances compelling the actor to do an unlawful act.⁴ According to Professor Hall, "[T]he harm, to be justified, must have been committed under pressure of physical forces."⁵ Thus, the early cases dealt mainly with emergencies at sea. The two leading cases are *United States v. Holmes*⁶ and *Regina v. Dudley*,⁷ both involving crimes committed by victims of shipwrecks.

Coercion was originally the term used to describe the presumed compulsion of a married woman who committed a crime in the presence of her husband.⁸ Today, however, this "has become little more than a vestige of the medieval conception of marriage,"⁹ and the term coercion is no longer limited to such a narrow scope of application. A more modern definition states that coercion "means 'compulsion,' forcible constraint; the act of compelling by force or arms."¹⁰

Duress has been similarly defined, as "unlawful constraint exercised upon a man whereby he is forced to do some act that he otherwise would not have done."¹¹ Although duress and coercion have been distinguished,¹² the two terms are generally used synonymously, and most writers use one or the other term as encompassing both.¹³

Analysis of this area of law is difficult because of the confused treatment of these defenses in both the case law and in writings on the subject.¹⁴

4. Hershey & Avins, *Compulsion as a Defense to Criminal Prosecution*, 11 OKLA. L. REV. 283 (1958).

5. J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 426 (2d ed. 1960).

6. 26 F. Cas. 360 (No. 15383) (C.C.E.D. Pa. 1842) (recognized necessity to jettison passengers in lifeboat after shipwreck, provided a fair method of selection used).

7. 14 Q.B.D. 273 (1884) (shipwreck victims found guilty of killing a passenger in lifeboat for food even though all passengers in lifeboat would otherwise have died before being rescued).

8. Perkins, *The Doctrine of Coercion*, 19 IOWA L. REV. 507 (1934); Annot., 71 A.L.R. 1116 (1931), 4 A.L.R. 266 (1919).

9. J. HALL, *supra* note 5, at 437.

10. Fluharty v. Fluharty, 38 Del. 487, 490, 193 A. 838, 839 (Super. Ct. 1937).

11. BLACK'S LAW DICTIONARY 594 (rev. 4th ed. 1968).

12. In *McKenzie-Hague Co. v. Carbide & Carbon Chem. Co.*, 73 F.2d 78 (8th Cir. 1934) it was stated:

The words "coercion" and "duress" are not synonymous, although their meanings often shade into one another. "Duress" generally carries the idea of compulsion, either by means of actual physical force or threatened physical force applied to the person (or to some near relative of the person) to be influenced, or applied to the property or reputation of such person. "Coercion" may include a compulsion brought about by moral force or in some other manner, with or without physical force. *Id.* at 82-83.

A similar distinction, indicating that coercion is broader than duress was made in *Fluharty v. Fluharty*, 38 Del. 487, 491, 193 A. 838, 840 (Super. Ct. 1937). Another court stated that "the word 'duress' as employed in civil law, is not synonymous with the term 'coercion' as employed in the criminal law." *Montford v. State*, 144 Ga. 582, 585, 87 S.E. 797, 798 (1961). See also J. HALL, *supra* note 5, at 437. Still another distinction often made is that duress is limited to situations where one is asked (forced) to commit the crime charged. See, e.g., *People v. Richards*, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969).

13. 1 W. BURDICK, *LAW OF CRIME* 260 (1946); R. PERKINS, *CRIMINAL LAW* 951 (2d ed. 1969); 1 F. WHARTON, *WHARTON'S CRIMINAL LAW AND PROCEDURE* 261 (1957); G. WILLIAMS, *CRIMINAL LAW* 751 (2d ed. 1961).

14. J. HALL, *supra* note 5, at 416.

This confusion may be primarily attributed to (1) the fact that all three defenses are generally agreed to have certain common requirements, resulting in frequent interchangeable use of the three terms, and (2) disagreement as to the requirements and limitations of a particular defense. In other words, certain requirements are generally thought to be applicable to any of the defenses, and at the same time there is disagreement over requirements when speaking of any one of the particular defenses.

A limitation often stated to be applicable to all the defenses in question is that none will excuse the taking of an innocent life.¹⁵ Some courts extend this exemption to capital crimes in general.¹⁶ Another requirement shared by all the defenses is that the danger sought to be avoided be present, imminent and impending; in other words, a threat of future harm will not excuse.¹⁷ Further, it is also generally required that one exhaust all alternatives. That is, the compulsion must be of such a nature as to leave one with no reasonable opportunity to avoid doing the unlawful act.¹⁸

As an example of the disagreement over requirements for a particular defense, most definitions of necessity speak not in terms of fear of death or serious bodily harm, but rather require that the harm or evil sought to be avoided by such conduct be greater than that sought to be prevented by the law defining the offense charged.¹⁹ The actor is simply required to choose the lesser of evils,²⁰ regardless of what the evils are. The courts, however, have not consistently applied a choice of evils test for necessity, and have sometimes required fear of death or serious bodily harm, particularly in the older cases.²¹ Furthermore, the requirement has not been strictly adhered to in cases of coercion or duress.²² A probable reason for this is that a necessary corollary to this requirement would be that a threat to one's property would never excuse;²³ it seems unlikely that any court would re-

15. *United States v. Holmes*, 26 F. Cas. 360 (No. 15383) (C.C.E.D. Pa. 1842); *R. PERKINS*, *supra* note 13, at 957; *Hershey & Avins*, *supra* note 4; Annot., 40 A.L.R.2d 908 (1955). However, it was stated in *Holmes* that necessity would even justify taking an innocent life if a fair method of selection (e.g., casting lots) was used to determine those who should die in a shipwreck situation.

16. *See, e.g.*, *State v. Dowell*, 106 N.C. 722, 726, 11 S.E. 525, 526 (1890).

17. *People v. Richards*, 269 Cal. App. 2d 768, 778, 75 Cal. Rptr. 597, 604 (1969); *Hall v. State*, 136 Fla. 644, 684, 187 So. 392, 409 (1939); *State v. St. Clair*, 262 S.W.2d 25, 27-28 (Mo. 1953); *State v. Davis*, 14 Nev. 439, 33 Am. R. 563 (1880); 1 W. BURDICK, *supra* note 13, at 262; 1 F. WHARTON, *supra* note 13, at 263; G. WILLIAMS, *supra* note 13, at 729.

18. *Dempsey v. United States*, 283 F.2d 934 (5th Cir. 1960); *R. I. Recreation Center v. Aetna Cas. & Sur. Co.*, 177 F.2d 603, 605 (1st Cir. 1949); *State v. St. Clair*, 262 S.W.2d 25, 27-28 (Mo. 1953); *R. PERKINS*, *supra* note 13, at 954; 1 F. WHARTON, *supra* note 13 at 263-64, 403-04; Annot., 40 A.L.R.2d 908, 911 (1955).

19. *People v. Richards*, 269 Cal. App. 2d 768, 777, 75 Cal. Rptr. 597, 604 (1969); *Chesapeake & O. Ry. v. Commonwealth*, 119 Ky. 519, 527, 84 S.W. 566, 568 (1905); J. HALL, *supra* note 5, at 426.

20. *See* MODEL PENAL CODE § 3.02 (Prop. Off. Draft, 1962).

21. 1 W. BURDICK, *supra* note 13, at 262.

22. *See Perryman v. State*, 63 Ga. App. 819, 12 S.E.2d 388 (1940). In *Perryman* a young boy was held to be acting under duress when he submitted to sodomy as a result of threats by an older man to slap the boy every time he saw him.

23. 1 W. BURDICK, *supra* note 13, at 262-63; *R. PERKINS*, *supra* note 13, at 954; 1 F. WHARTON, *supra* note 13, at 263.

quire danger of death or serious bodily harm in *all* cases,²⁴ but rather would decide the applicability of the defense based on the facts of a particular case. This results in applying a "choice of evils" test for coercion and duress, as in necessity. In other words, courts have sometimes, but not always, required fear of death or serious bodily harm for all three defenses. Thus, there is functionally little difference among necessity and coercion or duress, because the courts have failed to consistently impose the same requirements on each particular defense. Indeed, the court in *Green*, in dealing with *necessity*, resolved the issue against the defendant by reference to a case stating the requirements for *coercion*,²⁵ indicating the Missouri Supreme Court considers the terms to be at least functionally synonymous.

It should be apparent that it is often difficult to analyze a particular case which characterizes a defense in terms of one of these three types of compulsion. A better approach, it is submitted, would be similar to that embodied in the Model Penal Code, which provides affirmative defenses for duress (encompassing coercion), and justification generally (necessity). Both apply a choice of evils test.²⁶ Neither of these defenses requires a fear of death or serious bodily harm,²⁷ nor are capital crimes excluded.²⁸ Rather, they are defenses of general validity. Although the duress defense requires the threat to be to the person of the actor or another, and specifically disallows the defense where the threat is merely to property or reputation,²⁹ such a case comes within the defense of justification generally.³⁰ The defense of justification generally also resolves the "imminent and impending" problem, by excusing only "conduct which the actor believes to be necessary to avoid an evil to himself or to another . . ."³¹ The immediacy of a situation is simply a factor in determining the genuineness of the actor's belief in the necessity of his conduct.³² Similarly, the duress defense makes the imminency of the danger merely a factor to be considered, among others.³³

In spite of the recognized existence of the defenses of necessity³⁴ and

24. Perkins contends that this requirement is merely dicta in the decided cases, and states: "No case has ever decided that the threat to burn a man's house down would not be recognized as an excuse for what otherwise would be petit larceny, or a mild battery." R. PERKINS, *supra* note 13, at 960.

25. State v. St. Clair, 262 S.W.2d 25 (Mo. 1953).

26. MODEL PENAL CODE §§ 2.09, 3.02 (Prop. Off. Draft, 1962).

27. MODEL PENAL CODE § 2.09, comment at 7 (Tent. Draft No. 10, 1960); § 3.02, comment at 7 (Tent. Draft No. 8, 1958).

28. MODEL PENAL CODE § 2.09, comment at 8 (Tent. Draft No. 10, 1960); § 3.02, comment at 7 (Tent. Draft No. 8, 1958).

29. MODEL PENAL CODE § 2.09, comment at 7 (Tent. Draft No. 10, 1960).

30. MODEL PENAL CODE § 3.02, comment at 9 (Tent. Draft No. 8, 1958).

31. *Id.* § 3.02 (emphasis added).

32. *Id.* § 3.02, comment at 10.

33. MODEL PENAL CODE § 2.09, comment at 8 (Tent. Draft No. 10, 1960).

34. See United States v. Holmes, 26 F. Cas. 360 (No. 15383) (C.C.E.D. Pa. 1842), which recognized the necessity to jettison a ship's passengers, if done fairly, and State v. Jackson, 71 N.H. 552, 53 A. 1021 (1902), which recognized the necessity to keep a sick child home from school without the school board's advance permission. See also 1 W. BURDICK, *supra* note 13, at 262.

coercion or duress,³⁵ there are relatively few cases on coercion or duress, and even fewer cases dealing with necessity. Necessity, particularly, is allowed only in clear cases.³⁶ In Missouri, prior to *Green*, there were apparently no cases dealing with necessity and the first reported Missouri case on coercion or duress was decided in 1953.³⁷ One likely reason for this paucity of cases may be prosecutorial discretion. It may be that prosecutors often simply do not prosecute in cases where the defenses in question would be appropriate. Further, it is not known how often these defenses are successfully invoked at the trial level and subsequently not appealed or reported.³⁸ Some writers, however, attribute the lack of cases to judicial suspicion and hostility with regard to these defenses.³⁹

Reluctance to allow these defenses is nowhere stronger than in cases involving escape from prison. Some cases have recognized the defense of necessity as applicable to escape from prison, but there are apparently no reported cases where such a defense has been successful. For example, the court in *State v. Palmer*⁴⁰ recognized the defense in dictum when it stated:

Should a prison catch fire or a live steam pipe burst in a block of cells, a prisoner would be obviously justified in effecting an escape to save his life; and if he then promptly surrendered as soon as he was free of his immediate danger, as would be his duty, it would be inconceivable that he would thereafter be prosecuted for the technical escape.⁴¹

But, in *Dempsey v. United States*,⁴² defendant, a diabetic, claimed his escape was justified because he was in immediate need of insulin. His conviction was affirmed because the defendant had neither informed the prison authorities of his condition nor made a request for relief.⁴³ Similarly, the court in *State v. Davis*⁴⁴ affirmed the escape conviction of a defendant who claimed justification because of the unwholesome conditions of the jail in

35. See *R. I. Recreation Center v. Aetna Cas. & Sur. Co.*, 177 F.2d 603 (1st Cir. 1949); *State v. St. Clair*, 262 S.W.2d 25 (Mo. 1953); 1 F. WHARTON, *supra* note 13, at 261.

36. 1 W. BURDICK, *supra* note 13, at 262.

37. *State v. St. Clair*, 262 S.W.2d 25 (Mo. 1953).

38. Cf. the unreported case of *State v. Wootten*, discussed in Note, *The Law of Necessity as Applied in the Bisbee Deportation Case*, 3 ARIZ. L. REV. 264 (1961).

39. J. HALL, *supra* note 5, at 443-44. In the trial judge's ruling on an offer of proof in the unreported case of *State v. Wootten* it was stated:

The cases are and must be rare and conditions exceptional in which such a rule may be invoked. . . . Naturally the first impression the mind entertains is that such a defense is rather a desperate attempt to escape the consequences of criminal conduct than a bona fide excuse for such conduct.

21 COLUM. L. REV. 71, 73 n.19 (1921).

40. 45 Del. 308, 72 A.2d 442 (1950).

41. *Id.* at 311, 72 A.2d at 444.

42. 283 F.2d 934 (5th Cir. 1960).

43. It is questionable whether the court in *Dempsey* in fact recognized necessity as a defense to prison escape. The court stated:

Even if we were to assume, contrary to the well established general rule . . . that intolerable conditions endangering the safety or life of an inmate would be a defense . . . we are convinced that no such showing was here made. . . . *Id.* at 934.

44. 14 Nev. 439, 33 Am. R. 563 (1880).

which he was confined. The court in *Davis* recognized necessity as a defense to escape but held that it could excuse only when the prisoner first had exhausted all lawful methods of obtaining relief.⁴⁵ Thus, the defendant in *Green* proceeded with the defense of necessity on extremely meager authority.

As a general proposition unwholesome, intolerable, or even unconstitutional conditions of confinement will not justify escape from prison.⁴⁶ Although many earlier cases held that escape was justified where the proceedings leading to confinement were illegal,⁴⁷ the trend in recent years appears to be that even illegal confinement resulting from irregular proceedings is no excuse for escape where the imprisonment is under color of law.⁴⁸ In addition, there are recent cases involving factual situations very similar to that in *Green* in which the defense of necessity was rejected. *People v. Noble*⁴⁹ held that it was no defense that the defendant escaped from a prison work farm to avoid homosexual attacks by other prisoners. The court in *Noble* flatly rejected the defense, apparently for policy reasons, and stated that:

The problem of homosexuality in the prisons is serious and perplexing. . . . However, the answer to the problem is not the judicial sanctioning of escapes. . . . The solution must rather come from some kind of penological reform.⁵⁰

*People v. Richards*⁵¹ disallowed a defense of coercion and duress where defendant claimed he was threatened with death unless he submitted to homosexual acts. In *Richards*, as in *Green*, defendant's attempts to obtain help from the prison staff had resulted in advice to "grow up and fight back."⁵²

45. The court stated:

A person confined by the law should be delivered by the law; and no other means can be justified in any case until the officers in charge, and the law, refuse him relief. . . . *Id.* at 444, 33 Am. R. at 564-65.

46. *State v. Rentschler*, 444 S.W.2d 453 (Mo. 1969); *State v. Hart*, 411 S.W.2d 143 (Mo. 1967); *State v. Pace*, 402 S.W.2d 351 (Mo. 1966); *State v. King*, 372 S.W.2d 857 (Mo. 1963); *State v. Palmer*, 45 Del. 308, 72 A.2d 442 (1950).

47. Annot., 70 A.L.R.2d 1433-34 (1960).

48. *Bayless v. United States*, 141 F.2d 578 (9th Cir.), *cert denied*, 322 U.S. 748 (1944); *Aderhold v. Soileau*, 67 F.2d 259 (5th Cir. 1933); *State v. Cronney*, 425 S.W. 65 (Mo. 1968); *State v. Hart*, 411 S.W.2d 143 (Mo. 1967).

49. 18 Mich. App. 300, 170 N.W.2d 916 (1969).

50. *Id.* at 303, 170 N.W.2d at 918.

51. 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969).

52. *Id.* at 771 n.4, 75 Cal. Rptr. at 600 n.4. The value of this case as precedent is clouded by the fact that a statute was involved. The *Richards* court distinguished between necessity and duress, and stated that only duress, as embodied in the penal code, was a defense in California. *Id.* at 773, 75 Cal. Rptr. at 601. The California Penal Code deals with lack of capacity to commit a crime when a person acts "under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused" CAL. PENAL CODE § 26 (8) (West 1969) (emphasis added). The court in *Richards* held that the defendant failed to meet this statutory test because (1) the coercion was not aimed at getting defendant to escape, but to commit sodomy, and (2) because the statute required a fear of death, which defendant could have avoided by submitting to sodomy. 269 Cal. App. 2d at 773-74, 75 Cal. Rptr. at 601-02. The court went on, however, and said that even if the common law defense of necessity were

It seems clear that the decisions in these cases are based heavily on public policy grounds. On one hand it has been argued that public policy requires that any defendant be allowed to present a defense of necessity or coercion to a jury. It has been said that

[n]o one ought to be punished for committing a crime under the unlawful compulsion of another, unless it would be better for society had the accused resisted the compulsion, in spite of the possible consequences to himself, rather than commit the crime.⁵³

Hall argues the "inutility of punishment for action under extreme necessity or compulsion. Thus it is asked, how can the fear of future legal punishment equal that of imminent death?"⁵⁴ Should the fear of *possible* future punishment for escape have been expected to deter Green from escaping in the face of possible death if he resisted, or serious bodily harm (rape) if he submitted? These are obviously difficult questions.

On the other side of the public policy question is the argument that prison administration is difficult under normal conditions, and would become virtually impossible if each prisoner were allowed to determine for himself the legality of his confinement. Prisoners are expected to use accepted methods for gaining freedom or obtaining relief from intolerable conditions. Prison breaks are extremely disruptive of prison discipline and routine.⁵⁵ In addition, there is the substantial danger of injury to guards, policemen and those private citizens who may come in contact with a desperate escapee.⁵⁶ Fear that such a defense, if allowed in escape cases, might be abused was a concern in *People v. Noble*, where the court expressed the belief that it was "easy to visualize a rash of escapes, all rationalized by unverifiable tales of sexual assault."⁵⁷ Thus, for practical reasons courts have generally resolved the public policy argument against escapees.

Green's appeal, however, was not based solely on unconstitutional conditions of confinement, which he conceded to be no defense in itself. Green claimed that his confinement under unconstitutional conditions (due to the state's failure to protect him from homosexual assaults) combined with denial of access to the courts to obtain review of these unconstitutional conditions, and the necessity of escape to avoid the homosexual assaults justified his escape. The Missouri Supreme Court affirmed the conviction, holding: (1) there was no denial of access to the courts because defendant had not sought access; (2) defendant was not compelled by necessity to escape because the threatened danger was not sufficiently close at hand and because defendant failed to exhaust all available alternatives to avoid the danger; and (3) defendant's only remaining defense was therefore unconstitutional conditions of confinement, which is not a defense to escape.

available in California, defendant failed to establish the defense because he was not being pursued closely enough, *i.e.*, the danger of death was not sufficiently imminent and impending. *Id.* at 778, 75 Cal. Rptr. at 604.

53. Hershey & Avins, *supra* note 4, at 291.

54. J. HALL, *supra* note 5, at 445.

55. *People v. Whipple*, 100 Cal. App. 261, 265, 279 P. 1008, 1010 (1929).

56. *State v. Palmer*, 45 Del. 308, 310, 72 A.2d 442, 444 (1950).

57. *People v. Noble*, 18 Mich. App. 300, 303, 170 N.W.2d 916, 918 (1969).

Although the court did not decide the issue, Green's claim that he was being confined under unconstitutional conditions merits some discussion. It is well established that prisoners lose some, but not all constitutional rights. Generally, "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."⁵⁸ Thus, a prisoner obviously loses, for example, his right to travel.

It has been held, however, that the due process and equal protection clauses of the fourteenth amendment follow a person into prison.⁵⁹ Prisons are required to exercise reasonable care for the safety of prisoners,⁶⁰ and have a duty to protect them from assaults by guards or other prisoners.⁶¹ Thus, the question in this case would be whether the training center exercised reasonable care in protecting Green from homosexual assaults. However, it is not clear what constitutes reasonable care in this area. Although there is authority that a prison is not required to *isolate* inmates solely because of their homosexual inclinations,⁶² it is not clear whether a prison must take lesser steps, such as installing bolt locks on cell doors or providing extra guards at night, as suggested by Green. In any event, due to the prevalence of homosexual practices in prisons,⁶³ it seems apparent that if Green's contention that his confinement was unconstitutional because the state placed him in a position of vulnerability to homosexual attacks was sustained, it would have to be conceded that most prisoners today are being unconstitutionally confined. Indeed, some writers have claimed that prison life in general is unconstitutional.⁶⁴ Therefore, it seems likely that the question of whether the prison exercised reasonable care would be decided in the state's favor.

Closely related to appellant's contention that he was being unconstitutionally confined was his argument that he was denied access to the courts for redress of these grievances. Defendant claimed such access to be his constitutional right, and that his escape was justified as the only means of obtaining that right. He based this contention primarily on the fact that a training center rule forbade "jail house lawyers" to prepare applications for post-conviction relief. *Johnson v. Avery*⁶⁵ held such a rule to be unconstitutional unless the state provided other sources of legal assistance. Defendant claimed no such alternatives were provided by the training center. The court avoided a decision on the validity of the training center rule and simply held that *Johnson* was not applicable to the facts of this case

58. *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944).

59. *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968); *United States v. Lynch*, 94 F. Supp. 1011, 1015 (N.D. Ga. 1950), *aff'd*, 189 F.2d 476 (5th Cir.), *cert. denied*, 342 U.S. 831 (1951).

60. *Muniz v. United States*, 280 F. Supp. 542, 547 (S.D.N.Y. 1968); *Johnson v. United States*, 258 F. Supp. 372, 376 (E.D. Va. 1966).

61. *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944); *United States v. Lynch*, 94 F. Supp. 1011, 1015 (N.D. Ga. 1950), *aff'd*, 189 F.2d 476 (5th Cir.), *cert. denied*, 342 U.S. 831 (1951).

62. *Muniz v. United States*, 280 F. Supp. 542, 547 (S.D.N.Y. 1968); *Johnson v. United States*, 258 F. Supp. 372, 376 (E.D. Va. 1966).

63. *See State v. Green*, 470 S.W.2d 565, 569 n.1 (Mo. En Banc 1971).

64. *See Hirschkop & Millemann, The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969).

65. 393 U.S. 483 (1969).

because *Johnson* involved a habeas corpus proceeding in which the defendant himself was "jail house lawyer." By giving such a narrow construction to *Johnson* the court in effect held that only a "jail house lawyer," in a habeas corpus proceeding, can attack the constitutionality of a rule forbidding him to practice. The result of such a narrow construction of *Johnson* is that an ordinary prisoner (not a "jail house lawyer") is prevented from gaining access to the courts via habeas corpus in order to argue denial of that same right. That of course was the point Green was attempting to make; that prison authorities may perpetuate unconstitutional conditions (in this case an unconstitutional rule) by preventing prisoners from applying for writs of habeas corpus.

The court in *Green*, however, doubtless would have reached the same conclusion even if it had applied *Johnson* and declared the training center rule unconstitutional. The court held that there could be no denial of access to the courts unless there was an attempt to gain access, and that no such attempt was made by Green prior to his escape.⁶⁶ Thus, a prisoner is required to attempt to gain access to the courts regardless of whether such access is in fact available. A more rational approach, it seems, would be to consider the existing factual situation to determine whether such attempts to gain access would have been successful if made. It seems obvious that a prisoner will be discouraged from seeking access to courts if he knows he has no chance of even reaching the courts to present his case. In considering a defense of necessity to escape in *People v. Whipple*,⁶⁷ the court stated: "If the defense could be admitted at all, it should not be conditioned on the making of a plainly useless request."⁶⁸

The court in *Green* did give consideration to Green's contention that access to the courts was unavailable but concluded there was access by way of the mails, which were freely available to defendant. In spite of the fact that the court was bound to accept defendant's version of the facts as alleged in his offer of proof, the majority opinion apparently ignored defendant's claim that a letter mailed by him to the sheriff of the county where he was convicted was returned to him by prison officials, and that all out-going letters were normally read by prison officials and returned if they contained derogatory matters. It is questionable, then, whether Green, or any other prisoner at the training center in fact had unfettered mailing privileges.⁶⁹ Thus, the court, by imposing the requirement that a prisoner seek access to courts in order to claim denial of such access, and by assuming, contrary to defendant's claims, that unrestricted mailing privileges were available to prisoners for making such requests, concluded

66. 470 S.W.2d at 567.

67. 100 Cal. App. 261, 279 P. 1008 (1929).

68. *Id.* at 266, 279 P. at 1010.

69. Even if unfettered mailing privileges were in fact provided, it would seem that this would not meet the test of *Johnson v. Avery*, 393 U.S. 483 (1969). If a state could satisfy its burden of showing alternatives to "jail house lawyers" by pointing to the United States mails, the practical impact of *Johnson* would be minimal because the mails should be available in any case.

It should also be noted that because this appeal involved the trial court's ruling on an offer of proof to establish a defense, the appellate court is bound to consider appellant's version of the facts as true. 470 S.W.2d at 568 (dissenting opinion).

there was no denial of access to the courts. By so concluding the court was able to avoid the important question of whether escape is justified by denial of access to the courts.

Green's contention that his escape was justified by the necessity to avoid homosexual assaults was also rejected. The court held that the danger was not sufficiently close at hand, and that defendant could have avoided the threatened consequences of his refusal to submit to sodomy by reporting his predicament to the authorities during the hours between the threat and the escape.⁷⁰ The dissent argued that these holdings ignore the realities of the factual situation.⁷¹ The physical structure of the training center buildings, combined with the small number of guards on duty at night resulted in entire wings of the buildings being unsupervised for substantial periods of time. Under these circumstances, if defendant had waited until his attackers were close at hand (which would mean at his door or in his room, and out of the sight and earshot of the guards), he would have had no possible chance to escape from five men. A situation such as this illustrates the problem with the requirement that the threatened danger be imminent and impending rather than a threat of future harm. The problem lies in determining what constitutes "imminent and impending" danger. The imminent and impending requirement forces a person in Green's position to wait as long as possible before escaping. Thus, only if one waits until the last possible moment to escape can the threatened harm be said to be "imminent and impending." If one escapes before the last possible moment he is acting under a threat of *future* harm. It seems difficult, if not impossible to set a specific point in time which is the "last possible moment."⁷²

The dissent further argued that the majority ignored the realities of prison life in its holding that defendant could have resolved his problem by reporting it to the prison authorities.⁷³ It took several days to get response to a written complaint, and it was difficult to complain to a guard without the general population learning the identity of the prisoner who complained, or "snitched." To "snitch" apparently involves a high risk of death at the hands of other prisoners. Moreover, defendant's previous complaints to the authorities had met with the advice to fight it out, submit to sodomy or escape. Defendant, then, had little hope of obtaining help from the authorities even if he had requested it.

Thus, the majority employed the same analysis for both the denial

70. 470 S.W.2d at 568.

71. *Id.* at 568 (dissenting opinion).

72. See Newman and Weitzer, who state:

To say that a threat of future harm is not sufficient is to ignore the fact that the nature of a threat is to hold out a future harm. All danger to the "duressed" is in the future, for if it were in the present it would no longer be a danger or a threat but would be an accomplished harm. . . .

Thus, where the courts have required present danger to life rather than past or future fear of danger to life, such distinctions are meaningless.

Newman & Weitzer, *Duress, Free Will and The Criminal Law*, 30 So. CAL. L. REV. 313, 328 (1957). The authors suggest a better approach would be to allow the jury to consider the timing of the threat as one of several factors in determining whether a person was "coerced."

73. 470 S.W.2d at 568 (dissenting opinion).

of access to the courts contention and for the necessity argument. On both issues the court examined the steps taken by defendant to obtain relief and rejected the argument that further action by defendant would have been futile. The facts indicate that in all likelihood defendant's attempts to reach the courts and obtain help from prison authorities would have been unsuccessful, and that defendant knew this from past experience. Faced with such a case, it seems unreasonable to require a defendant to make a useless request for help in order to present his defense to a jury.

Undoubtedly public policy was a consideration in the decision of this case. As previously explained, there are obviously valid reasons for requiring prisoners to use accepted procedures to obtain freedom or relief from intolerable conditions of confinement. No doubt the court in *Green* was influenced by the fear that, given the widespread incidence of homosexuality in prisons, there could be an epidemic of escapes where the attempted justifications would be unverifiable and perhaps fabricated claims of homosexual assaults.⁷⁴ However, the question is not whether a prisoner should be allowed to escape from such conditions with impunity. The question is rather one of whether a defendant in such a case should be allowed to present his defense to a jury.

A better approach, it is submitted, would be to allow a defendant in *Green's* situation to present his defense to a jury. The jury would then have the task of ferreting out truth from fabrication and, considering all the facts (only one of which would be the proximity in time of the threatened danger), determine whether the defendant was in fact "coerced" or acted from "necessity."

If, however, it should be determined that sound public policy requires that the rights of prisoners to protection from homosexual attacks and to access to the courts should be subordinated to the interest of society in maintaining well-ordered prisons, a more forthright approach should be employed. That is, the law should simply say that necessity is not a defense to escape from prison. Although the court in *Green* implicitly recognized necessity as a defense to escape, it is difficult to conceive of a factual situation in which a prisoner could be pursued closely enough to be in "imminent" danger and still elude his pursuers, much less escape from prison. Thus, as a practical matter, necessity is not a defense to escape from prison in Missouri.

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74. See *People v. Noble*, 18 Mich. App. 300, 303, 170 N.W. 2d 916, 918 (1969).

TORTS—BLASTING—IMPOSITION OF LIABILITY WITHOUT REGARD TO FAULT

*Galbreath v. Engineering Construction Corp.*¹

Engineering Construction Corporation was engaged in blasting operations near a high pressure gas line owned by Northern Indiana Public Service Company. One of the blasts allegedly caused the gas line to rupture. Galbreath, an employee of the gas company, was injured when the escaping gas ignited and exploded while he was repairing the ruptured gas line.

Galbreath based his cause of action for personal injuries on two theories. First, he contended that the construction company was negligent in detonating dynamite too close to the gas line and in leaving a backhoe engine in operation and positioned just above the excavation where the gas line had been ruptured. Secondly, plaintiff alleged that the defendant's use of dynamite constituted an extra-hazardous activity which imposed liability without regard to fault upon defendant for injuries resulting from his act.

The trial court sustained defendant's demurrer to the liability without fault allegation on the ground that, as a matter of law, plaintiff's injury was but an indirect result of the blast. On review, plaintiff restated his contention that the construction company was liable, regardless of negligence, for any injury proximately caused by his blasting operation and that such liability was not limited to debris or concussion damage. Defendant argued that liability without fault extended only to damage which is the direct result of "trespassing" debris or vibration. The Indiana Court of Appeals reversed the trial court's granting of the demurrer, holding that a person engaged in an acknowledged extra-hazardous activity is liable for all the consequences which were a foreseeable result of the activity. The court dismissed as "artificial" the distinction between direct and indirect results of extra-hazardous activities, and agreed with plaintiff's contention that it would be unfair to allow recovery for damage caused by falling debris or vibrations, without proof of negligence, but deny recovery to a plaintiff injured by gas escaping from a broken main caused by blasting.²

While scholars disagree on the historical point, it is generally accepted that the early tort law imposed liability largely without regard to fault.³ While it may not be completely accurate to say that a man always acted at his peril,⁴ it is clear that liability was frequently imposed irrespective of the defendant's innocence.⁵ A possible explanation for this is the early law's acknowledged concern for keeping peace between individuals, which was easily accomplished by providing a remedy that would be accepted in lieu of private vengeance.⁶ This early concept subsequently gave way to the recognition of fault as the primary basis for granting recovery.⁷ But,

1. 273 N.E.2d 121 (Ind. Ct. App. 1971).

2. *Id.* at 124.

3. W. PROSSER, *THE LAW OF TORTS* § 4 (4th ed. 1971).

4. Winfield, *The Myth of Absolute Liability*, 42 L.Q. REV. 37 (1926).

5. W. PROSSER, *supra* note 3, § 75.

6. O. HOLMES, *THE COMMON LAW* 3 (1881).

7. Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908).

despite this movement, there remained certain areas, such as nuisance and the keeping of wild animals, where the concept of liability without fault was retained.⁸

The modern doctrine of imposing liability without regard to fault for abnormally dangerous activities developed in the 1868 English case of *Fletcher v. Rylands*,⁹ which involved the flooding of plaintiff's mine by water escaping from a reservoir on defendant's land. In holding defendant liable for the damage, Mr. Justice Blackburn ruled that a person bringing anything onto his land that is likely to do damage if it escapes is liable for all damage which is the natural consequence of its escape.¹⁰ According to Prosser, the rule enunciated by Justice Blackburn was merely an extension of the principles applicable to the animal and nuisance cases. In other words, the court's decision was based upon generalizations from these precedents in light of the facts in *Rylands*, and was not the formulation of a novel doctrine of liability.¹¹ However, it was Lord Cairns, in review of the decision, who stated the rule that has become widely accepted.¹² The Cairns opinion focused on the "non-natural" use of the land as the basis for imposing liability without regard to fault, thus limiting Blackburn's broad statement of the rule.¹³ According to the Cairns opinion, the question of whether or not a particular activity was "non-natural" so as to support the imposition of liability without fault depended solely on the location and circumstances in which the particular activity was carried on.¹⁴

There has been much debate concerning the degree to which *Rylands v. Fletcher* has been accepted in the United States. Reversing his earlier opinion,¹⁵ Prosser now contends that the majority of American jurisdictions have accepted the *Rylands* doctrine either by name or in fact, and that many cases in which American courts have refused to apply the doctrine occurred under circumstances which would have been regarded by the English courts as a "natural" use of the land.¹⁶ The *Restatement of Torts* has limited the *Rylands* doctrine to "ultrahazardous" activities and ignores the relationship of an activity to its surroundings.¹⁷ However, the *Restatement of Torts (Second)* appears to be more in line with the *Rylands* principle in defining the activity in terms of "abnormally dangerous" as opposed to "ultrahazardous." It includes as one of the factors to be considered in determining whether or not an activity is abnormally dangerous "whether the activity is inappropriate to the place where it is carried on."¹⁸

8. W. PROSSER, *supra* note 3, §§ 76, 86.

9. L.R. 1 Ex. 265 (1866).

10. *Id.* at 279.

11. W. PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* 138 (1953).

12. *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868).

13. *Id.* at 338.

14. W. PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* 139, 142 (1953).

15. W. PROSSER, *THE LAW OF TORTS* 452 (1941).

16. W. PROSSER, *supra* note 3, at 510. *See, e.g.*, *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 96 S.W.2d 221 (1936).

17. *RESTATEMENT OF TORTS* § 519 (1939).

18. *RESTATEMENT (SECOND) OF TORTS* § 519 (Tent. Draft No. 10, 1964). The applicable provisions provide:

§ 519. General Principle

(1) One who carries on an Abnormally Dangerous Activity is subject to

Cases involving the use of explosives for blasting have frequently been given as an example of the type of activity to which the *Rylands* doctrine applies.¹⁹ However, nuisance and trespass theories have also been utilized to hold defendants liable without considering fault.²⁰ Many early American cases dealing with damage caused by blasting made a sharp distinction between damage caused by rocks thrown onto plaintiff's premises and damage caused by vibration. In these cases, the courts found liability regardless of fault for damage caused by falling debris by applying a trespass theory.²¹ However, plaintiff was required to plead and prove negligence in order to recover for concussion damage.²² This technical distinction has now largely been rejected and, today, most jurisdictions hold the defendant strictly liable for either debris or concussion damage.²³

While many jurisdictions hold a blaster liable without regard to fault for injuries he inflicts, no jurisdiction has held him liable for all the consequences of his activity.²⁴ Professor Harper has expressed the limitations placed on absolute liability in terms of three factors which must be satisfied before a defendant can be held liable in tort for an "abnormally dangerous" activity.²⁵ The first of these factors concerns the type of harm threatened. By this it is meant that the defendant is only liable without fault for consequences which belong to the general class of harms which make the conduct "extra-hazardous." This general class of harms has, in the decided cases, been limited to injuries produced by falling debris or the

liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent such harm.

- (2) Such strict liability is limited to the kind of harm, the risk of which makes the activity abnormally dangerous.

§ 520. Abnormally Dangerous Activities

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- a) whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;
- b) whether the gravity of the harm which may result from it is likely to be great;
- c) whether the risk cannot be eliminated by the exercise of reasonable care;
- d) whether the activity is not a matter of common usage;
- e) whether the activity is inappropriate to the place where it is carried on; and
- f) the value of the activity to the community.

Note (3) The thing which stands out from the cases is that the important thing is not that it is extremely dangerous in itself, but that it is abnormally so in relation to its surroundings.

19. W. PROSSER, *supra* note 3, at 513-14.

20. For example, Missouri courts have utilized three rationales in holding defendants liable without fault for blasting: nuisance, trespass, and the *Rylands* doctrine without expressly adopting it. Gladden, *The Rylands v. Fletcher Doctrine and Its Standing in Missouri*, 18 Mo. L. REV. 53, 56 (1953).

21. See, e.g., *Hay v. Cohoes County*, 2 N.Y. 159 (1849).

22. *Booth v. Rome*, 140 N.Y. 267, 35 N.E. 592 (1893).

23. W. PROSSER, *supra* note 3, at 514.

24. *Id.* at 517.

25. Harper, *Liability Without Fault and Proximate Cause*, 30 MICH. L. REV. 1001 (1932).

direct effects of vibrations of the earth or concussions of the sky.²⁶ The second factor to be considered is the class of persons protected. In most cases, this factor does not take on much importance since the injury usually is suffered by adjoining landowners. But, for example, in *Klepsch v. Donald*,²⁷ where a rock was hurled farther than previous experience had indicated was probable, defendant was held not to be liable for the resulting damage because there was no reason to expect that plaintiff's premises would be damaged.²⁸ In other words, this distant plaintiff was not within the chosen class. The third factor concerns the manner of occurrence of the injury. This is essentially a proximate cause test and suggests that even if the first two requirements for finding liability without fault are met, defendant will not be held liable unless his act is found to be the legal cause of the injury.

While Prosser utilizes the same three factors, he recognizes that they merely represent the practical necessity of restricting liability without regard to fault within reasonable bounds.²⁹ Regardless of the manner in which the issues are characterized, the result of utilizing these factors has been to narrow defendant's liability on liability without fault principles to a greater extent than it is in negligence cases.³⁰ This for the most part stems from the reluctance, based on policy considerations, of the courts to impose liability without fault on a broad basis.³¹

In the instant case, the circumstances leading to plaintiff's injury made the effect of an intervening causal factor upon the imposition of liability without fault the issue of significance. Had the injury involved in *Galbreath* resulted from debris or concussion, the court would have encountered no difficulty in holding defendant strictly liable for plaintiff's injury.³² But the fact that the blasting had only set in motion the force producing the injury, and was not in itself the direct cause, forced the court to determine the limits to which liability without fault extends.

Three previous cases involving the issue of indirect injury resulting from an intervening factor set in motion by blasting concerned commercially raised female mink which devoured their young after being subjected to the vibrations and concussions of defendant's blasting. In *Gronn v. Rogers Construction, Inc.*,³³ the court emphasized that defendant's conduct was classified as hazardous because of the potential for danger resulting from an explosion, not because of possible psychological effects of vibration and concussion upon human beings and animals.³⁴ This conclusion by the *Gronn* court, which seemed to stress the "type of harm threatened" factor

26. *Foster v. Preston Mill Co.*, 44 Wash. 2d 440, 268 P.2d 645 (1954).

27. 4 Wash. 436, 30 P. 991 (1892).

28. *Id.* at 439, 30 P. at 992-93.

29. W. PROSSER, *supra* note 3, § 79.

30. *Id.* at 517.

31. See McNeal, *Use of Explosives and Liability Questions Involved*, 23 INS. COUNSEL J. 125, 126 (1956).

32. See *Enos Coal Mining Co. v. Schuchart*, 243 Ind. 692, 188 N.E.2d 406 (1963) (vibration damage); *Wright v. Compton*, 53 Ind. 337 (1876) (falling debris).

33. 221 Ore. 226, 350 P.2d 1086 (1960).

34. *Id.* at 230, 350 P.2d at 1088.

of the Harper analysis, was supported by similar reasoning in *Foster v. Preston Mill Co.*³⁵ The court stated:

The decided cases, as well as common experience indicate that the thing which makes blasting ultrahazardous is the risk that property or persons may be damaged or injured by coming into direct contact with flying debris, or by being directly affected by vibrations of the earth or concussions of the air.³⁶

In *Madsen v. East Jordan Irrigation Co.*,³⁷ the court stressed the "manner of the injury's occurrence" factor, and stated that the intervention of the mother mink was sufficient to break the chain of causation necessary to support the allegation of liability without fault.³⁸ Thus, the courts in all of these cases refused to impose liability without fault by finding in each instance that the perimeter of liability which surrounded the blasting activity did not encompass the harm incurred by plaintiff. To these courts, the imposition of an intervening causal factor between the blast and the resulting injury precluded the defendant's conduct from being classified as extra-hazardous in relation to the plaintiff's injury. Therefore, the only avenue of recovery remaining for the plaintiffs was one based on negligence principles.

The *Galbreath* court rejected this reasoning and, in doing so, expanded the risk perimeter of extra-hazardous activity to allow consideration of the effect of intervening causal factors in determining whether liability without fault is available as a means of recovery. To the Indiana court, the presence of an intervening factor between the blast and the injury did not prevent plaintiff from recovering without proving negligence. Instead, the court asserted that the application of strict liability in cases involving both direct and indirect injury must be determined by applying a foreseeability test; that is, a consideration of whether it was foreseeable that the injury inflicted would result from the particular abnormally dangerous activity.

The practical effect of the holding is to give a plaintiff, injured by forces other than debris or vibration, a greater chance of reaching the jury on the ultimate issue of liability. This point can be illustrated by the "mink cases." Since the female mink were the intervening causal factors which actually destroyed the mink kittens, the blasting operation was not, by the courts' definitions, the direct cause of the injury. However, utilizing the foreseeability test, enunciated in *Galbreath*, the intervening factor of the mother mink would not foreclose plaintiff from recovering if the action of the mink under those circumstances was a foreseeable result of the blasting (which experience indicates it was). Thus, while plaintiff would likely suffer a demurrer if the first test were used, his chances of reaching the jury on the foreseeability question on a liability without fault theory are substantially increased.

By holding that an intervening factor does not, in itself, prevent plaintiff from proceeding upon a liability without fault theory, the Indiana

35. 44 Wash. 2d 440, 268 P.2d 645 (1954).

36. *Id.* at 445, 268 P.2d at 648.

37. 101 Utah 552, 125 P.2d 794 (1942).

38. *Id.* at 554, 125 P.2d at 795.

court has increased the number of situations in which liability can arise for injuries resulting from blasting operations. While courts have tended to limit the situations in which liability without proof of negligence applies by holding that no public policy or social standard was violated,³⁹ the Indiana court has essentially reversed this policy decision in order to protect a greater number of persons suffering what may be termed indirect damages. The court accomplished this by eliminating the requirement that the injury must result directly from the blast in order for plaintiff to recover without proving negligence. Now, if plaintiff can establish that the harm, regardless of intervening factors, was a foreseeable result of the blasting, he can recover without proving negligence.

Missouri courts have consistently held that a person conducting blasting operations is liable regardless of negligence for any damage inflicted by debris or concussion.⁴⁰ No Missouri case has yet dealt with the issue of a causal factor intervening between the blast and the injury. Missouri Approved Instruction 31.03, which is mandatory in blasting cases based on liability without fault, requires that the jury find the injury to be the "direct result" of the blasting.⁴¹ If this language is construed in the context of past decisions, it is likely that the intervention of a causal factor between the blast and the injury would prevent plaintiff from reaching the jury on a liability without fault theory. However, the Missouri courts could interpret "direct" to include an injury resulting from a foreseeable intervening factor, and thus follow the *Galbreath* court's lead in broadening the scope of a defendant's liability for blasting activities.

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39. W. PROSSER, *supra* note 3, at 517.

40. Gladden, *The Rylands v. Fletcher Doctrine and Its Standing in Missouri*, 18 Mo. L. REV. 53, 56 (1953).

41. Mo. Approved Instr. § 31.03 (2d ed. 1969):

Verdict Directing—Explosives

Your verdict must be for plaintiff if you believe: First, defendant intentionally exploded [dynamite] [TNT], and Second, as a *direct* result of such explosion, plaintiff was damaged. (Emphasis added.)

WITNESSES—MOTION TO EXCLUDE FROM THE COURTROOM—GUARDIAN AD LITEM EXEMPT

*Keating v. Jerde*¹

Plaintiff was involved in a traffic collision allegedly caused by two other motorists—James Gold and Linda Jerde, a minor. Both were joined as defendants in a resulting tort action, with Linda's father appointed her guardian ad litem after petition was filed.² Mr. Jerde had been a passenger in the automobile driven by his daughter, and was expected to provide eye-witness testimony at trial. Prior to commencement of trial, Linda Jerde's attorney moved that the court enforce the rule excluding witnesses from the courtroom until called to testify. The judge failed to rule on the motion and no potential witnesses were advised to leave. Later, when Linda's attorney called Mr. Jerde as a witness, counsel for both plaintiff and defendant Gold objected to the receipt of his testimony, on the basis he had violated the witness sequestration rule by remaining in court. The judge sustained the objection and prevented Mr. Jerde from testifying.

Following an adverse judgment, Linda Jerde appealed, assigning as error the judge's failure to exempt the guardian ad litem from the sequestration rule. The Kansas City Court of Appeals reversed and remanded, holding that the failure to exclude the guardian ad litem from the rule was prejudicial error.³

Because the issue on appeal was a matter of first impression in Missouri, the court reviewed both the function of a guardian ad litem and the rule on witness sequestration. The witness sequestration rule is of ancient origin;⁴ in fact, it can be traced back to biblical times.⁵ The main purpose for the rule is to insure that one prospective witness will not shape his report or refresh his memory in light of testimony given by others.⁶ Akin to this preventive purpose, the rule also helps reveal latent inconsistencies, as well as suspicious consistencies, in the testimony of several individuals.⁷ The use of nearly identical phraseology by several witnesses

1. 472 S.W.2d 651 (K.C. Mo. App. 1971).

2. § 517.190, RSMo 1969.

3. 472 S.W.2d at 655.

4. See 6 J. WIGMORE, EVIDENCE § 1837, at 347 (3d ed. 1940).

5. The story of Daniel's judgment in Susanna's Case is told in the apocryphal Scriptures. Susanna, wife of Joachim, was wrongfully accused of adultery by two frustrated suitors. They claimed to have witnessed certain adulterous acts between Susanna and another young man during a rendezvous in Joachim's garden. After making their initial charges together, Daniel demanded: "Put these two aside, one far from another, and I will examine them." Separately, he asked each: "Under what tree sawest thou them companying together?" The first answered: "Under a mastick tree," and the other contradicted: "Under an holm tree." Susanna's reputation was saved. *Daniel* 13: 51-53 (Apocrypha); 6 J. WIGMORE, *supra* note 4, § 1837, at 347-48.

6. *Louisville & N.R.R. v. York*, 128 Ala. 305, 310, 30 So. 676, 678 (1902); *Speshoits v. Coclanes*, 311 Ky. 547, 552, 224 S.W.2d 653, 656 (Ct. App. 1949); *State v. Zellers*, 7 N.J.L. 220, 226 (Sup. Ct. 1824); *Commonwealth v. Turner*, 371 Pa. 417, 427-28, 88 A.2d 915, 920-21 (1952); *Wisener v. Maupin*, 61 Tenn. (2 Baxt.) 342, 357 (1872); *Huddleston v. Commonwealth*, 191 Va. 400, 405, 61 S.E.2d 276, 279 (1950).

7. 6 J. WIGMORE, *supra* note 4, § 1838, at 352.

in describing a given circumstance is much more indicative of a conspired fabrication if they have not heard each other testify.⁸ Furthermore, the rule aids the cross-examiner in trapping an untruthful witness who is ignorant of other conflicting testimony.⁹ Some authorities suggest sequestration is imperative when a party plans to use a large number of witnesses, for in this situation the other party needs every available psychological and tactical advantage.¹⁰

Despite the utility of the sequestration rule, several principles conflict and interfere with its effectiveness. First, trial court discretion in granting the motion¹¹ has been diminished in some jurisdictions by appellate court holdings that a positive indication of conspiracy or similar wrongdoing should exist among the witnesses before separation is appropriate.¹² Further, parties to the action are often mandatorily exempted from the rule.¹³ Several courts have held that a party's constitutional right in criminal prosecutions to confront witnesses and confer with counsel¹⁴ also attaches in civil litigation.¹⁵ In the St. Louis Court of Appeals case of *H. T. Simon-Gregory Dry Goods Co. v. McMahan*¹⁶ this right was even extended to include non-party beneficiaries of a chattel mortgage under litigation. This case held that any person pecuniarily interested in the trial of a cause, whether or not a party, has a constitutional right to be present during the hearing.¹⁷ Thus, Missouri has joined several other jurisdictions in recognizing the right of some "parties in interest" to remain at the trial.¹⁸

As a practical matter, exclusion of a party might be futile since he may already be familiar with the expected testimony of other witnesses from an earlier reading of their depositions.¹⁹ Nevertheless, courts in a minority of jurisdictions recognize a danger in exempting party-witnesses from the

8. Goldstein, *The Exclusion (Separation) of Witnesses*, 5 TR. LAWYER'S GUIDE 341, 342 (1961).

9. *Id.*

10. *Id.* at 341.

11. See e.g., *Berberet v. Electric Park Amusement Co.*, 310 Mo. 655, 664, 276 S.W. 36, 38 (1925); *Noone v. Olehy*, 279 Ill. 160, 130 N.E. 476 (1921). But see *Hughes v. State*, 126 Tenn. 40, 89, 148 S.W. 543, 555 (1912), where the court indicated that when an affidavit is filed stating sufficient grounds for exclusion of witnesses, the court has a duty to grant the request.

12. See *Coonan v. Baltimore & O.R.R.*, 25 F. Supp. 834, 835-36 (E.D. Pa. 1938); *Commonwealth v. Turner*, 371 Pa. 417, 430, 88 A.2d 915, 921 (1952).

13. See *Jaeschke v. Reinders*, 2 Mo. App. 212, 215 (St. L. Ct. App. 1876). Accord, *Cone v. Davis*, 66 Ga. App. 229, 238, 17 S.E.2d 849, 856 (1941); *Kopplin v. Kopplin*, 330 Ill. App. 211, 214, 71 N.E.2d 180, 182 (1946); *Shew v. Hews*, 126 Ind. 474, 476, 26 N.E. 483, 484 (1891); *Bernheim v. Dibrell*, 66 Miss. 199, 202, 5 So. 693 (1889). Cf. *Bryant v. Kansas City Ry.*, 286 Mo. 342, 355, 228 S.W. 472, 475 (En Banc 1921); *Odum v. Corn Products Ref. Co.*, 173 Ill. App. 348, 352 (1912).

14. U.S. CONST. AMEND. VI; MO. CONST. art. I, § 18a.

15. 1 S. THOMPSON, THE LAW OF TRIALS § 279, at 256 (1889), citing *Chester v. Bower*, 55 Cal. 46, 48 (1880); *Ryan v. Couch*, 66 Ala. 244, 249 (1880). See also *Gross v. Johnson*, 248 Ill. App. 531, 534 (1928); *French v. Sale*, 63 Miss. 386, 391 (1885).

16. 61 Mo. App. 499 (St. L. Ct. App. 1895).

17. *Id.* at 505.

18. See *Chester v. Bower*, 55 Cal. 46, 48 (1880); *Adolf v. Irby*, 110 Tenn. 222, 225-26, 75 S.W. 710, 711 (1923); *Southern Ice & Util. Co. v. Richardson*, 128 Tex. 82, 85, 95 S.W.2d 956, 958 (Ct. Civ. App. 1936).

19. Goldstein, *supra* note 8, at 343.

rule—an attitude which is traceable to the time when parties were first held competent as witnesses. In that era a prevalent view among judges was that pre-testimony separation from court was a necessary compensation for the built-in bias of a party.²⁰ While some jurisdictions currently allow exclusion of parties, the suspicion which originated the practice probably fails to remain so widespread.

The status of a guardian ad litem as the "alter-ego" of a minor defendant prompted the *Keating* court to place him on equal footing with both parties of record and parties in interest with respect to immunity from the exclusion rule.²¹ Several Missouri courts have similarly recognized the importance of the guardian ad litem's representative function during litigation.²² The decisions reveal that he is the vehicle through which the courts fulfill their duty of jealous protection of infants or incompetent wards of the court.²³ For example, in examining a motion to adjust a guardian ad litem's fees, the Springfield Court of Appeals, in *M.F.A. Mutual Insurance Co. v. Alexander*,²⁴ commented that the guardian ad litem's attendance at trial is essential to the defense of a suit and stressed the importance of his presence in the courtroom as a necessary aid to counsel. In other words, during the course of litigation the guardian ad litem is to do for the infant that which the infant would do for himself if legally capable.²⁵ In comparing rationales, the same factors which favor exemption for parties also support immunity of the guardian ad litem from the rule. Furthermore, the guardian ad litem may often fail to possess the inherent bias of a party.

In *Keating v. Jerde*, the minor's representative was disqualified as a witness for his violation of the sequestration rule.²⁶ Generally a court has less discretion in dealing with violators than it has in making the original decision whether to grant the motion.²⁷ Research of Missouri case law indicates that mere failure of the excluded witness to comply with the rule cannot, by itself, warrant his disqualification.²⁸ In fact, violations which

20. See *Randolph v. McCain*, 34 Ark. 696, 704 (1879); *Missouri, O. & G. Ry. v. Hayden*, 31 Okla. 21, 119 P. 581 (1911) (court applying Arkansas law); *Wisener v. Maupin*, 61 Tenn. (2 Baxt.) 342 (1872).

21. *Keating v. Jerde*, 472 S.W.2d 651, 655 (K.C. Mo. App. 1971), citing *Larue v. Russell*, 26 Ind. 386 (1866); *Cottrell v. Cottrell*, 81 Ind. 87 (1881); *Miller v. Harpest*, 39 Ohio App. 184 (1930).

22. See *Tracy v. Martin*, 363 Mo. 108, 249 S.W.2d 321 (En Banc 1952); *Kenard v. Wiggins*, 349 Mo. 283, 160 S.W.2d 706, cert. denied, 317 U.S. 652 (1942); *Quincy v. Quincy*, 430 S.W.2d 638 (St. L. Mo. App. 1968); *M.F.A. Mut. Ins. Co. v. Alexander*, 361 S.W.2d 171 (Spr. Mo. App. 1962).

23. See *Spotts v. Spotts*, 331 Mo. 917, 55 S.W.2d 977 (1932); *Crawford v. Amusement Syndicate Co.*, 37 S.W.2d 581 (Mo. 1931); *West St. Louis Trust Co. v. Brokaw*, 232 Mo. App. 209, 102 S.W.2d 792 (St. L. Ct. App. 1937).

24. 361 S.W.2d 171 (Spr. Mo. App. 1962).

25. *Id.* at 181.

26. 472 S.W.2d at 652.

27. Annot., 14 A.L.R.3d 16, 25-26 (1967).

28. See *State v. Shay*, 339 S.W.2d 799 (Mo. 1960); *State v. Lord*, 286 S.W.2d 737 (Mo. 1956); *State v. Compton*, 317 Mo. 475, 296 S.W. 137 (1927); *State v. Sloan*, 186 S.W. 1002 (Mo. 1916); *State v. Fannon*, 158 Mo. 149, 59 S.W. 75 (1900); *State v. Sumpter*, 153 Mo. 436, 55 S.W. 76 (1900); *State v. Gesell*, 124 Mo. 531, 27 S.W. 1101 (1894); *O'Bryan v. Allen*, 95 Mo. 68, 8 S.W. 225 (1888); *Keith v. Wilson*, 6 Mo. 435 (1840); *Dyer v. Morris*, 4 Mo. 214 (1835).

result merely from a party's negligence may not be sufficient to prevent the witness from testifying.²⁹ Disqualification is appropriate only when some element of consent, connivance, or other intentional wrongdoing by the party accompanies the violation.³⁰ Absent this element the proper remedy is to punish the witness for contempt,³¹ along with an attack on his credibility if he takes the stand.³²

In *Keating* the required degree of connivance or fault on the part of Mr. Jerde and Linda appeared to be lacking. Assuming *arguendo* that a guardian ad litem can be excluded from court, the judge's failure to rule on the motion may have caused Linda Jerde's counsel to think the motion had been refused.³³ The situation in *Keating* may be analogous to instances where a party is unaware that his witnesses have disobeyed the order, *e.g.*, where a witness re-enters the chamber after exclusion and counsel fails to see the violation³⁴ or where a witness arrives too late to hear the order and sits where the party would not notice him.³⁵ In such cases the party is virtually without fault, causing many courts to admit the testimony.³⁶

Exemption of the guardian ad litem from the exclusion order appears to be a logical extension of Missouri precedent since both parties of record and parties in interest were already immune. However, as more exceptions are carved into the rule, and as judicially defined standards of discretion evolve, fewer witnesses become subject to exclusion, which severely dilutes the rule's preventive and detective functions. As a solution it is first suggested that courts not condition the granting of the motion upon any "show cause" requirement, for often the attorney may have little more than his intuition as a guideline. Second, for those exempted via some right or duty to be in court, a compromise measure, used in some jurisdictions, might help reconcile the conflicting notions. One not subject to the rule can in many situations be given the choice of either testifying before any of the other witnesses, excluding himself until taking the stand, or not testifying at all.³⁷ If the exempted witness testifies first he can thereafter remain in court without danger of his testimony having been fashioned in relation to the other evidence presented. However, a requirement that de-

29. *Brown v. McDaniel*, 140 Mo. App. 522, 120 S.W. 642 (St. L. Ct. App. 1909). *But see* *State v. Shay*, 339 S.W.2d 799, 802 (Mo. 1960) (court hedged approval of the rule in *Brown v. McDaniel*).

30. Cases cited note 28 *supra*.

31. *See* *State v. Compton*, 317 Mo. 475, 296 S.W. 137 (1927); *State v. Sloan*, 186 S.W. 1002 (Mo. 1916); *Keith v. Wilson*, 6 Mo. 435 (1840).

32. *See* *Holder v. United States*, 150 U.S. 91 (1893); *Louisville & N.R.R. v. York*, 128 Ala. 305, 30 So. 676 (1901).

33. Failure to rule on the motion may also indicate the judge felt exclusion was a matter of right for the movant, despite Missouri case law to the effect that sequestration rests in the sound discretion of the court. *State v. Compton*, 317 Mo. 475, 296 S.W. 137 (1927); *Berberet v. Electric Park Amusement Co.*, 310 Mo. 655, 276 S.W. 36 (1925); *Jaeschke v. Reinders*, 2 Mo. App. 212 (St. L. Ct. App. 1876).

34. *See* *State v. Shay*, 339 S.W.2d 799 (Mo. 1960).

35. *Id.* at 800-01.

36. *Annot.*, 14 A.L.R.3d 16, 82-87 (1967).

37. *See* *Boutelli v. White*, 40 Ga. App. 415, 149 S.E. 805 (1929); *Burnheim v. Dibrell*, 66 Miss. 109, 5 So. 693 (1889).

fense witnesses testify at the beginning of trial might seriously impair the orderly presentation of facts.³⁸ Nevertheless, the compromise is usually workable for witnesses on the plaintiff's side of the case, especially the next friend of a minor plaintiff. To the extent of its workability, this option may be a step toward fulfillment of the purpose behind sequestration while simultaneously protecting the rights of persons who should hear all the testimony.

STEPHEN G. SCHOLL

**WITNESSES—PRESENT MEMORY REVIVED—EXTENT
OF PARTY OPPONENT'S RIGHT OF INSPECTION
OF WRITINGS USED TO REVIVE
MEMORY IN MISSOURI**

*State v. Scott*¹

Jesse Scott was arrested and tried for first degree robbery with a dangerous and deadly weapon. During his pre-trial hearing, John Billings, a witness for the state, was allowed, while on the stand, to refer to a certain paragraph of a police document to revive his memory as to the number of persons who appeared in a prior identification lineup involving the defendant.² The defendant's counsel requested permission to inspect the police document in its entirety, since it had been used to revive the witness' memory. The prosecution objected to inspection of the entire document, and acquiesced only to the inspection of the paragraph which the witness used. The defendant then moved to suppress Billings' testimony on the grounds that the defendant was refused the right of inspection of the entire document. The trial court overruled this motion.

The other prosecution witnesses later testified that, prior to their appearance in court, they had revived their memories from certain notes made during an interrogation of the defendant, and that they had failed to bring the notes with them to court. Defendant's counsel moved to suppress their testimony because the defendant had not been allowed to inspect the notes. The lower court also overruled this motion. After conviction, defendant appealed to the Missouri Supreme Court, claiming as error the lower court's rulings on both of his motions to suppress. The supreme court upheld the lower court's rulings, holding that the defendant was not entitled to inspect the entire document used to revive memory,³ nor was the defendant entitled to inspect a document which was used to revive memory prior to the time the witness took the stand to testify.⁴

38. See *Wilson v. Peacock*, 111 Miss. 116, 71 So. 296 (1916).

1. 467 S.W.2d 851 (Mo. 1971).

2. *Id.* at 851-52.

3. *Id.* at 853.

4. *Id.*

Generally, in Missouri a witness while testifying is allowed to revive his memory by use of a document which he made and which he knows to be correct.⁵ In turn, the party opponent is entitled to inspection of the document used by the witness to revive his memory.⁶ The reason for this right to inspection is to assure that the document used to revive memory was of a nature that could revive the witness' memory,⁷ and also to discourage the use of imposition and false aids in order to give an appearance of present memory revived.⁸ More specifically, when the witness uses written aids to supplement his testimony, it creates an impression of reliability and accuracy which enhances his credibility.⁹ It is only fair that the party opponent be permitted to examine those aids in order that he may verify their accuracy and reliability,¹⁰ and bring to the surface any discrepancies between the witness' testimony and what the document says.¹¹ Inspection of the document may also reveal omitted facts which were later related by the witness at trial, or reveal any difference in emphasis placed upon the facts as related in the document and by the witness at trial.¹²

Scott dealt with two limitations on this general rule: (1) Is a party opponent entitled to inspect the *entire* document which is used to revive the witness' memory? And (2) is a party opponent entitled to inspect a document which is used to revive the witness' memory at some point prior to the time the witness takes the stand to testify?

The jurisdictions are split on the issue of whether the party opponent is entitled to inspect the entire document. Some courts allow inspection of the entire document used to revive a witness' memory, regardless of whether its content refers to the subject matter in issue.¹³ The reason for such a broad inspection rule is to assure fully the accuracy of the parts of the document used to revive memory, by permitting thorough examination of the accuracy of the entire document.¹⁴ Any inaccuracy in the document, even if totally unrelated to the parts referred to, will reflect upon the accuracy of the parts used.¹⁵ However, many jurisdictions do

5. *State v. Patton*, 255 Mo. 245, 255, 164 S.W. 223, 225 (1914).

6. *See, e.g.*, *State v. Gadwood*, 342 Mo. 466, 116 S.W.2d 42 (1938); *State v. Tracy*, 294 Mo. 372, 243 S.W. 173 (1922); *State v. Miller*, 234 Mo. 598, 137 S.W. 887 (1911); *Traber v. Hicks*, 131 Mo. 180, 32 S.W. 1145 (1895); *State v. Jackson*, 194 S.W. 1078 (K.C. Mo. App. 1917).

7. *Green v. State*, 53 Tex. Crim. 490, 493, 110 S.W. 920, 921 (1908); C. McCORMICK, EVIDENCE § 9, at 17 (1954) [hereinafter cited as McCORMICK].

8. 3 J. WIGMORE, EVIDENCE § 762, at 108 (3d ed. 1940) [hereinafter cited as WIGMORE].

9. *Allen v. State*, 243 So. 2d 448, 450 (Fla. App. 1971).

10. *Id.*

11. *The Alpha*, 44 F. Supp. 809, 815 (E.D. Pa. 1942).

12. *People v. Estrada*, 54 Cal. 2d 713, 716, 355 P.2d 641, 642-43, 7 Cal. Rptr. 897, 898 (1960); *People v. Chapman*, 52 Cal. 2d 95, 98, 338 P.2d 428, 430 (1959).

13. *See, e.g.*, *Mosson v. Liberty Fast Freight Co.*, 124 F.2d 448 (2d Cir. 1942); *People v. Bowman*, 240 Cal. App. 2d 358, 49 Cal. Rptr. 772 (1966); *Allen v. State*, 243 So. 2d 448 (Fla. 1971); *State v. Peirce*, 178 Iowa 417, 159 N.W. 1050 (1916); *Moran v. Otis Elevator Co.*, 291 Mass. 314, 197 N.E. 11 (1935); *People v. Lyons*, 49 Mich. 78, 13 N.W. 365 (1882); *State v. Deslovers*, 40 R.I. 89, 100 A. 64 (1917); *State v. Bacon*, 41 Vt. 526 (1869); *Ossen v. Commonwealth*, 187 Va. 902, 48 S.E.2d 204 (1948).

14. *People v. Lyons*, 49 Mich. 78, 81, 13 N.W. 365, 366 (1882).

15. *Id.*

not allow inspection of the entire document.¹⁶ Although an early Missouri case allowed inspection of the entire document,¹⁷ the court in *Scott* clearly adopts the view that the entire document need not be made available for inspection.¹⁸

Among the jurisdictions which do not allow inspection of the entire document, there is division as to the extent of inspection that will be allowed. Some courts hold that the party opponent may only inspect the particular parts of the document which the witness used to revive his memory.¹⁹ It has been contended, however, that this view has the effect of inducing unethical use of the documents to revive memory, because portions of the document may be taken out of their original context by the party offering them.²⁰ This tends to defeat the purposes for allowing inspection.²¹ However, this view eliminates attempts by the party opponent to "fish" for information which would not otherwise be attainable under the normal rules of discovery.

Other courts follow the view that a party opponent may inspect the parts specifically referred to as well as any other parts of the document which are within the same context or deal with the same subject matter.²² This view prevents "fishing expeditions" for information by the party opponent. It also prevents the danger that the part of the document used to revive memory will be taken out of context.²³ However, this view does not allow for a check on the accuracy of the part of the document used by the witness by allowing inspection of the entire document for its overall accuracy. This view also presents the practical problem of how to determine which parts of the document, other than those specifically referred to, are within the same context or deal with the same subject matter. The federal law, which allows a similar rule as to the extent of inspection,²⁴ suggests one

16. See Annots., 82 A.L.R.2d 473, 572-73 (1962), 125 A.L.R. 19, 204-06 (1940), 22 L.R.A. (n.s.) 706, 707 (1909), for cases applying this rule.

17. *State v. Nardini*, 186 S.W. 557 (K.C. Mo. App. 1916).

18. 467 S.W.2d at 853. See also *State v. Johnson*, 454 S.W.2d 27, 30 (Mo. 1970).

19. See, e.g., *Engle v. Stull*, 377 F.2d 930 (D.C. Cir. 1967); *United States v. Easterday*, 57 F.2d 165 (2d Cir. 1932); *Smith v. Smith*, 222 Ga. 313, 149 S.E.2d 683 (1966); *Commonwealth v. Ponzi*, 256 Mass. 159, 152 N.E. 307 (1926); *Jewett v. Boston Elevated R.R.*, 219 Mass. 528, 107 N.E. 433 (1914); *Leach v. State*, 220 Tenn. 526, 420 S.W.2d 641 (1967).

20. *Moran v. Otis Elevator Co.*, 291 Mass. 314, 319, 197 N.E. 11, 13 (1935).

21. *Id.*

22. See, e.g., *Brownlow v. United States*, 8 F.2d 711 (9th Cir. 1925); *Parks v. Biebel*, 18 Colo. App. 12, 69 P. 273 (1902); *Bendett v. Bendett*, 315 Mass. 59, 52 N.E.2d 2 (1943); *Commonwealth v. Haley*, 95 Mass. (13 Allen) 587 (1866); *Morrow v. State*, 56 Tex. Crim. 519, 120 S.W. 491 (1909); 3 WIGMORE § 762, at 111.

23. See text accompanying note 20 *supra*.

24. However, under federal statute, inspection in criminal cases is not limited to only documents used to revive memory. It grants the party opponent the right to inspect all statements made by a witness for the United States, after he has testified, which relate to the subject matter about which he testified. Witnesses and Evidence Act, 18 U.S.C. § 3500 (1970).

answer to this problem. The "Jencks Act,"²⁵ which partially embodied the principles set forth in *Jencks v. United States*,²⁶ provides in section 3500 (c):

[T]he court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use.²⁷

A similar procedure could be instituted in those jurisdictions which follow the rule which allows examination of parts referred to or within the same context.

It is not entirely settled as to whether Missouri has adopted the approach that only the particular parts of the document which are specifically referred to by the witness may be inspected, or the view that the opponent may inspect the parts referred to as well as any other parts of the document which are within the same context or deal with the same subject matter. In *Scott*, there is some support for the proposition that Missouri adopts the former view. The court states:

[T]he court offered to allow appellant's counsel to see that portion of the document containing the paragraph which the witness read to refresh his memory. . . . In view of the fact that other portions of the document were not used by the witness Billings to refresh his recollection, there was no error in the court's ruling.²⁸

This language tends to reflect the idea that the party opponent may only inspect as a matter of right the portions of the document which are specifically used by the witness to revive his memory. However, a broad reading of *Scott* might permit the alternative interpretation that the party opponent may not only inspect portions actually referred to but also those portions in the same context. The court's language indicates that it might have been more concerned about disapproving an apparent attempt by defendant's counsel to conduct a "fishing expedition," than about formulating a hard and fast rule as to the scope of the inspection right. The court emphasizes that the document was used only once, and then only to a limited extent; that the validity of the answer given by the witness was not questioned by the party opponent; and that the subject matter of the response was never really at issue in the case. It was said, therefore, that the defendant could not have been prejudiced by it in any event by being denied inspection of the document.²⁹ Because the party opponent never raised the possibility that the portion used to refresh the witness' memory might have been taken out of context, the court never addressed itself

25. *Id.* See Annot., 5 L.Ed.2d 1014 (1961), for an examination of validity and construction of the Act, and Annot., 5 A.L.R.2d 763 (1966), for application of the Act.

26. 353 U.S. 657 (1957).

27. Witnesses and Evidence Act, 18 U.S.C. § 3500 (c) (1970).

28. 467 S.W.2d at 852-53.

29. *Id.* at 853.

directly to the validity of this contention as grounds for broader examination.³⁰

The second issue in *Scott* was whether a document used to revive the memory of a witness before he takes the stand may be inspected by the party opponent as a matter of right. Again, the jurisdictions are split. Some courts limit inspection by the party opponent to the situation where the document is used to revive the witness' memory while he is on the stand testifying.³¹ This view prevents "fishing expeditions" by an unscrupulous opponent to obtain information he would otherwise be unable to discover.³² It also prevents the danger that the opponent would use his right of inspection as a dilatory tactic, by demanding to be allowed to examine every memoranda used by every witness in preparation for trial.³³ Finally, it prevents exclusion of otherwise valid testimony on a basis that a witness cannot produce a writing to which he once referred, without regard to how long ago he referred to it or why he is unable to produce it.³⁴

However, there are certain disadvantages to this no-inspection rule. The same evils which attend use of the document to revive memory on the stand also attend the use of the document to revive memory out of court.³⁵ Also the rule encourages attorneys to revive the memory of their witnesses out of court to avoid inspection, thereby making it difficult to determine the manner or extent of the refreshing of the witnesses' memory, and thus making it difficult for the jury to weigh the credence which should be given to the witnesses' testimony.³⁶ Some proponents of the non-inspection rule have argued that it is necessary to prevent "fishing expeditions" by the party opponent. Some courts have met this contention by pointing out that such an approach loses sight of the very purpose of a criminal trial, the ascertainment of all the facts.³⁷

Other courts allow inspection of a document used to revive memory regardless of whether it was used at some point in time before the witness testifies or on the stand while he is testifying.³⁸ This view prevents misuse

30. See *id.* at 851-52. The defendant's only request at the pretrial hearing was to see the "entire document."

31. See, e.g., *Echert v. United States*, 188 F.2d 336 (8th Cir. 1951); *United States v. Cohen*, 148 F.2d 94 (2d Cir.), *cert. denied*, 325 U.S. 852 (1945); *United States v. Toner*, 77 F. Supp. 908, (E.D. Pa. 1948), *rev'd on other grounds*, 173 F.2d 140 (3d Cir. 1949); *Williams v. State*, 208 So. 2d 628 (Fla. App. 1968); *Rose v. B.L. Cartage Co.*, 110 Ill. App. 2d 260, 249 N.E.2d 199 (1969); *Leonard v. Taylor*, 315 Mass. 580, 53 N.E.2d 705 (1944); *Winters v. Winters*, 282 S.W.2d 749 (Tex. Civ. App. 1955); *State v. Paschall*, 182 Wash. 304, 47 P.2d 15 (1935).

32. *Leonard v. Taylor*, 315 Mass. 580, 583, 53 N.E.2d 705, 707 (1944).

33. 41 CALIF. L. REV. 753 (1953).

34. 1 U.C.L.A. L. REV. 108, 109-10 (1953).

35. *People v. Scott*, 29 Ill. 2d 97, 111, 193 N.E.2d 814, 821-22 (1963); *McCORMICK* § 9, at 17; 3 WIGMORE § 762, at 111.

36. Comment, *Witnesses; Examination Of—Use of Memoranda*, 18 ORE. L. REV. 136, 145 (1939).

37. *People v. Silberstein*, 159 Cal. App. 2d 848, 851, 323 P.2d 591, 593 (Super. Ct. 1958).

38. See, e.g., *People v. Estrada*, 54 Cal. 2d 713, 355 P.2d 641, 7 Cal. Rptr. 897 (1960); *People v. Silberstein*, 159 Cal. App. 2d 848, 323 P.2d 591 (Super. Ct. 1958); *People v. Hartgraves*, 31 Ill. 2d 375, 202 N.E.2d 33, *cert. denied*, 380 U.S. 96 (1964); *People v. Scott*, 29 Ill. 2d 97, 193 N.E.2d 814 (1963); *State v. Hunt*, 25

of these documents both in and out of court.³⁹ However, as previously mentioned, such a rule may allow "fishing expeditions"⁴⁰ and dilatory tactics.⁴¹ In *Scott*, the court reiterates Missouri's position by following the former view; inspection is allowable only if the witness' memory is revived while he was on the stand.⁴²

In the final analysis, *Scott* makes it clear that Missouri will not allow a party opponent to inspect documents used to revive a witness' memory unless this was accomplished while the witness was testifying, and even then he does not have the right to inspect the entire document, where only part of the document was used to revive memory. However, the court does not deal directly with whether the party opponent will be permitted to see only those portions of the document which the witness specifically used to revive his memory, or whether he will be permitted to see the portions specifically referred to by the witness as well as other portions of the document within the same context or dealing with the same subject matter. Although the language in *Scott* leans toward the former interpretation, it will take another case, where the court is squarely faced with this question, before the issue will clearly be resolved.

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N.J. 514, 138 A.2d 1 (1958); *State v. Mucci*, 25 N.J. 423, 136 A.2d 761 (1957); *State v. Bradshaw*, 101 R.I. 233, 221 A.2d 815 (1966); *State v. Deslovers*, 40 R.I. 89, 100 A. 64 (1917).

39. Authorities cited note 35 *supra*.

40. *Leonard v. Taylor*, 315 Mass. 580, 583, 53 N.E.2d 705, 707 (1944).

41. Note, *supra* note 33, at 753.

42. See *State v. Smith*, 431 S.W.2d 74, 82 (Mo. 1968); *State v. Aubuchon*, 381 S.W.2d 807, 814 (Mo. 1964); *State v. Miller*, 368 S.W.2d 353, 357 (Mo. 1963); *State v. Crayton*, 354 S.W.2d 834, 838 (Mo. 1962); *State v. Gadwood*, 342 Mo. 466, 483, 116 S.W.2d 42, 51 (1937); *Bova v. St. Louis Pub. Serv. Co.*, 316 S.W.2d 140, 146 (St. L. Mo. App. 1958).