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Recent Cases

CONSTITUTIONAL LAW—EQUAL PROTECTION—UNITED STATES CITIZENSHIP REQUIREMENT FOR ADMISSION TO THE BAR

*In Re Griffiths*¹

Fre Le Poole Griffiths, a citizen of the Netherlands, applied for permission to take the Connecticut bar examination. A local county bar association refused to grant this permission solely because Ms. Griffiths was not a United States citizen.² Ms. Griffiths sought a declaration of eligibility in superior court; an adverse judgment was affirmed by the Connecticut Supreme Court.³ Ms. Griffiths appealed to the United States Supreme Court, alleging that the citizenship requirement constituted a denial of equal protection of the law under the 14th amendment. The Supreme Court struck down the citizenship requirement.⁴

In *Schwartz v. Board of Bar Examiners*⁵ the Supreme Court held that the 14th amendment limits a state's authority to set qualifications required for admission to the bar.⁶ Thus, only two questions were before the Court in *Griffiths*: (1) What burden must the state sustain to justify the citizenship requirement, and (2) did Connecticut meet that burden?

Before *Griffiths* the Supreme Court had held that certain alienage classifications established by state laws were "inherently suspect" under the 14th

1. 413 U.S. 717 (1973). See companion case, *Sugarman v. Dougall*, 413 U.S. 634 (1973), rejecting alienage classifications for civil servants in New York as overbroad.

2. Many states have required United States citizenship as a condition for admission to the bar. Missouri's requirement prior to amendment was typical. Section 484.040, RSMo 1969, gives the Missouri Supreme Court the exclusive power to admit and license persons to practice law in Missouri. Prior to Sept. 1, 1972, Mo. Sup. Ct. R. 8.05 read in part, "[A]pplicant[s] for examination for admission to the Bar in this State must be . . . citizen[s] of the United States." The Rule now provides that applicants be of good moral character and be 21 years of age.

The Attorney General of Missouri has held that a United States citizenship requirement for licensing doctors is invalid. 27 Mo. ATT'Y GEN. OP. 276 (May 22, 1970).

3. 162 Conn. 249, 294 A.2d 281 (1972).

4. 413 U.S. at 718.

5. 353 U.S. 232 (1957).

6. 353 U.S. at 238-39. The Connecticut Supreme Court in *Griffiths* found that the citizenship requirement met the "rational connection" test of *Schwartz*. See Application of Griffiths, 162 Conn. 249, 260, 294 A.2d 281, 286 (1972). *Schwartz* did not control *Griffiths* because it involved a former member of the Communist Party who was refused admission to the bar on moral grounds. *Schwartz* holds only that regulations of the legal profession must comply with the 14th amendment.

amendment;⁷ and, therefore, that the state must show a "compelling state interest" to justify them.⁸ Thus, restrictions on an alien's right to employment,⁹ to obtain fishing licenses,¹⁰ to receive welfare,¹¹ and to practice certain professions¹² constitute denials of equal protection. Several of these cases, however, involved an alienage classification that tended to impact on race instead of national allegiance only.¹³ The *Griffiths* Court held that classifications based on alienage are suspect¹⁴ and that the state, to justify them,

... must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary to the accomplishment' of its purpose or the safeguarding of its interest.¹⁵

Having established the state's burden of proof, the Court gave its attention to the question whether Connecticut had met this burden. Commentators¹⁶ and cases¹⁷ have suggested five justifications for the citizenship requirement as a condition for admission to the bar. First, it is argued that an alien is incapable of possessing the required appreciation of the spirit of American institutions.¹⁸ Yet, a state cannot exclude a citizen from the legal profession solely because of his political beliefs concerning American institutions.¹⁹ Although a state does have a legitimate interest in insuring that

7. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). In 1886 the Supreme Court held that aliens are "persons" within the meaning of the 14th amendment. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

8. *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). See *Clarke v. Deckebach*, 274 U.S. 392 (1927), in which the Court held that a mere rational basis will justify an alienage classification.

9. *Truax v. Raich*, 239 U.S. 33 (1915). See *Sugarman v. Dougall*, 413 U.S. 634 (1973).

10. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

11. *Graham v. Richardson*, 403 U.S. 365 (1971).

12. *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

13. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Although *Yick Wo* was an alien, the ordinance he challenged was aimed at discrimination against the Chinese as a race rather than as a nationality. See also *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), where the classification was aimed at specific nationalities, not aliens in general, thus giving it the effect of a race classification. In *Graham v. Richardson*, 403 U.S. 365, 372 (1971), the Court merely stated that classifications based on alienage were inherently suspect. The authority for this view was taken from a footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). However, *Carolene Products* did not concern aliens, and only four Justices joined in the opinion. See *Clark v. Deckebach*, 274 U.S. 392 (1927). *Clark* is an early Supreme Court case setting a mere rational basis standard for alienage classifications.

14. 413 U.S. at 721.

15. *Id.* at 721-22.

16. M. KONVITZ, *THE ALIEN AND THE ASIATICS IN AMERICAN LAW* (1946). See also Comment, 10 STAN. L. REV. 777, 780 (1958).

17. Application of Park, 484 P.2d 690 (Alas. 1971); *Raffaelli v. Comm. of Bar Examiners*, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972); *In re Chi-doo Li*, 79 Wash. 2d 561, 488 P.2d 259 (1971).

18. *Raffaelli v. Comm. of Bar Examiners*, 7 Cal.3d 288, 296, 496 P.2d 1264, 1269, 101 Cal. Rptr. 896, 902 (1972).

19. *Baird v. State Bar*, 401 U.S. 1, 6 (1971); *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

a bar applicant has an understanding of the American governmental system, the exclusion of all aliens does not promote that interest.²⁰

A second justification given is that an alien cannot take the required oath to support the Constitution because he owes his allegiance to another country.²¹ Yet, aliens have long taken this oath upon induction into the armed services.²² In *Griffiths* the Court found no merit in the contention that noncitizens could not in good conscience take an oath to support the Constitution.²³ The Court further said that applicants can constitutionally be required to take the oath sincerely, and that a pro forma mouthing of it is insufficient.²⁴ This requirement is relevant to an applicant's character, not his nationality, and is equally applicable to aliens and citizens alike.²⁵

A third argument against allowing aliens to practice law is that an alien is likely to return to his native land and thus shirk his duty of remaining accessible to his clients.²⁶ Yet, in our highly mobile society lawyers often move from state to state; in this regard aliens are no more likely to be derelict in their duty of accessibility than are nationals. Further, there is little basis for believing that an alien who has established a law practice will suddenly give it up to return to his native soil.

A fourth argument is that the practice of law is a privilege, not a right, and therefore the state may regulate it freely.²⁷ But, the Supreme Court has held that the practice of law is a matter of right for one qualified by his learning and moral character,²⁸ and, more fundamentally, that constitutional rights do not turn on whether a benefit is characterized as a right or a privilege.²⁹

The final argument, and the one the Connecticut bar most strongly relied on, is that a lawyer is an officer of the court and that he should, therefore, be a citizen.³⁰ Respondents contended that since citizenship is required of other public officials, citizenship may likewise be required for an attorney.³¹ They pointed out that citizenship is a prerequisite for many public offices because of the danger inherent in those with a substantial public

20. *Raffaelli v. Comm. of Bar Examiners*, 7 Cal. 3d 288, 296, 496 P.2d 1264, 1270, 101 Cal. Rptr. 896, 902 (1972).

21. *Application of Park*, 484 P.2d 690, 694 (Alas. 1971); *Raffaelli v. Comm. of Bar Examiners*, 7 Cal. 3d 288, 297, 496 P.2d 1264, 1270, 101 Cal. Rptr. 896, 902 (1972).

22. 10 U.S.C. § 502 (1972).

23. 413 U.S. at 726 n.18.

24. *Id.* at 726.

25. *Id.*

26. *Raffaelli v. Comm. of Bar Examiners*, 7 Cal. 3d 288, 299, 496 P.2d 1264, 1271-72, 101 Cal. Rptr. 896, 903-04 (1972).

27. *Id.* at 299, 496 P.2d at 1272, 101 Cal. Rptr. at 904.

28. *Baird v. State Bar*, 401 U.S. 1, 8 (1971).

29. *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 n.5 (1957). The companion case to *Griffiths*, *Sugarman v. Douglass*, 413 U.S. 634, 644 (1973), reinforces the rejection of the right-privilege dichotomy.

30. *Application of Park*, 484 P.2d 690, 695 (Alas. 1971); *Application of Griffiths*, 162 Conn. 249, 254, 294 A.2d 281, 284-85 (1972); *Raffaelli v. Comm. of Bar Examiners*, 7 Cal. 3d 288, 300-01, 496 P.2d 1264, 1273, 101 Cal. Rptr. 896, 905 (1972).

31. 413 U.S. at 728 (1973).

responsibility having a divided loyalty.³² The Court noted that most states use the phrase, "officer of the court," in its figurative sense, instead of its constitutional or legal sense.³³ For example, in Missouri an attorney is an officer of the court only in the sense that he is responsible to the public for the proper administration of justice.³⁴ The Missouri courts have held that the phrase "officer of the court" means only that an attorney will be faithful to those who may trust him with their causes³⁵ and that he will assist the court in administering justice.³⁶ Therefore, the lawyer possesses no substantial public responsibility, and there is no overriding state interest in minimizing the possibility of a divided loyalty that could prevent an alien from performing these tasks.³⁷

In Connecticut the situation is somewhat different in that the lawyer has extraordinary powers.³⁸ A Connecticut attorney has authority to sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgements of deeds.³⁹ Nevertheless, the Supreme Court found that these powers "hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens,"⁴⁰ and thus held that the Connecticut Bar had failed to meet the heavy burden of proof required of suspect classifications.⁴¹

In his dissent, Mr. Chief Justice Burger conceded the desirability of letting aliens become members of the bar but felt that there was no constitutional basis for the Court's holding.⁴² He rejected the majority's suspect classification test and held that any "rational basis" would uphold the requirement.⁴³ Furthermore, Mr. Chief Justice Burger concluded that the lawyer is indeed an officer of the court as well as an advocate for his client.⁴⁴ Agreeing with the Chief Justice, Mr. Justice Rehnquist noted that society places tremendous responsibility and trust on lawyers and, therefore, some-

32. *Id.* at 724.

33. *Id.* at 728-29. See *Cammer v. United States*, 350 U.S. 399, 405 (1956).

34. *In re Sizer*, 134 S.W.2d 1085 (Spr. Mo. App. 1939); *In re Lacy*, 234 Mo. App. 71, 112 S.W.2d 594 (St. L. Ct. App. 1937); *In re H— S—*, 229 Mo. App. 44, 69 S.W.2d 325 (St. L. Ct. App. 1934).

35. *State v. Lewis*, 9 Mo. App. 321, *aff'd*, 74 Mo. 222 (1881).

36. *Leimer v. Hulse*, 352 Mo. 451, 178 S.W.2d 335 (1944), *cert. denied*, 323 U.S. 744, *rehearing denied*, 323 U.S. 814 (1944); *Esmor v. Haeussler*, 341 Mo. 33, 106 S.W.2d 412, *transferred*, 234 Mo. App. 217, 115 S.W.2d 54 (St. L. Ct. App. 1938).

37. 413 U.S. at 723.

38. CONN. GEN. STAT. § 51-85.

39. 413 U.S. at 724.

40. *Id.* at 724.

41. *Id.* at 727.

42. *Id.* at 730.

43. *Id.* at 732. The criticism of the rational basis test is that it is so easily met that the state can justify almost any requirement. See *Hoyt v. Florida*, 368 U.S. 57, 62 (1968). See also Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 NEB. L. REV. 131 (1968).

Mr. Chief Justice Burger also suggests that states may constitutionally adopt, either by law or court rule, reciprocal provisos which would only admit to the bar nationals of those countries which admit Americans to practice under their legal systems. 413 U.S. at 733.

44. 413 U.S. at 733.

thing more than technical skills is required—a lawyer needs an understanding of the American political and social experience which the alien cannot obtain without the naturalization process.⁴⁵ Neither dissenter clarifies how the naturalization provides this understanding. If it is so necessary for the practice of law, perhaps all applicants, citizens as well as aliens, should be tested for this attribute.⁴⁶

The significance of *Griffiths* has not yet been fully felt. The citizenship requirement has impacted not only on aliens who wanted to practice law in the United States, but has also been detrimental to the general public. The advice of an alien expert on foreign law has been unavailable because he was precluded from the practice of law.⁴⁷ Indeed, with expanding world trade, lawyers capable of practicing law in more than one country will become especially helpful to their clients. The Court has removed one impediment toward providing such counsel.

CHARLES D. SINDEL

CRIMINAL LAW—CAN RETRIAL OF A CRIMINAL DEFENDANT RESULT IN A HARSHER SENTENCE THAN THAT IMPOSED IN FIRST TRIAL?

*Chaffin v. Stynchcombe*¹

In 1969, Chaffin was tried by a jury in a Georgia state criminal court for the capital offense of robbery by force or violence.² The jury returned a guilty verdict and sentence of 15 years in prison. On appeal his conviction was affirmed, but on a subsequent writ of habeas corpus Chaffin was granted a new trial. Upon retrial with a different judge and jury he was again found guilty and sentenced to life imprisonment. On certiorari to the United States Supreme Court Chaffin argued that the due process clause of the 14th amendment bars the jury from rendering a longer sentence on retrial following the reversal of a prior conviction.

The defendant based his contention primarily on *North Carolina v. Pearce*.³ In *Pearce* the defendant was convicted for assault with intent to commit rape. After a retrial, the trial judge ordered a harsher sentence than had been previously imposed. The United States Supreme Court stated that vindictiveness toward a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.

45. *Sugarman v. Dougall*, 413 U.S. 634, 663 (1973) (companion case) (dissenting opinion, Rehnquist, J.).

46. Neither Chief Justice Burger nor Justice Rehnquist asserted that the state could show a "compelling" interest.

47. *In re Roel*, 3 N.Y.2d 224, 144 N.E.2d 24 (1957), *appeal denied*, 355 U.S. 604 (1958). The New York Court of Appeals held that it was an illegal practice of law for a Mexican lawyer, unable to become a member of the New York bar because he was an alien, to advise New York clients on Mexican divorces.

1. 412 U.S. 17 (1973).

2. GA. CODE ANN. § 26-1902 (1972).

3. 395 U.S. 711 (1969).

Thus, due process requires that the defendant be free of apprehension of vindictiveness, since that fear may otherwise deter the exercise of the right to appeal or to collaterally attack the first conviction. *Pearce* held that where a judge imposes a harsher sentence at a second trial for the same offense his reasons for doing so must "affirmatively appear."⁴ *Chaffin* held that *Pearce* is not controlling where the jury is uninformed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness. Thus, where a jury sentences, the defendant has the burden of showing the jury's knowledge of the previous conviction and its vindictiveness.

In accordance with the rationale of *Pearce*, Chaffin had asserted three due process claims: (1) Harsher sentences on retrial violate the double jeopardy provision of the fifth amendment;⁵ (2) harsher sentences occasioned by vindictiveness on the part of the sentencing authority violate concepts of fairness in the criminal process;⁶ and (3) the possibility of a harsher sentence, even without a reasonable fear of vindictiveness, has an impermissible "chilling" effect on the exercise of the right to appeal and to collaterally attack a conviction.

The Court rejected Chaffin's double jeopardy argument, holding that the original conviction was, by defendant's choice, wholly nullified and the slate wiped clean.⁷ *Chaffin* recognized the power of the state to retry a

4. *Id.* at 726. Those reasons must be based on objective information concerning the conduct of the defendant occurring after the time of the original sentence, and such conduct must be readily identifiable. The Court also required that the factual data on which the increased sentence is based must be made part of the record so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

5. Being twice put in jeopardy is a different proposition than being sentenced twice. *See* *Downum v. United States*, 372 U.S. 734 (1963).

The fifth amendment is applicable to the states through the due process clause of the 14th amendment. *Benton v. Maryland*, 395 U.S. 784 (1969).

6. *Pearce* found that due process of law required that vindictiveness play no part in the sentence received after a new trial:

Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, 'penalizing those who choose to exercise' constitutional rights, 'would be patently unconstitutional.' *United States v. Jackson*, 390 U.S. 570, 581. And the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to 'chill the exercise of basic constitutional rights.' *Id.* at 582. *See also* *Griffin v. California*, 380 U.S. 609; *c.f.* *Johnson v. Avery*, 393 U.S. 483. . . . A court is 'without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice.' *Worcester v. Commissioner*, 370 F.2d 713, 718. *See* *Short v. United States*, 120 U.S. App. D.C. 165, 167, 344 F. 2d 550, 552.

395 U.S. at 724. The difference in *Pearce* and *Chaffin* is that *Pearce* requires the sentencing authority to justify the harsher sentence (show a lack of vindictiveness), and *Chaffin* requires the defendant to prove vindictiveness (the sentencing authority is presumed not to have been vindictive).

7. The double jeopardy clause has been held to protect against a second prosecution for the same offense after the accused is acquitted. *Green v. United States*, 355 U.S. 184 (1957); *United States v. Ball*, 163 U.S. 662 (1896). The clause has also been construed to prevent a second prosecution for the same

defendant who has succeeded in getting his first conviction set aside, and in conjunction with such power the right to impose whatever sentence may be legally authorized.⁸

As to Chaffin's second contention, the Court distinguished *Pearce* by noting that Chaffin was sentenced by a jury with no knowledge, presumably, of the first sentence, whereas in *Pearce* the possibility existed that a judge with knowledge of the first proceeding might be influenced by that knowledge. The judge's potential inclination to punish the prisoner for appealing, or his resentment for having to try the suit again, could chill the prisoner's rights of appeal and due process. Contrarily, a jury has no personal stake in the matter and no motivation to be vindictive.⁹

The majority¹⁰ rejected Chaffin's third contention, also, concluding that harsher second-trial sentences, where free of vindictiveness, are constitutionally valid despite any incidental deterrent effect they may have on the right to appeal.¹¹ The court believed that the possibility of a higher sentence is too remote¹² to produce a "chilling" effect at the time of defendant's

offense after conviction. *In re Nielsen*, 131 U.S. 176 (1888). Additionally, the clause protects against the infliction of multiple punishments for the same offense. *United States v. Benz*, 282 U.S. 304, 307 (1931); *United States v. Sacco*, 367 F.2d 368 (2nd Cir. 1966); *United States v. Adams*, 362 F.2d 210 (6th Cir. 1966); *Kennedy v. United States*, 330 F.2d 26 (9th Cir. 1964). In *Ashe v. Swenson*, 397 U.S. 436 (1970), the Court indicated that collateral estoppel is a part of the fifth amendment's guarantee against double jeopardy. In other words, once a fact or issue has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.

8. The Court relied on reasoning in *Pearce*. Thus, the state has power "to retry a defendant who has succeeded in getting his first conviction set aside . . . and, as a corollary . . . to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." *North Carolina v. Pearce*, 395 U.S. 711, 720. (1969). See *Stroud v. United States*, 251 U.S. 15 (1919).

9. 412 U.S. at 23. See note 34 *infra*.

10. Justices Powell, Rehnquist, Blackmun, and White, and Chief Justice Burger.

11. The Supreme Court has never held that the accused has an absolute right to appeal, but it has held that once such appellate procedures are developed they must comply with due process requirements. See note 13 *infra*. *Pearce* rejected the argument that since convicts who do not seek new trials cannot have their sentences increased, it creates an invidious classification, for equal protection purposes, to impose that risk only on those who succeed in getting their original conviction set aside. 395 U.S. at 722. Even though a harsher sentence is not a deliberate effort to frustrate the right of appeal it may be sufficient that it has that effect if it cannot otherwise be shown as a necessary means for effectuating a legitimate public policy. This appears to be especially true when considering the difficulties in applying the *Chaffin* rule. 412 U.S. at 46 (dissenting opinion). See text accompanying notes 25-35 *infra*.

12. 412 U.S. at 33. The court stated:

Several contingencies must coalesce. First, his appeal must succeed. Second, it must result in an order remanding the case for retrial rather than dismissing outright. Third, the prosecutor must again make the decision to prosecute and the accused must again select trial by jury rather than securing a bench trial or negotiating a plea. Finally, the jury must again convict and then ultimately the jury or the judge must arrive

decision to appeal.¹³

The *Chaffin* dissent made three telling points. First, there is a substantial danger of vindictiveness even if the jury is uninformed of the prior conviction—from the judge, in his handling of the trial and in giving the instructions, and the prosecutor, in asking for and actively seeking a harsher sentence.¹⁴ Second, establishing a different rule for judge and jury trials burdens the defendant's right to trial by jury because a harsher sentence from a jury is more difficult to attack successfully.¹⁵ Third, the application of *Pearce* to jury trials would not be difficult; the judge would be compelled to reduce the second sentence to the level of the first unless he can set forth the reasons for the harsher sentence as *Pearce* requires.¹⁶

at a harsher sentence in circumstances devoid of a genuine likelihood of vindictiveness. . . . [W]e cannot agree with petitioner that such speculative prospects interfere with the right to make a free choice whether to appeal.

13. The American Bar Association recommends that legislatures prohibit a second harsher sentence for the same offense or a different offense based on the same conduct. ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 3.8 (1967). See also, ABA STANDARDS POST-CONVICTION REMEDIES § 6.3 (Tent. Draft 1967); ABA STANDARDS APPELLATE REVIEW OF SENTENCES § 3.4 (Tent. Draft 1967). The committee thought that the only argument that can justify an increased sentence is that the original was too light or that new facts have been discovered that bear upon the sentence. ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, § 3.8 (1967). Even this argument, the committee thought, overlooks the fact that only those who have exercised their right to appeal are vulnerable to the increased sentence. There is no rational basis for distinguishing the treatment of those who appeal from those who do not if both equally deserve, because the first sentence was too light or because of subsequent events, an increase in sentence. The risk of a greater sentence as the result of the assertion of the right of review necessarily acts, the committee believed, as a deterrent to the exercise of the right. The committee concludes that a system which fears the assertion of error to the degree that it must place artificial deterrents in the path is not conducive to due process. *Id.* at 310.

To be constitutionally suspect the hinderance of the right to appeal must be unreasonable, as the Court states in *Rinaldi v. Yeager*, 384 U.S. 305 (1966):

This Court has never held that States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

Id. at 310, citing *Griffin v. Illinois*, 351 U.S. 12; *Douglas v. California*, 372 U.S. 353; *Lane v. Brown*, 372 U.S. 477; *Draper v. Washington*, 372 U.S. 487.

Authorities supporting flexibility in sentencing on retrial rely on four rationales: (1) A prior sentence has no legal existence because it was imposed pursuant to a "void" conviction; (2) by utilizing a post-conviction remedy the defendant waived any benefit he may have had from a prior sentence; (3) the appellate court has no authority to revise a sentence imposed by a trial court within statutory limits (*but see*, PROP. NEW MO. CRIM. CODE § 2.070 (1973), which permits appellate courts to reduce sentences); and (4) a new trial and sentence does not foreclose an independent consideration of the sentence at a second trial, since the new trial and sentence is simply a continuation of the same case. *Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606, 610 (1965).

14. 412 U.S. at 36 (dissenting opinion).

15. *Id.* at 36.

16. *Id.* at 37.

Even before *Chaffin*, federal cases subsequent to *Pearce* had already limited its effect. In *Moon v. Maryland*¹⁷ the Court dismissed, as improvidently granted, a writ of certiorari based on the trial judge's affidavit setting forth the reasons for the harsher sentence.¹⁸ These reasons included identifiable conduct of the defendant subsequent to the first sentence.¹⁹ In *Colten v. Kentucky*²⁰ the Court refused to apply the *Pearce* rule to a sentence received after a trial de novo in a higher court.²¹ *Chaffin*, *Moon*, and *Colten* have apparently limited *Pearce* to cases with judge sentencing where there is evidence of vindictiveness.²²

The debate, of course, is over the burden of producing evidence. *Pearce* requires the judge to set forth identifiable conduct of the defendant occurring subsequent to the first sentence to justify his harsher sentence (i.e., show a lack of vindictiveness).²³ *Chaffin* presumes that a jury sentence is not vindictive and requires the defendant to rebut that presumption.²⁴ The practical result is that a judge will impose a harsher sentence less frequently, or, if imposed, a harsher sentence imposed by a judge will stick much less frequently than one imposed by a jury because the vindictiveness element will seldom be provable, negatively, or affirmatively.

Excluding *Pearce* from application where a jury without knowledge of the prior trial sentences, as the Missouri Supreme Court did in *Spidle v. State*,²⁵ raises a problem in the seven states,²⁶ including Missouri, that

17. 398 U.S. 319 (1970).

18. *Id.* The Court also relied on admission of petitioner's counsel that, "I have never contended that Judge Pugh was vindictive." *Id.* at 321.

19. *Id.* at 320.

20. 407 U.S. 104 (1972).

21. *Id.* Appellant was charged with disorderly conduct, convicted, and fined \$10 in the Quarterly Court of Fayette County. The appellant had a trial de novo under Kentucky's two-tier system, but was again convicted and fined \$50. The Court said that there was a fresh determination of guilt and the court had no motive to deal with a de novo defendant more strictly than any other. *Id.* at 117.

22. I.e., where the judge does not affirmatively show valid reasons for the increased sentence.

23. 395 U.S. 711, 725 (1969).

24. 412 U.S. at 28.

25. 446 S.W.2d 793 (Mo. 1969). Defendant was charged with assault with intent to kill with malice aforethought. The jury at the first trial found him guilty of assault without malice and fixed punishment at five years imprisonment. On appeal, the conviction was reversed for the trial courts failure to excuse a juror for cause. A second trial resulted in the jury finding the defendant guilty of assault with malice and sentencing him to eight years imprisonment.

See also *Kansas City v. Henderson*, 468 S.W.2d 48 (Mo. 1971), where the Missouri Supreme Court again said, relying on *Spidle*, that *Pearce* does not apply to cases wherein the jury rather than the trial judge determines the punishment. The court stated that where there is no evidence that the jury knows of a prior sentence, there can be no violation of due process. See, e.g., *McCulley v. State*, 486 S.W.2d 419 (Mo. 1972); *State v. Holley*, 488 S.W.2d 925 (Mo. App., D.K.C. 1972).

26. In addition to Missouri, these states include Arkansas, Georgia, Kentucky, Oklahoma, Tennessee, and Virginia.

normally require jury sentencing.²⁷ By statute in Missouri the jury is to assess the punishment in situations where there is any alternative or discretion with regard to the kind and extent of punishment.²⁸ Can the defendant, without restriction, waive his constitutional rights to trial by jury to bring a possible second trial within *Pearce*? The Supreme Court of the United States in *Singer v. United States*²⁹ said that a defendant can waive the right, but that the right of so doing may be subjected to the approval of the trial court. Missouri's rules of criminal procedure provide that all issues of fact in a criminal case shall be tried by a jury, unless the defendant waives this right with the assent of the court.³⁰ Whether the court's assent must include the prosecutor's consent has not been determined. In *State v. Butler*³¹ a memorandum signed by the defendant and his attorney and approved by the trial judge satisfied the requirements of waiver. That the defendant's right to elect that he shall be tried by the court without a jury is not absolute is

27. See generally LaFont, *Assessment of Punishment—A Judge or Jury Function?* 38 TEXAS L. REV. 835 (1960); Comment, *A Review of Sentencing in Missouri: The Need for Re-evaluation and Change*, 11 ST. L. U. L. J. 69 (1966); Comment, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968 (1967).

28. § 546.410, RSMo 1969.

In all cases of a verdict of conviction for any offense where by law there is any alternative or discretion in regard to the kind or extent of punishment to be inflicted, the jury may assess and declare the punishment in their verdict, and the court shall render a judgment according to such verdict, except as herein provided.

There are exceptions to jury sentencing in Missouri. Section 546.430, RSMo 1969, provides:

The court shall have the power, in all cases of conviction, to reduce the extent and duration of the punishment assessed by a jury, if in its opinion the conviction is proper, but the punishment assessed is greater than . . . ought to be inflicted.

Section 546.440, RSMo 1969, provides:

Where the jury agree upon a verdict of guilty but fail to agree upon the punishment to be inflicted or do not declare such punishment by their verdict, the court shall assess and declare the punishment and render judgment accordingly. Where the jury find a verdict of guilty and assess a punishment not authorized by law, and in all cases of judgment by confession, the court shall assess and declare the punishment, and render judgment accordingly.

29. 380 U.S. 24 (1965).

30. Mo. R. CRIM. P. 26.01 states:

a.) All issues of fact in any criminal case shall be tried by a jury to be selected, summoned and returned in the manner prescribed by law, unless trial by jury be waived as provided in this Rule.

b.) The defendant may, with the assent of the court, waive a trial by jury and submit the trial of any criminal case to the court, whose findings shall have the force and effect of the verdict of a jury. In felony cases such waiver by the defendant shall be made in open court and entered of record.

See also Mo. Att'y Gen. Op. No. 99 (Nov. 7, 1960):

Defendant in a felony case may, with approval of court, waive his right to jury trial and be tried without jury according to procedure authorized by Const. art. 1, section 22(a), and proper method of waiving jury trial in any criminal case is governed by this rule.

31. 415 S.W.2d 784 (Mo. 1967).

shown by *State v. Taylor*,³² where the trial court's refusal of defendant's request to waive the jury was approved.³³

Should the *Pearce* rationale—requiring a showing of the reasons for the harsher sentence—apply where the jury knows of the previous conviction, either through publicity or improper courtroom comment? As the *Chaffin* dissent noted, a judge and/or prosecutor who know can influence the outcome of a jury trial even if the jury does not know of the previous conviction.³⁴ Can the defendant determine on voir dire the extent of the jury's knowledge without prejudicing his case? If the jury has knowledge of the prior conviction, will a cautionary instruction be effective? These questions

32. 391 S.W.2d 835 (Mo. 1965). Taylor was convicted of selling a narcotic drug and sentenced to eight years in prison at the first trial. At a second trial Taylor was sentenced to 12 years after being denied waiver of a jury. The court stated:

The declared public policy of the state requires that a waiver by an accused of the right to trial by jury, to be effective, be agreed to by the court. It is considered the rights of society, as well as the rights and privileges of the accused, are involved. . . . The accused has no absolute right, either by constitution, statute, or court rule, to elect that he shall be tried by the court without a jury.

Id. at 836. Could the judge at the second trial refuse defendant's request for waiver solely because he wanted the jury to have the discretion of imposing a harsher sentence?

33. In *Payne v. Nash*, 327 F.2d 197 (8th Cir. 1964), the court said: Appellant's right to trial by jury under the Missouri Constitution (Section 22(a), Art. I, Constitution of Missouri, V.A.M.S.) is the same as the right that existed at common law. At common law the jury assessed the guilt or innocence of the accused; the court fixed the punishment. *State v. Morton*, 338 S.W.2d 858, 861 (Mo. 1960); *State v. Griffin*, 339 S.W.2d 803, 806 (Mo. 1960). Though it is permissible for juries to assess punishment in Missouri (*Ex parte Dusenberry*, 97 Mo. 504, 11 S.W. 217 (1889)), such was only a conditional privilege. . . . Thus, there is nothing in the Due Process clause of the Fourteenth amendment of the United States Constitution, nor in the Constitution and laws of the State of Missouri, which gave appellant the right to have his punishment assessed by the jury.

Id. at 200. See *State v. Morris*, 476 S.W.2d 485 (Mo. 1971); *State v. Brown*, 443 S.W.2d 805 (Mo. 1969); *State v. Hampton*, 317 S.W.2d 348 (Mo. 1958).

The question may be asked whether jury sentencing in itself is proper. Some authorities believe that the jury tends to take into account the punishment when deciding the question of guilt. Thus, where the issues of guilt and punishment are decided in the same proceeding, the attorney finds it difficult to persuade the jury to lower the punishment and yet at the same time maintain his client's innocence. See generally ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE SENTENCING ALTERNATIVES AND PROCEDURES § 1.1 (Approved Draft 1968); PRESIDENTS COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 145 (1967); Stubbs, *Jury Sentencing in Georgia—Time for a Change*, 5 GA. ST. B.J. 421 (1969); Comment, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968 (1967).

Under the PROP. NEW MO. CRIM. CODE § 2.060 (1973), jury sentencing would be abolished. However, the committee compromised to some extent by providing that the jury shall be informed of the range of authorized terms which the court might impose after a jury finding of guilt.

34. 412 U.S. at 36.

illustrate the difficulty of applying *Chaffin*. It is submitted that if the jury knows of the prior conviction the same dangers are present that *Pearce* seeks to protect against.³⁵ Further, it will be difficult and hazardous to determine the extent of the jury's knowledge, and virtually impossible to prove vindictiveness once discovered.³⁶

RICHARD J. COLLINS

CRIMINAL LAW—REMARKS BY THE TRIAL JUDGE TO THE DEFENSE ATTORNEY

*State v. Wren*¹

On August 14, 1970, defendant, Darrell Wren, was arrested for stealing. At his trial, while his attorney cross-examined a police officer, the trial judge remarked in the presence of the jury that he would allow the attorney to develop his line of questioning "ad nauseum."² Several other times during the trial the judge admonished the attorney somewhat derogatorily.³ The defendant was convicted. On appeal, the Missouri Supreme Court reversed,

35. Perhaps a jury would be less aware of or less concerned by the added burden the second trial places on the criminal justice system than a judge. Perhaps also the jury would be less respectful of the defendants' full exercise of his rights. The point is that all juries are not likely to react one way and all judges another; rather, some judges and juries will be vindictive, and some will not.

36. Many courts treat jury deliberations as "privileged." *McDonald v. Pless*, 238 U.S. 264 (1915).

One partial solution to the problem under discussion is suggested by PROP. NEW MO. CRIM. CODE § 2.070(2) (1973), which permits an appellate court to reduce a sentence on the ground that the sentence imposed was more severe than was appropriate, under the circumstances of the case. Alternatively, the appellate court may set the sentence aside for further proceedings in the sentencing court.

1. 486 S.W.2d 447 (Mo. 1972).

2. *Id.* at 448. The comment by the trial judge arose in the following context:

Defense Counsel: What do you ask them when you stop?

The Court: You will have to develop that it serves some useful purpose. I can't see any useful purpose in this line of inquiry.

Defense Counsel: Your Honor, it will become relevant because the defendant was afraid.

Prosecutor: I object to the question on the grounds of immateriality, Your Honor.

The Court: I think the objection is well justified, but I will overrule you and allow you to develop this ad nauseum. Go ahead and proceed. Ask your questions.

3. Brief for Appellant at 39, *State v. Wren*, 486 S.W.2d 447 (Mo. 1972). During the defense attorney's cross-examination, the trial judge interrupted the defense counsel with the following comment:

That has been asked at least three or four times. I ask you not to plow the field again and again, Mr. (defense counsel). I have heard you ask that, and I have heard opposing counsel ask it, and I just don't want to hear it again. Just because you don't like the answer, you are not entitled to ask the question again or if you do like the answer, you don't ask it again.

stating that "an undue burden was placed on defendant and that he was denied a fair trial."⁴ The court reasoned that the words "ad nauseum" could have conveyed to the jury the impression that the trial court thought defendant's evidence to be without merit and "totally absurd."⁵ This reasoning is apparently based on the assumption that jurors identify the defendant with his attorney, and hence derogatory remarks by the trial judge to the attorney may prejudice the client's case.⁶

The foundation of the American system of criminal law is that every defendant has a constitutional right to a fair and impartial trial.⁷ A cornerstone of the foundation rests upon the rule that "a fair trial exacts absolute impartiality on the part of the judge, as to both his conduct and remarks."⁸ Missouri has codified rules pertaining to judicial conduct in the Canons of Judicial Ethics⁹ that require a trial judge to conduct himself without bias.

The problem is distinguishing remarks directed to the defense attorney which may prejudice a criminal defendant from fair, though possibly stern, remarks which trial judges necessarily use occasionally to maintain an orderly trial. Criticism or admonishment of an attorney, whether in chambers¹⁰ or in the presence of the jury, rests within the discretion of the trial court and ordinarily will not be grounds for reversal.¹¹ This general rule "establish[es] that one person, the judge, must be in charge of the courtroom to assure an orderly trial."¹² The cases show that when appellate

4. 486 S.W.2d at 449.

5. *Id.*

6. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEXAS L. REV. 629, 655 (1972).

7. U.S. CONST. amend. VI; MO. CONST. art. 1, § 18(a).

8. *State v. Hudson*, 358 Mo. 424, 425, 215 S.W.2d 441, 442 (Mo. 1948). See also *State v. Tate*, 468 S.W.2d 646 (Mo. 1971); *State v. Sanders*, 360 S.W.2d 722, 726 (Mo. 1962); *State v. Pinkston*, 333 S.W.2d 63 (Mo. 1960).

9. ABA CANONS OF JUDICIAL ETHICS (1967) provide:

2.05 Essential Conduct—A judge should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

2.10 Courtesy and Civility—A judge should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the courts.

2.15 Interference in Conduct of Trial—Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial manner or tone.

10. See *United States v. Capaldo*, 402 F.2d 821 (2d Cir. 1968); *Harris v. United States*, 367 F.2d 633 (1st Cir. 1966); *Paddock v. United States*, 320 F.2d 624 (9th Cir. 1963); *Green v. State*, 42 Ala. App. 439, 167 So. 2d 694 (1964); *State v. Mucie*, 448 S.W.2d 879 (Mo. 1970).

11. *State v. Barron*, 465 S.W.2d 523 (Mo. 1971); *State v. Gyngard*, 333 S.W.2d 73 (Mo. 1960); *State v. Thursby*, 245 S.W.2d 859, 863 (Mo. 1952) (defense attorney's statement was "childish"); *State v. Teeter*, 239 Mo. 475, 483, 144 S.W. 445, 447 (1912) (defense attorneys "only competent to practice before justices of the peace").

12. 486 S.W.2d at 448.

courts characterize the trial judge's remarks as criticism or discipline of an attorney, relief will not be granted.¹³ The defendant must show more than a chastizing of his attorney, but prejudice to his interests.¹⁴

If a defense attorney believes the judge's remarks exhibit bias, the attorney must object or move for a mistrial to preserve the error for review.¹⁵ Even with a proper objection, however, appellate review may be handicapped. A transcript cannot convey tonal quality and facial expressions which may cloak innocuous words with prejudice. In *State v. Barnholtz*,¹⁶ the Missouri Supreme Court recognized that "Until . . . transcripts are brought to us on sound recordings there is little that we can do about objections to tonal qualities."¹⁷

The reviewing courts must examine the record as a whole to decide the actual effect of the allegedly prejudicial remarks. Separate passages, isolated from the entire trial record, will often take on an undesired aura of special importance. The appellate court must place itself in the position of the jury to determine whether the remarks were prejudicial.¹⁸

13. Cases cited note 11 *supra*.

14. Cases cited note 11 *supra*.

15. See *Trial Tactics in Criminal Cases*, 37 TENN. L. REV. 705 (1970) (proceedings of a symposium at the Southeastern Trial Lawyers Institute), where Mr. Rothblatt described how he handles a trial judge whose conduct seemed biased against him:

The question is how to take him on. Very early in the trial, when he begins to show his prejudice, let him know in a dignified way that you are not afraid of him. What I do is immediately call a bench conference. A case I was trying about two months ago was presided over by a judge who did not really mean to act in an apparently prejudiced manner. I think it was just one of those unfortunate slips. He made some remark . . . that I thought was a little facetious and sarcastic, causing members of the jury to snicker. I immediately said to myself, "Let me put him in his place." Aloud, I said, "Your Honor, we want a bench conference." We went up to the bench and, almost in a monotone, I said, "The defendant now moves for a mistrial." (When you tell off a judge, you, the attorney, never make any motions; it is the defendant who is making the motions) I said, "Your Honor's remarks, though I'm sure they weren't deliberate, hurt just as badly when you said _____," and I quoted his exact words. I said, "There was snickering in the jury. Your Honor gave that jury the impression that the defendant's defense here is completely without merit." . . .

Every time you chew out a judge . . . raise constitutional questions. What you are doing is telling the judge in very nice language that you are a constitutional lawyer, that you are telling him off in constitutional terms, that this case is going not only all the way to the highest state court, but that you are going to petition for certiorari to the United States Supreme Court, and that the petition is going to say what a lousy mean judge he is.

Id. at 714. See *State v. Hudson*, 358 Mo. 424, 215 S.W.2d 441 (1948).

16. 287 S.W.2d 808 (Mo. 1956).

17. *Id.* at 812. *Accord*, *Goldstein v. United States*, 63 F.2d 609 (8th Cir. 1933), where the district court stated: "It is impossible to gather from the cold record, particularly when it is in narrative form, the atmosphere of the trial itself, the manner in which the words were spoken . . ." *Id.* at 613. See also *State v. Hudson*, 358 Mo. 424, 428, 215 S.W.2d 441, 443 (1948).

18. In *United States v. Porter*, 441 F.2d 1204 (8th Cir.), *cert. denied*, 404 U.S. 911 (1971), the court stated: "It is difficult for appellate judges to place

Two analyses have developed to make this determination. It is sometimes stated that courts will reverse only when the remark appears likely to have contributed to the defendant's conviction.¹⁹ In *United States v. Porter*,²⁰ the defense attorney was admonished for delaying the trial and at one point a heated exchange took place between him and the trial judge.²¹ The court applied the test "that error is not harmless if there is a reasonable possibility that the matter complained of might have contributed to the conviction."²² The court acknowledged that the remarks were outside "the confines of judicial propriety,"²³ but affirmed the conviction because they had not affected the outcome.²⁴ In *State v. Hicks*²⁵ the Missouri Supreme Court applied a test similar to that used in *Porter* and found that three separate statements²⁶ to defense counsel by the trial court indicated obvious hostility and "could not help but [have] obscure[d] the merits of the litigation and which may have contributed to an unjust result."²⁷ Accordingly, defendant's conviction of second degree murder was reversed.²⁸

themselves in the subjective role of a juror to assess the prejudicial effect of erroneous comment." *Id.* at 1215.

19. See *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963); *Homan v. United States*, 279 F.2d 767, 771 (8th Cir.), *cert. denied*, 364 U.S. 866 (1960).

20. 441 F.2d 1204 (8th Cir. 1971).

21. *Id.* at 1213-14 n.4. The following colloquy took place. Mr. Steinger (attorney for Porter):

Yes, let the record show that the United States District Attorney has supplied me the written statement. If it please your Honor, I would like to ask for a ten-minute recess for the reason there are some changes that have been made as evidenced by the first page, and I would like to compare it to all the pages because that change is not indicated on page 1.

To this the court replied:

Let's don't make a speech about that. I would say to you without the slightest fear of any contradiction if there's a difference in them, there's some misunderstanding somewhere about it, because I know the government is not in the habit of giving information to people that is untrue and incorrect. I don't think you ought to be making that statement unless you can back it up.

Id. On one occasion defense counsel was also admonished for "deliberate tactics" and on another for "blowing smoke rings" to "confuse the jury." *Id.*

22. *Id.* at 1215.

23. *Id.* at 1213.

24. The court noted that "the erroneous comments occupy only brief moments in the overall proceedings Based on our reading of the entire record here, we must conclude that the jury was not influenced by the comments of the court" *Id.* at 1215-16.

25. 438 S.W.2d 215 (Mo. 1969).

26. During the cross-examination of a police officer, the officer asked the defense attorney what he meant by the word "awesome," and the trial judge remarked to the defense attorney, "The officer asked you a pretty good question." *Id.* at 220. Later, while the defense counsel was examining a witness the trial judge on his own accord remarked, "What is the purpose of this? We are going on a Cook's tour." *Id.* Finally, the defense attorney asked for a few moments to examine some records, and the trial judge remarked, "All right, gentlemen. Let's step on it." *Id.* at 220-21.

27. *Id.* at 221.

28. *Id.*

A second test is one of substantial injustice. If the evidence, in light of the whole record, is so overwhelmingly against the defendant that he would have been convicted in any event, the conviction will stand.²⁹ In *State v. Bunton*³⁰ the Missouri Supreme Court seemed to challenge this view. There, the trial judge had interrupted the trial and threatened the defense attorney with contempt on several occasions. The supreme court reversed the ultimate trial court conviction on a finding that, by reason of his remarks, the trial judge had conveyed to the jury the impression that the defense lacked merit and had therefore contributed to the conviction.³¹ Regarding the strength of the evidence the court said:

It may be that he would be convicted by any jury in a trial where the fairness and impartiality of the trial judge could not be questioned. But that is not the criterion. Guilty or innocent, the defendant was entitled to be tried fairly and impartially.³²

Bunton is more in line with traditional notions of fair play; the strength of the evidence should have no bearing on whether a defendant was prejudiced by a trial judge's remark.

Relief will seldom be granted if defense counsel provoked the trial judge's comment.³³ Thus, the defendant must sometimes suffer the consequences of his counsel's misconduct. The rationale for this rule is discouraging defense attorneys from deliberately provoking remarks from the trial judge and then urging such remarks as error on appeal.

Appellate courts are favorably impressed by attempts at amelioration. Courts in a majority of jurisdictions, including Missouri, generally affirm convictions where the trial court, although making harsh comments to

29. *Homan v. United States*, 279 F.2d 767 (8th Cir.), *cert. denied*, 364 U.S. 866 (1960), in which the court stated:

Errors of the trial court which may be prejudicial in a close criminal case, in the sense of being capable in such a situation of possibly affecting the result, can well be without any such rational possibility in a strong case, and thus not entitle the defendant to a reversal of his conviction.

Id. at 771. See *United States v. Hamilton*, 452 F.2d 472 (8th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972); *United States v. Coke*, 339 F.2d 183 (2d Cir. 1964); *People v. Johnson*, 219 Cal. 72, 25 P.2d 408 (1933); *State v. Gionfriddo*, 154 Conn. 90, 221 A.2d 851 (1966); *Tyndall v. State*, 234 So.2d 154 (Fla. App. 1970); *People v. Evenow*, 355 Ill. 451, 189 N.E. 368 (1934); *State v. Montgomery*, 223 S.W.2d 463 (Mo. 1949); *State v. Musick*, 101 Mo. 260, 14 S.W. 212 (1890); *Dale v. State*, 441 P.2d 476 (Okla. Crim. App. 1968).

30. 312 Mo. 655, 280 S.W. 1040 (1926).

31. *Id.* at 365, 280 S.W. at 1043.

32. *Id.* at 666, 280 S.W. at 1043.

33. See *Carter v. United States*, 373 F.2d 911 (9th Cir. 1967); *People v. Dickenson*, 210 Cal. App. 2d 127, 26 Cal. Rptr. 601 (1962); *People v. Allum*, 78 Ill. App. 2d 462, 223 N.E.2d 187 (1967); *Commonwealth v. Haley*, 296 N.E.2d 207 (Mass. 1973); *Lambert v. State*, 471 P.2d 935 (Okla. Crim. App. 1970); *Fleck v. State*, 380 S.W.2d 621 (Tex. Crim. 1964); *State v. Hankish*, 147 W. Va. 123, 126 S.E.2d 42 (1962).

In *State v. Headley*, 18 S.W.2d 37 (Mo. 1929), the court thought defense counsel was trying to lead the court into error. The Court: "I cannot think you are making it in good faith. While you have a right to make your objections, there ought at least to be some foundation for them." *Id.* at 40.

defense counsel, subsequently instructed the jurors to ignore the comments in arriving at their verdict.³⁴ This cautionary instruction is often seized on as an independent rationale to support the conviction.³⁵ The actual effect of such warnings on the jurors is impossible to measure. In *Mansfield v. United States*,³⁶ a mail fraud prosecution, the trial judge remarked at one point, "This lawsuit is turning into a riot . . . This is the most outrageous case I have ever tried . . ."³⁷ At the end of the colloquy and again before submission the trial judge told the jury to disregard all controversies that took place between the trial judge and defense attorneys. The convictions were affirmed because the "admonitions of the court must have had the effect of dispelling any possible harmful effect the remarks may have had."³⁸ It is submitted that in an area so potentially destructive of the defendant's interest an assumption that a cautionary instruction will cure a prejudicial remark is unjustified.

The most satisfactory way to eliminate the instant problem is for trial judges to refrain from making pejorative remarks to defense counsel. This is far from an easy solution, as the majority of such remarks occur during an emotion-filled trial in which a person's liberty is at stake. To prevent error, the trial judge should make every effort to make all critical remarks to the defense attorney in a bench conference or in chambers. If a heated remark should slip out, the trial judge should admonish the jury in a serious tone that whatever remarks he has made to the defense attorney should not and must not be considered in their deliberations.

Though some defense lawyers may agree with the writer who viewed judges as tyrants,³⁹ it is important to remember that the handing out of justice "is the highest function the state performs to its subjects, and it requires and demands wisdom, justice, and moderation to a high degree in both court and counsel."⁴⁰ Because the problem of prejudicial remarks has

34. *State v. Hudson*, 358 Mo. 424, 426, 215 S.W.2d 441, 442 (1948); *State v. Strait*, 279 S.W. 109, 114 (Mo. 1925); cases cited note 35 *infra*.

35. See *United States v. Boatner*, 478 F.2d 737 (2d Cir. 1973); *United States v. Carrion*, 463 F.2d 704 (9th Cir. 1972); *United States v. King*, 415 F.2d 737 (6th Cir. 1969); *Duran v. United States*, 413 F.2d 596 (9th Cir. 1969); *Carter v. United States*, 373 F.2d 911 (9th Cir. 1967); *Milam v. United States*, 322 F.2d 104 (5th Cir. 1963); *People v. Dickenson*, 210 Cal. App. 2d 127, 26 Cal. Rptr. 601 (1962); *Hughes v. State*, 103 So. 2d 207 (Fla. App. 1958); *Commonwealth v. Haley*, 296 N.E.2d 207 (Mass. 1973); *Riley v. State*, 406 S.W.2d 438 (Tex. Crim. 1966); *State v. Ingle*, 64 Wash. 2d 491, 392 P.2d 442 (1964).

36. 76 F.2d 224 (8th Cir.), *cert. denied*, 296 U.S. 601 (1935).

37. *Id.* at 232.

38. *Id.*

39. Schwartz, *Judges as Tyrants*, 7 CRIM. L. BULL. 129, (1971): Glaring down from their elevated perches, insulting, abrupt, rude, sarcastic, patronizing, intimidating, vindictive, insisting on not merely respect but also abject servility—such judges are frequently encountered in American trial courts, particularly the lowest criminal and juvenile courts which account for most of our criminal business.

Id. at 130.

40. *State v. Whitworth*, 126 Mo. 573, 582, 29 S.W. 575, 597 (1895).

not reached serious proportions, it seems that it can be controlled by an occasional reversal. A measure of respect is due to trial judges, for in the vast number of cases they handle, such remarks are the exception rather than the rule.⁴¹

NILES S. CORSON

ESTATE TAX—TAXATION OF LIFE INSURANCE HELD BY THE INSURED AS TRUSTEE: THE OTHER VIEW OF SKIFTER

*Skifter v. Commissioner*¹

More than three years prior to his death, Hector Skifter assigned his entire interest in nine insurance policies on his life to his wife. When the wife died in 1961 the policies passed through her estate into a testamentary trust. Her daughter was the sole income beneficiary of the trust, which gave the daughter power to appoint the remainder by will.² Skifter was both executor and trustee.³ As trustee, he was empowered to terminate the trust by paying the corpus to the income beneficiary.⁴ When Skifter died in 1964 the proceeds of the policies were not included in the gross estate on his federal estate tax return. The Commissioner asserted a deficiency,⁵ claiming that Skifter's powers as trustee constituted sufficient incidents of ownership

41. See generally Annot., 62 A.L.R.2d 166 (1958).

1. 468 F.2d 699 (2d Cir. 1972).

2. In default of appointment the principal was to pass to the daughter's living issue or, if there were none, to the insured if he were still living, and if not, to other named beneficiaries. *Id.* at 1092.

3. As executor, Skifter filed a New York estate tax return in which the gross estate included the nine insurance policies on his life valued at \$20,620.32. Aside from receipt of the policies, Skifter's only act as trustee was to receive dividends on one of them. He made no distribution of income or principal. Estate of Hector R. Skifter, 56 T.C. 1190, 1192-93 (1971).

4. The will provided:

THREE: A. I authorize my Trustee in his absolute discretion, at any time and from time to time, to pay over the whole or any part of the principal of the trust created by ARTICLE TWO of this Will to any beneficiary entitled at the time of such payment to the current income from the principal so paid over whether or not any such payment shall result in the termination of the trust from which the payment is made.

56 T.C. at 1192.

5. The deficiency was computed on the basis of proceeds of \$121,923.52 from the nine insurance policies. With respect to one of these policies, Skifter paid an annual premium until his death. Rev. Rul. 71-497, 1971-2 CUM. BULL. 329, suggests that this fact brings a portion of the premiums paid within the reach of § 2035 of the Internal Revenue Code of 1954 [hereinafter the Code] (transactions in contemplation of death). See *Gorman v. U.S.*, 288 F. Supp. 225 (E.D. Mich. 1968); *Estate of Coleman*, 52 T.C. 921 (1969). Compare *Bel v. U.S.*, 452 F.2d 683 (5th Cir. 1971), noted in *Federal Estate Tax—Life Insurance—Policy Transferred and Premiums Paid In Contemplation of Death*, 38 Mo. L.

to require inclusion of the proceeds of his gross estate under section 2042(2) of the Internal Revenue Code of 1954.⁶ The court held that the proceeds were not includible in the gross estate.⁷

A significant aspect of the court's holding restricts section 2042 to incidents of ownership exercisable by decedent for his own or his estate's benefit. A Treasury Regulation under section 2042 stated that a decedent who had, as trustee, the power to change the beneficial ownership of the policy or its proceeds, or the time or manner of enjoyment, had incidents of ownership in the policy even though he had no beneficial interest therein.⁸

REV. 710 (1973), with *First National Bank v. U.S.*, 423 F.2d 1286 (5th Cir. 1970). See generally *Eliasberg, Contemplation of Death and the Estate Taxation of Life Insurance*, 111 Tr. & Est. 690 (1972). The premiums on another policy were paid by Skifter's employer. REV. RUL. 68-334, 1968-1 CUM. BULL. 403, restated and superseded in REV. RUL. 69-54, 1969-1 CUM. BULL. 221, outlines the circumstances under which group life insurance may be assigned. In *New York* such transfers were upheld in *Lansdorf v. U.S.*, 408 F.2d 461 (Ct. Cl. 1969). For a recent case applying § 2042 of the Code to group term life insurance see *In re Estate of Lumpkin*, 474 F.2d 1092 (5th Cir. 1973). See generally *Eliasberg, Life Insurance: Recent Estate Tax Developments*, 1970 INS. L.J. 334, 339-42; *Dopheide, Assigning Group Life Insurance: How Can the Current Problems Be Overcome*, 34 J. TAX 220 (Ap. 1971).

6. Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954, as amended. Section 2042 provides in part:

The value of the gross estate shall include the value of all property . . .

(2) RECEIVABLE BY OTHER BENEFICIARIES.—To the extent of the amount receivable by other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person.

7. 468 F.2d 699, 705 (2d Cir. 1972). Decisions concerning insurance held by the insured as trustee have been inconsistent. See generally *Note, Federal Estate Taxation—Life Insurance Trusts*, 49 N.C.L. REV. 539 (1971); *Note, Cotrusteeship Sufficient Incidents of Ownership to Require Inclusion of Corpus in Cotrustee's Gross Estate Where Possibility of Economic Benefit Exists*, 22 VAND. L. REV. 711 (1969).

8. Treas. Reg. § 20.2042-1(c)(4) (1958) provides:

A decedent is considered to have "incidents of ownership" in an insurance policy on his life held in trust if, under the terms of the policy, the decedent (either alone or in conjunction with another person or persons) has the power (as trustee or otherwise) to change the beneficial ownership in the policy or its proceeds, or the time and manner of enjoyment thereof, even though the decedent has no beneficial interest in the trust

(emphasis added). Compare Treas. Reg. § 20.2042-1(c)(2) (1958):

For purposes of this paragraph, the term "incidents of ownership" is not limited in its meaning to ownership of the policy in the technical legal sense. Generally speaking, the term has reference to the right of the insured or his estate to the economic benefits of the policy. Thus, it includes the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. . . .

(emphasis added). That the incidents of ownership under § 2042 are based on the right of the insured or his estate to the economic benefits of the policy is shown by H.R. Rep. No. 2333, 77th Cong., 2d Sess. 163 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess. 235 (1942). The phrase "economic benefits" appears

The Commissioner argued that Skifter's power to terminate the trust and pay the corpus to the income beneficiary was clearly in contravention of this regulation.⁹ The court, however, like the Tax Court before it,¹⁰ refused to interpret this regulation to apply where the exercise of the power could not benefit the decedent or his estate, thus implying that the regulation went too far.¹¹ Prior cases seemingly supported the Commissioner's position.¹²

The *Skifter* court grounded its reasoning on what it saw to be the purpose of section 2042—to extend to life insurance estate tax treatment roughly equal to that given other forms of property.¹³ The court logically points out that the Skifter trust included property other than life insurance, but that no contention was made that Skifter's power over this property should cause its inclusion in the gross estate.¹⁴ Section 2036 would be inapplicable to such property because it applies only when the decedent

to have originated in *Chase National Bank v. United States*, 278 U.S. 327 (1929). See *Estate of Burt L. Fuchs*, 47 T.C. 199, 206 (1966), and *Central Hanover Bank & Trust Co.*, 40 B.T.A. 268, 272 (1939), where the courts' decisions were premised on the assumption that the term "incidents of ownership" presupposes that the insured or his estate can obtain some economic benefit from the policy. But see *In re Estate of Lumpkin*, 474 F.2d 1092 (5th Cir. 1973); *United States v. Rhode Island Hospital Trust Co.*, 355 F.2d 7 (1st Cir. 1966). Compare *Estate of Harry R. Fruehauf*, 50 T.C. 915, 918-19 (1968), with *Fruehauf v. Commissioner*, 427 F.2d 80, 86 (6th Cir. 1970).

9. 468 F.2d 699, 703 (2d Cir. 1972).

10. *Estate of Hector R. Skifter*, 56 T.C. 1190, 1197 (1971).

11. 468 F.2d at 703. If a regulation, as a formal explanation of the statute, exceeds the scope of a statute it is invalid. See, e.g., *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129 (1936).

12. In *Commissioner v. Karagheusian's Estate*, 233 F.2d 197 (2d Cir. 1956), decedent's wife purchased insurance on his life and placed it in trust. The trust instrument provided that the wife could alter, amend, or revoke the trust only with the consent of both the insured and their daughter. The court of appeals held that "if the decedent acting with others can effectively change the beneficiary of the policy, he possesses an incident of ownership." *Id.* at 199. In contrast to *Skifter*, in *Karagheusian's Estate* the decedent's power could be exercised for his own benefit, and extended to the selection of new, additional, or alternate beneficiaries. 233 F.2d at 198. Skifter could not change who enjoyed the property, but only when the beneficiary enjoyed it. The *Skifter* court thought the decedent's power in *Karagheusian's Estate* was analogous to a general power of appointment. Section 2041 makes includible in the gross estate property over which the decedent possessed a general power of appointment. Section 2041 defines a general power of appointment as a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. § 2041(b)(1). A power of appointment is not a general power, and therefore is not taxable under § 2041, if it is exercisable only in favor of one or more designated persons other than the decedent or his estate. *Treas. Reg. § 20.2041-1(c)(1)* (1958). Section 2041 would not apply to *Karagheusian's Estate* because there the insured's power could be exercised only in conjunction with the creator of the power. See § 2041(b)(1)(C)(i).

In accord with *Karagheusian's Estate* are *Goldstein v. United States*, 122 F. Supp. 677 (Ct. Cl. 1954); *Hall v. Wheeler*, 174 F. Supp. 418 (D. Me. 1959); *Altshuler v. United States*, 169 F. Supp. 456 (W.D. Mo. 1958).

13. See S. Rep. No. 1622, 83d Cong., 2d Sess. 124 (1954). The legislative history of § 2042 is in 2 J. MERTENS, *THE LAW OF FEDERAL GIFT AND ESTATE TAXATION* § 17 (1959).

14. 468 F.2d at 703.

retained the prohibited power in a prior transfer.¹⁵ Section 2038 gave the court more difficulty because Skifter did have the power to terminate the trust at his death,¹⁶ and under that section it is immaterial whether the power can be exercised for decedent's benefit.¹⁷ Arguing by analogy, the Commissioner contended that this power, applicable to other property through section 2039, should be considered an incident of ownership and hence applicable to life insurance through section 2042.¹⁸

In rejecting this analogy the court noted that section 2038 had never been applied where decedent's power to alter, amend, revoke, or terminate had been conferred on him by another.¹⁹ Skifter did not reserve his power

15. *Id.* For purposes of inclusion under § 2036 the decedent must retain for life the right to income from property he transfers or the right to designate the persons who shall possess or enjoy the income.

For purposes of inclusion under § 2037 the decedent must retain a reversionary interest in the property transferred. The five percent reversionary rule of § 2037 applies to life insurance under § 2042. S. Rep. No. 1622, 83d Cong., 2d Sess. 124 (1954).

16. By terminating the trust and paying the corpus to the income beneficiary. § 2038(a)(1) provides:

The value of the gross estate shall include the value of all property . . . [t]o the extent of any interest therein of which the decedent has at any time made a transfer . . . where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power) to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death.

Skifter's power was within § 2038. In *Lober v. United States*, 346 U.S. 335 (1953), the decedent transferred property to a trust for the benefit of his children, but retained as trustee the power to accumulate the income and distribute the corpus. The court held the property subject to taxation under the predecessor to § 2038. See also *Commissioner v. Holmes*, 326 U.S. 480 (1946); *Estate of Thorp v. Commissioner*, 164 F.2d 966 (3d Cir. 1947). See generally 3 MERTENS, *supra* note 13, § 25.03.

17. *Lober v. United States*, 346 U.S. 335 (1953); *Commissioner v. Holmes*, 326 U.S. 480 (1946); *Porter v. Commissioner*, 288 U.S. 436 (1933); *Reinecke v. Northern Trust Co.*, 278 U.S. 339 (1929); *Florida National Bank v. United States*, 336 F.2d 598 (3d Cir. 1964); *Commissioner v. Chase National Bank*, 82 F.2d 157 (2d Cir. 1936).

18. 468 F.2d at 703. Apparently, the Commissioner failed to argue § 2038 as an independent grounds for inclusion in the the Tax Court, and thus could not do so in the court of appeals. Issues before the Tax Court are framed by the pleadings, as in any other court, and the appellate court will not review issues not properly raised there. This is especially true where a new theory of liability in support of the Commissioner's position involves a completely different section of the Code and may be affected by additional facts not in the record. See 9 J. MERTENS, *THE LAW OF FEDERAL INCOME TAXATION* § 51.26 (Rev. ed. 1971).

The Revenue Act of 1969 made the Tax Court a constitutional court. Although the Commissioner can appeal its ruling, the Tax Court is bound in later cases only by appellate court decisions involving cases in the particular circuit. See *Jack E. Golsen*, 54 T.C. 742 (1970).

19. *Id.* at 703-04. Section 2038 has been applied, however, to powers created in the decedent by law, as, for example, where under state law a gift from one spouse to another remains revocable by the donor. *Vaccaro v. United States*, 149 F.2d 1014 (5th Cir. 1945); *Commissioner v. Allen*, 108 F.2d 961 (3d Cir.

when he transferred the policies; it developed on him long after the transfer. The transaction was thus nontestamentary and not one the estate tax provisions were aimed toward.²⁰ Because no case had specifically held that section 2038 extends to powers the decedent receives from another, the court believed that including the policies with regard to the source of the power, under section 2042, would discriminate against life insurance as a form of property.²¹

The court's view of the reach of section 2038 disregards its plain wording. Section 2038 expressly provides that it is applicable without regard to when or from what source the decedent acquired his power.²² The court finessed this language by finding that it went no farther than to require inclusion of property over which decedent's power, although received by him subsequent to his initial transfer, was *created* by him in someone else (his transferor) *at the time of the initial transfer*.²³ This situation is more clearly

1939). It has also been applied to hold that contributions by the decedent to a trust created by his wife are includible where his consent is required to revoke or modify the trust. REV. RUL. 55-683, 1955-2 CUM. BULL. 603. In several states voluntary trusts are revocable by the settlor, unless expressly made irrevocable by the trust instrument. See Note, 55 HARV. L. REV. 684 (1942). Apart from state law, the grantor may have the power to revoke because of his incapacity, the beneficiary's fraud, etc. See 4 H. SCOTT, THE LAW OF TRUSTS §§ 329A, 333 (3d ed. 1967). For a discussion of the significance of state law see 3 MERTENS, *supra* note 13, § 25.05.

20. The critical test under § 2038 is whether enjoyment was subject, at the date of death, to any change of enjoyment through the exercise of a power to revoke. Where the donor's consent is a necessary element of revocation (either because expressly required by the instrument of transfer or under state law) the transfer would seem to be sufficiently testamentary to be includible. Yet, the *Skifter* transaction may not have been because it is not one that would be planned when testamentary decisions are made, largely because it is triggered by the fortuitous order of death of Skifter and his wife, and also because the policies did not avoid the estate tax completely—Mrs. Skifter's estate had paid tax on them. 56 T.C. at 1192.

21. Dictum in *Fruehauf v. Commissioner*, 427 F.2d 80 (6th Cir. 1970), supports the proposition that the power must have been one that is retained by the decedent. In *Fruehauf* decedent's wife purchased a policy insuring his life which passed at her death into a testamentary trust. The insured was both trustee and income beneficiary. As trustee, he had power to surrender the policies for cash value, thus increasing the income producing capacity of the trust to his own advantage. In holding that the insured possessed incidents of ownership, the court specifically distinguished the situation in which the insured holds the requisite powers over the policies solely as "a transferee, in a fiduciary capacity, of those powers, with no beneficial interest therein." 427 F.2d at 84. This dictum finds support in *Porter v. Commissioner*, 288 U.S. 436 (1933), and *Commissioner v. Chase Nat'l Bank*, 82 F.2d 157 (1936), cases interpreting the predecessor to § 2038. See also *St. Louis Union Trust Co. v. United States*, 262 F.Supp. 27 (E.D. Mo. 1966); *Estate of Myron Selznick*, 15 T.C. 716 (1950). But see *Kearns v. United States*, 399 F. Supp. 226 (Ct. Cl. 1968); *United States v. Rhode Island Hospital Trust Co.*, 355 F.2d 7 (1st Cir. 1966).

22. See statute quoted note 16 *supra*; 3 MERTENS, *supra* note 13, § 25.03.

23. 468 F.2d at 704. The court concluded that the language "without regard to when or from what source the decedent acquired such power," in § 2038, added by Congress in 1936, was a response to *White v. Poor*, 296 U.S. 98 (1935), and had since been applied strictly to change the result in that case. In *White v. Poor* the decedent created an inter vivos trust and conferred on the trustee the

testamentary than than in *Skifter*.²⁴

Skifter, although no *Polaris* of statutory interpretation, arguably fulfills the legislative purpose manifested by the federal estate tax scheme—to tax every transaction that is the substantial equivalent of a testamentary disposition.²⁵ Congress listed several powers that it considered to be incidents of ownership within the ambit of the new section 2042.²⁶ These powers all involve a substantial degree of control over the policy.²⁷ Such control would allow a decedent to determine the passing of the property until the time of his death, and thus is testamentary.²⁸ But *Skifter* had no intention of retaining the incidents of ownership in the policies and had irrevocably transferred all interests in them to his wife. The powers he received as trustee were not exercisable for his or a third party's benefit. In *In re Estate of Lumpkin*²⁹ the decedent, under the provisions of a group term policy on his life, had the power to alter the time and manner of enjoyment of the proceeds but not, as in *Skifter*, to select any new, additional, or alternative beneficiaries.³⁰ The court held this control was substantial enough to require inclusion, but noted that the insured could easily have divested himself of control completely by assigning the power.³¹ This is precisely what *Skifter* did orig-

power jointly to terminate the trust. Decedent was subsequently appointed as successor trustee, and as such at death possessed that power. The Supreme Court held that the predecessor to § 2038 did not apply because decedent had not retained the power at the time of the transfer but had received it later. He had, of course, created the power in someone else to make him a successor trustee at the time of the initial transfer.

24. It is more clearly testamentary because it can be planned by decedent as part of his overall testamentary dispositions, unlike the *Skifter* transaction. See note 20 *supra*.

25. C. LOWNDES & R. KRAMER, *FEDERAL ESTATE & GIFT TAXES* § 2.2 (2d ed. 1962).

26. H.R. Rep. No. 2333, 77th Cong., 2d Sess. 163 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess. 235 (1942). The treasury must have relied on this legislative history in promulgating Treas. Reg. § 20.2042-1(c)(2) (see note 8 *supra*) because the list contained therein is virtually identical to the one set forth in the committee reports.

27. See *In re Estate of Lumpkin*, 474 F.2d 1092 (5th Cir. 1973); *United States v. Rhode Island Hosp. Trust Co.*, 355 F.2d 7 (1st Cir. 1966), for an indication that "substantial control" is the test of incidents of ownership.

28. Compare *In re Estate of Lumpkin*, 474 F.2d 1092 (5th Cir. 1973), with *National Metropolitan Bank v. United States*, 87 F. Supp. 773 (Ct. Cl. 1950).

29. 474 F.2d 1092 (5th Cir. 1973).

30. The insurance contract contained an "Optional Modes of Settlement" provision exercisable in connection with the "Contingent Coverage" benefits which empowered the insured to elect to have any monthly installments payable to his spouse reduced by half. But in any event, the order in which the insured's survivors succeeded to the right to receive the proceeds was irrevocably fixed. 474 F.2d at 1093.

31. 474 F.2d at 1097-98. One of the insurance policies with which the *Skifter* case was concerned was a group term policy. Assuming that the policy in *Lumpkin* could have been assigned as the court suggests, if it later came under the control of the insured as trustee coincident with a power to terminate the trust for the benefit of someone other than the insured, it would still have been includible in the insured's gross estate if *Skifter* were not followed.

inally. To require inclusion in spite of this would arguably defeat the intention of Congress. In this respect, the Tax Court's conclusion in *Skifter* is significant:

(I)t seems inconceivable . . . that Congress would have intended the proceeds to be included in the insured's gross estate . . . merely because the third-party owner of the policy had entrusted the insured with fiduciary powers that were exercisable only for the benefit of persons other than the insured.³²

Although life insurance is inherently testamentary,³³ its transfer is not necessarily a testamentary substitute.³⁴ *Skifter* is arguably a case in which it was not.³⁵ If so, the court's disregard of the plain wording of sections 2042 and 2038 and their accompanying regulations, in favor of fulfilling the legislative intent, may be justified.

RICHARD M. WAUGH

EVIDENCE—SILENCE AS AN ADMISSION OF GUILT —ADMISSIBILITY CRITICIZED.

*State v. Hornbeck*¹

On the evening of August 20, 1969, the defendant was arrested for burglary. Two police officers, acting on the report of an informer, had placed a suspicious automobile under surveillance for several hours. The automobile was parked in a residential area where numerous burglaries had been reported during the preceding three months. The police officers disconnected wires in the engine of the automobile so the driver would be unable to start it when he returned. Hornbeck and two other men returned to the automobile, threw some sacks and satchels into the trunk and attempted to start it, without success. The police officers approached the car and ordered Hornbeck to get out. One of the officers then asked Hornbeck what he was doing in the area, but Hornbeck remained silent.² Hornbeck was then arrested.

At Hornbeck's trial for burglary and stealing, the arresting officer testified, over objection, that the defendant "wouldn't answer any questions"³

32. 56 T.C. 1190, 1197 (1971).

33. 3 MERTENS, *supra* note 13, § 22.41.

34. See, e.g., *Estate of Aaron v. Commissioner*, 224 F.2d 314 (3d Cir. 1955); *Routzahn v. Brown*, 95 F.2d 766 (6th Cir. 1938). Since the theory of the federal estate tax is to tax transfers made at death, the decision as to whether an arrangement is in substance a testamentary disposition indicates whether such an arrangement is within the scope of the statute.

35. *Skifter* has been severely criticized. See, e.g., Note, *Estate Taxation of Life Insurance Policies Held by the Insured as Trustee*, 32 Md. L. Rev. 305 (1972); Note, *Broad Fiduciary Powers Acquired, Rather Than Retained, by an Insured Over Life Insurance Policies Do Not Constitute Incidents of Ownership Under § 2042(2) Unless the Insured Can Exercise Them for His Own Economic Benefit*, 48 N.D. LAW. 995 (1973).

1. 492 S.W.2d 802 (Mo. 1973).

2. *Id.* at 804.

3. *Id.*

when he was asked what he had been doing in the neighborhood. On appeal following his conviction defendant contended, *inter alia*, that the court's admission of this testimony violated his constitutional right to remain silent and that this evidence was "highly prejudicial and objectionable."⁴ The supreme court dismissed Hornbeck's constitutional argument summarily, holding that "[s]ilence of the accused when not under arrest, and in circumstances where only a guilty person would remain silent, may be shown."⁵

Another objection to such testimony, not specifically raised by defendant or addressed by the court, is that it is hearsay. One of the standard exceptions to the hearsay rule is that statements which constitute admissions of parties are admissible to prove the truth of the contents of such statements.⁶ A subcategory of this rule is the so-called tacit admission rule which makes admissible evidence that a party remained silent in the face of an accusatory statement to which a reasonable man would have proclaimed his innocence.⁷ Because a defendant's silence is viewed as an assent to,⁸ or adoption of,⁹ the speaker's accusation, it is an admission and falls within the hearsay exception.

If the accusatory statement is not one to which an innocent person would respond, then defendant's silence in the face of it lacks significant probative value and is irrelevant. Although no Missouri court has explicitly cited the considerations determining the relevancy of defendant's silence, an analysis of Missouri decisions and other jurisdictions reveals that one or more of the following are important: (1) The accusatory statement was made in the presence of the accused;¹⁰ (2) the statement was heard and understood by the accused;¹¹ (3) the accusatory statement was made by a party to the transaction or by someone to whose statement the accused could be expected to reply, and not by a mere third party;¹² (4) the veracity of the accusatory

4. *Id.* at 808.

5. *Id.* Since the accused was determined not to be under arrest or custodial interrogation, he had a duty to speak. If the defendant was under custodial interrogation, the prior administration of a *Miranda* warning would not, of course, render the tacit admission admissible, as it would in the case of an oral admission.

In support of *Hornbeck* are numerous Missouri cases which hold that the silence of the accused when not under arrest and in circumstances such that only a guilty person would remain silent may be shown as evidence of the accused's guilt. See, e.g., *State v. Woods*, 434 S.W.2d 465, 468 (Mo. 1968); *State v. Phelps*, 384 S.W.2d 616, 621 (Mo. 1964). The federal courts in Missouri support this position also. *Egan v. United States*, 137 F.2d 369 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943). Reports of civil cases on this question in Missouri are scarce. For civil cases in other jurisdictions see Annot., 70 A.L.R.2d 1099 (1960).

6. See C. McCORMICK, *LAW OF EVIDENCE* § 262 (2d ed. 1972).

7. See *id.* §§ 269, 270.

8. *Id.* § 270.

9. MODEL CODE OF EVIDENCE, rule 507, comment (a) (1942).

10. See *State ex rel. Tiffany v. Ellison*, 266 Mo. 604, 182 S.W. 996 (1916).

11. See *State v. Phelps*, 384 S.W.2d 616 (Mo. 1964); *People v. Briggs*, 24 Cal. Rptr. 417, 374 P.2d 257 (1962); *Quillin v. Colquhoun*, 42 Idaho 522, 247 P. 740 (1926); *Wheeler v. Le Roy*, 296 Ill. 579, 130 N.E. 330 (1921); *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847); *State ex rel. Tiffany v. Ellison*, 266 Mo. 604, 182 S.W. 996 (1916); *State v. Murray*, 126 Mo. 611, 29 S.W. 700 (1895).

12. For cases holding that if the statement is made by a mere stranger to the transaction, the accused may regard the statement as an impertinence and need

statement was ascertainable by the accused;¹³ (5) the accused was physically at liberty to reply to the accusatory statement;¹⁴ (6) the statement was one which, by its nature, called for a reply from the accused;¹⁵ (7) the accused's silence could fairly be construed as an admission of guilt;¹⁶ and (8) other miscellaneous circumstances were not such as would rebut any inference of assent which might otherwise have arisen from the accused's silence.¹⁷

The court did not analyze the circumstances surrounding Hornbeck's silence in the above terms, concluding simply that Hornbeck had "a duty to answer the officer's legitimate inquiry made in the course of a routine investigation, prior to arrest."¹⁸ Doubtless, however, an analysis using the foregoing factors would have reached the same result.¹⁹

not reply, *see* *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847); *Creager v. Chilson*, 453 S.W.2d 941 (Mo. 1970); *Keim v. Blackburn*, 280 S.W. 1046 (Mo. 1926); *State ex rel. Tiffany v. Ellison*, 266 Mo. 604, 182 S.W. 996 (1916); *State v. Murray*, 126 Mo. 611, 29 S.W. 700 (1895); *State v. Young*, 99 Mo. 666, 12 S.W. 879 (1890); *Phillips v. Towler's Adm'r.*, 23 Mo. 401 (1856); *Greenberg v. Stanley*, 30 N. J. 485, 153 A.2d 833 (1959). For cases holding that such a statement when made by a police officer before arrest is not an impertinence and merits a reply *see* *Smith v. Duncan*, 181 Mass. 435, 63 N.E. 938 (1902); *State v. Rush*, 286 S.W.2d 767 (Mo. 1956).

13. *See* *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847); *State v. Foley*, 144 Mo. 600, 46 S.W. 733 (1898).

14. *See* *People v. Briggs*, 24 Cal. Rptr. 417, 374 P.2d 257 (1962) (accused must have an opportunity to reply); *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847) (accused must be at liberty to reply); *State v. Phelps*, 384 S.W.2d 616 (Mo. 1964) (accused must be physically able to reply); *Klever v. Elliott*, 212 Ore. 490, 320 P.2d 263 (1958) (confusion or excitement following an accident may justify a failure to reply).

15. *See* *Whaley v. Crutchfield*, 226 Ark. 921, 294 S.W.2d 775 (1956); *Gerulus v. Viens*, 130 Me. 378, 156 A. 378 (1931); *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847); *Keim v. Blackburn*, 280 S.W. 1046 (Mo. 1926); *State ex rel. Tiffany v. Ellison*, 266 Mo. 604, 182 S.W. 996 (1916) (statement shouted from an adjoining room by third party to the transaction did not call for a reply); *State v. Murray*, 126 Mo. 611, 29 S.W. 700 (1895); *State v. Glahn*, 97 Mo. 679, 11 S.W. 260 (1889).

16. *See* *State v. Hamilton*, 55 Mo. 520 (1874).

17. *See* *Creager v. Chilson*, 453 S.W.2d 941 (Mo. 1970), where the court considered the youth and the highly emotional state of the defendant in determining the admissibility of this type of evidence.

18. 492 S.W.2d at 808. In *State v. Rush*, 286 S.W.2d 767 (Mo. 1956), police officers with probable cause to believe a crime had been committed stopped the defendant and asked him for identification. They then asked the defendant what he was doing in the neighborhood. When the defendant failed to reply to this question, the officer placed him under arrest. The court held that the evidence of the accused's silence while not under arrest or in custody was admissible, since the officer's inquiry was not one of impertinence deserving of no reply, and also because the defendant's failure to explain his presence in the neighborhood under the circumstances was one element leading to his arrest. *Id.* at 771-72.

19. *E.g.*, (1) The question asked of Hornbeck was essentially accusatory and was asked in his presence; (2) Hornbeck apparently heard and understood the question; (3) a police officer, who is one to whom Hornbeck could be expected to reply, asked the question; (4) the veracity of the statement was within Hornbeck's knowledge; (5) Hornbeck was physically at liberty to reply; (6) the question was one which naturally called for a reply; (7) Hornbeck's silence in response to the question could be fairly construed as an admission of guilt, since

Contrasting somewhat with *Hornbeck* is *Creager v. Chilson*.²⁰ There the 17-year-old defendant drove her automobile into an intersection and made a left turn which caused plaintiff's vehicle to swerve out of its lane and collide head-on with an oncoming automobile. A police officer investigating the accident attempted to talk to the defendant but could not do so because she was upset and crying. Shortly thereafter, an acquaintance asked the defendant and her stepsister, who was a passenger in defendant's automobile, what had happened. At trial plaintiff offered evidence that one of the two girls—the witness was not certain which—replied to this question by saying that they had pulled out in front of the plaintiff's automobile and thus caused the accident. The plaintiff argued that the statement was an admission if made by the defendant, or was a tacit admission if made by her passenger, because the defendant failed to refute it. The trial court refused this offer of proof.²¹

The Missouri Supreme Court affirmed the trial court's refusal to admit this evidence. One of the reasons it did so was because the evidence was merely cumulative.²² Another was that the circumstances were not such as to clearly call for a reply.²³ Analysis of *Chilson* through the above factors indicates that the court reached the correct conclusion as to the relevancy of defendant's silence.²⁴ More significantly, the court emphasized that tacit admissions generally are weak in probative force,²⁵ and said that "because of the uncertainty which attends interpreting a person's silence as an implied admission of a statement made, such evidence is considered by the courts 'as dangerous and to be received with caution.'"²⁶ Yet, in *Hornbeck*, the admission of evidence of a criminal defendant's silence was affirmed without discussion of the surrounding circumstances or the probative force of such evidence.²⁷

One might quarrel with *Hornbeck* on three grounds. First, the court failed to discuss the meaning of the defendant's silence. Evidence of silence

if Hornbeck had an innocent explanation for his presence in the neighborhood under the given circumstances he presumably would have offered it; and (8) the court determined that Hornbeck was not yet in police custody or under arrest at the time the question was asked.

20. 453 S.W.2d 941 (Mo. 1970).

21. *Id.* at 943.

22. *Id.* at 944.

23. *Id.* at 943-44.

24. It is uncertain that the defendant heard or understood the statement, the statement was made by a stranger to the transaction and could thereby be regarded as an impertinence, the defendant was very young and in a highly excited emotional state, and the statement was made during the confusion surrounding an automobile accident, and thus did not necessarily call for a reply. See *Klever v. Elliott*, 212 Ore. 490, 320 P.2d 263 (1958), where the court rejected evidence of the defendant's silence following a similar accusatory statement when it was made in the confusion following an automobile accident.

25. 453 S.W.2d at 943.

26. *Id.* at 944, quoting 29 AM. JUR. 2D *Evidence* § 633. The uncertainty of interpreting the silence was underscored in *State v. Dowling*, 348 Mo. 589, 154 S.W.2d 749 (1941), where the court stated that if the accused is in doubt about his rights, as Hornbeck may well have been, silence in the face of an accusatory statement may not be used against him. See text accompanying notes 30-32 *infra*.

27. 492 S.W.2d at 808.

in the face of an accusatory statement is hearsay, and it is within the admissions exception to the hearsay rule only if it is in fact an admission, *i.e.*, if the defendant was actually consenting to or adopting the statement or if he believed he was guilty and thought any response would tend to incriminate him. More fundamentally perhaps, the silence is relevant to the lawsuit as evidence of guilt only if defendant's silence was motivated by guilt. But there are other motivations the defendant may have for remaining silent. For example, he may be in doubt about his rights,²⁸ he simply may not wish to communicate anything to the police at that time, or the statement may not be of such a nature as to induce a response. In such cases the silence is not relevant as evidence of guilt. And, "inquiry into the motive of silence . . . is so difficult that no accurate results can be expected."²⁹ Assuming that the meaning of a particular defendant's silence cannot be ascertained with certainty, it is preferable to exclude all evidence of silence, even where relevant, rather than to admit evidence of silence, even where irrelevant.

A second criticism of *Hornbeck* is that the defendant was likely in police custody when the question was asked.³⁰ Hornbeck's "admission" would therefore have been inadmissible because (1) a *Miranda* warning did not precede the question, and (2) he had the right to remain silent. Being in custody means that one is not free to depart.³¹ It is highly doubtful that Hornbeck could have done so.

There is another constitutional problem in applying the tacit admissions rule against Hornbeck, or any criminal defendant, regardless of whether they are under arrest or in custody—it may violate the 5th and 14th amendment privilege against self-incrimination.³² The right of a defendant to remain silent once he is under arrest or in custody is well settled. Not so clear is whether there is a constitutional privilege against self-incrimination

28. See *State v. Dowling*, 348 Mo. 589, 599, 154 S.W.2d 749, 755 (1941), and cases cited n.5 therein.

29. C. McCORMICK, *supra* note 6, at 355.

30. In *State v. Kissinger*, 343 Mo. 781, 123 S.W.2d 81 (1939), the defendant was arrested for driving an automobile while intoxicated. Although he had not yet been placed under arrest, his automobile had run out of gasoline, so he was physically unable to leave the control of the arresting officers. The court stated that his silence in the face of his wife's statement that he was driving was inadmissible because the defendant was at least constructively in police custody. *Id.* at 785-86, 123 S.W.2d at 83.

31. "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

32. The fifth amendment states that a person may not "be compelled in any criminal case to be a witness against himself" (U.S. CONST. amend. V.), and says nothing about self-incrimination. This language could be interpreted as limiting the privilege to judicial proceedings only, which clearly would not include the investigatory stage. Mr. Justice Harlan, dissenting in *Miranda v. Arizona*, 384 U.S. 436 (1966), conceded that the constitutional language did not limit the application of the fifth amendment to judicial proceedings.

at an earlier stage, the investigatory stage.³³ *Davis v. Mississippi*³⁴ makes clear that the 4th and 14th amendment prohibitions against unreasonable searches and seizures apply during the investigatory stage.³⁵ Unreasonable searches and seizures have a great potential of being "wholesale intrusions upon the personal security"³⁶ of citizens, however, and hence the protection of the 4th and 14th amendments may be broader than that of the 5th amendment. Yet, in *Davis* the Court said that the police have no right to compel answers from persons during the investigatory stage.³⁷ This would indicate that the privilege against self-incrimination does apply at that time.³⁸

Assuming the fifth amendment is applicable, the circumstances attending the defendant's silent "admission" must meet the constitutional requirements applicable to oral admissions. The admissibility of a defendant's oral admission has always depended on whether it is voluntary. Silence in the face of an accusatory statement is a voluntary admission only if motivated by a genuine desire to consent to or adopt the statement. As noted, silence under these circumstances is more likely motivated by a desire to communicate nothing, and seldom is motivated by a desire to communicate guilt.³⁹ Allowing silence to be evidence of guilt gives a guilty defendant a choice between lying; making an oral admission, making a silent admission, or running away. Thus, he is in effect compelled to incriminate himself because he has no alternative that does not result in an inference of guilt.

33. The post-*Miranda* cases have sanctioned the use of tacit admissions before arrest or custodial interrogation. See, e.g., *State v. Saiz*, 103 Ariz. 567, 447 P.2d 541 (1968); *People v. Tolbert*, 70 Cal. 2d 790, 76 Cal. Rptr. 445, 452 P.2d 661 (1969); *State v. McClain*, 254 La. 56, 222 So. 2d 855 (1969); *State v. Thomas*, 440 S.W.2d 467 (Mo. 1969). In none of the cases was the accusatory statement made by a police officer in the course of an investigation.

C. McCORMICK, *supra* note 6, at 355, apparently assumes that the fifth amendment is broad enough to apply to the investigatory stage.

34. 394 U.S. 721 (1969).

35. "[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment." *Id.* at 726.

36. *Id.*

37. Footnote six states:

The state relies on various statements in our cases which approve general questioning of citizens in the course of investigating a crime. See *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966); *Culombe v. Connecticut*, 367 U.S. 568, 635 (concurring opinion) (1961). But these statements merely reiterated the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes *they have no right to compel them to answer*.

394 U.S. 721, 727 n.6 (1969) (Emphasis added). The tacit admission rule in effect compels an answer because it compels the defendant to take one of several courses of action, all of which can be used as evidence of guilt.

38. See generally C. McCORMICK, *supra* note 6, at 354-56.

39. It is probable that

inquiry into the motive of silence, since silence is inaction, is so difficult that no accurate results can be expected. And in that event, either the voluntariness requirement must be abandoned in this context or the danger of involuntariness must be regarded as sufficiently high to exclude

Missouri courts have indicated that the admissibility of tacit admissions is primarily for the trial court.⁴⁰ The trial judge does have a good perspective from which to gauge the probative value of such evidence in the particular context in issue. It is submitted, however, that silence should never be admissible as evidence of guilt against a criminal defendant.

ARTHUR E. FILLMORE II

JOINT BANK ACCOUNTS—RIGHT OF SURVIVORSHIP

*LaGarce v. Mouldon*¹

August LaGarce transferred a savings and loan certificate to himself and James and Leona Mouldon, in their presence, "as joint tenants with right of survivorship and not as tenants in common." No consideration was given. The certificate provided that deposits "shall be conclusively intended to be a gift"² to the other joint tenants, and that the bearer thereof could make withdrawals without the others' consent. LaGarce, declaring that he wished to be able to withdraw funds whenever he needed them, delivered the certificate to the Mouldons with the statement that he knew they would not cash it. James agreed to return the certificate on request. Some months later, LaGarce attempted unsuccessfully to transfer the account without possession of the certificate. He then requested Leona to return it; because LaGarce was very close to death, however, Leona refused, believing that LaGarce had intended that she and James have the money after he died. LaGarce died the next day.³

LaGarce's executrix brought a discovery of assets proceeding in the probate court,⁴ and a judgment on the pleadings ordering return of the certificate resulted. The court based its holding on the theory that the transfer had not satisfied requirements for a common law joint tenancy.⁵ The circuit court affirmed. The Missouri Supreme Court reversed, holding that common law requirements need not be met where a joint tenancy is created pursuant to section 369.150 of the Missouri Revised Statutes.⁶

all silences on this ground. In view of the high probability that silence is, in these situations, in fact motivated by a desire not to communicate any reaction to the assertion (and thus in effect to assert the privilege against compelled self-incrimination), a blanket rule of exclusion might well be most appropriate.

C. McCORMICK, *supra* note 6, at 355.

40. See *McCarty v. Bishop*, 231 Mo. App. 604, 102 S.W.2d 126 (K.C. Ct. App. 1937); *Klever v. Elliott*, 212 Ore. 490, 320 P.2d 263 (1958).

1. 487 S.W.2d 493 (Mo. En Banc 1972).

2. *Id.* at 495.

3. *Id.* at 497.

4. §§ 473.343-.357, RSMo 1969, *repealed and superseded by* § 473.340, RSMo 1973.

5. 487 S.W.2d 493, 497.

6. In the absence of fraud, undue influence, mental incapacity, or mistake.

1. An association may issue membership certificates in the name of two or more persons, whether minor or adult, and provide for

Several methods have been used in Missouri to establish accounts in more than one name. An agency account is created when deposits are made by A and authority is given to B to make withdrawals.⁷ Such accounts are usually established for the convenience of A and B is accountable for withdrawals. Ownership problems may result if the agency is unclear in the account instrument.⁸ The "pay on death" account is created by A to be paid to B upon A's death.⁹ Such language is not effective in Missouri,¹⁰ absent

payment to any one or more of them, or the survivor or survivors of them.

2. Such account, and any additions made thereto by any of them, shall become the property of such persons as joint tenants and shall be held for the exclusive use of the persons so named and may be paid to any person named therein, or the survivor or survivors of them.
3. And such payment and the receipt of acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to said association, whether any one or more of the persons named be living or dead, for all payments so made by the association on such account prior to the acknowledgment of receipt by, or service by an officer empowered to make service of process upon, said association at its home office of notice in writing signed by any one of such joint tenants not to pay such account in accordance with the terms thereof.
4. If there are more than two persons named in such membership certificate and one of such persons dies, the account represented by such certificate shall become the property of the survivors as joint tenants. Such a joint account shall create a single membership in an association.

Section 362.470, RSMo 1969, involving banks and trust companies, is to the same effect:

When a deposit is made by any person in the name of the depositor and any one or more other persons, whether minor or adult, and "in form to be paid" to any one or more of them, or the survivor or survivors of them, the deposits thereupon and any additions thereto made by any of these persons, upon the making thereof, *shall become the property of these persons as joint tenants*, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to any of them, or to the survivor or survivors of them; and the payment and the receipt or the acquittance of the one to whom the payment is made shall be a valid and sufficient release and discharge to the bank or trust company, whether any one or more of the persons named is dead or alive, for all payments made on account of such deposit prior to the receipt by the bank or trust company of notice in writing signed by any one of the joint tenants not to pay the deposit in accordance with the terms thereof. If more than two persons are named as such depositors and one of them dies, the deposit becomes the property of the survivors as joint tenants. (Emphasis added).

Although only § 369.150 was under consideration in *LaGarce*, the court expressly stated § 362.470 is the same as § 369.150 "in all material respects." 487 S.W.2d at 499. The discussion in this note is equally applicable to both. *But cf.* §§ 370.287 (credit union shares); § 369.485 (federal savings and loan companies).

7. See Schrader, *Bank Deposits as Will Substitutes in Missouri*, 28 Mo. L. Rev. 482, 498 (1963).

8. *Schnur v. Dunker*, 38 S.W.2d 282 (St. L. Mo. App. 1931).

9. See Schrader, *supra* note 7 at 486.

10. *Bank v. Kutz*, 276 S.W.2d 593 (St. L. Mo. App. 1955).

independent facts establishing a gift or trust.¹¹ The "Totten Trust"¹² is created by A, trustee, for B, the beneficiary; the terms of the trust are not stated. The trust is presumed to be revocable during the trustee's lifetime, but upon his death the trust is presumed irrevocable.¹³ The effectiveness of this form in Missouri is unclear.¹⁴

La Garce's deposit was in form payable to A or B or the survivor. This is the statutory joint tenancy form set out in section 369.150.¹⁵ The plain meaning of this section is that use of the statutory language creates a joint tenancy. Cases prior to *LaGarce* interpreting section 369.150¹⁶ and section 362.470¹⁷ had not followed this plain meaning, nor had the legislature reacted to the case law interpretation.

Joint account statutes similar to Missouri's are given various interpretations.¹⁸ Some are interpreted as merely protecting banks from liability

11. *Butler State Bank v. Duncan*, 319 S.W.2d 913 (K.C. Mo. App. 1959).

12. *Matter of Totten*, 179 N.Y. 112, 71 N.E. 748 (1904).

13. SCOTT ON TRUSTS § 58 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 58 (1959).

14. Schrader, *supra* note 7, at 486.

15. See statute quoted note 6 *supra*.

16. Cases dealing with joint savings and loan accounts under § 369.150: *In re Estate of Barcikowski*, 480 S.W.2d 877 (Mo. 1972); *Wantuck v. United Sav. & Loan Ass'n*, 461 S.W.2d 692 (Mo. En Banc 1971); *Jenkins v. Meyer*, 380 S.W.2d 815 (Mo. 1964); *In re Patterson's Estate*, 348 S.W.2d 6 (Mo. 1961); *Young v. Knell*, 423 S.W.2d 28 (K.C. Mo. App. 1967); *Melton v. Ensley*, 421 S.W.2d 44 (Spr. Mo. App. 1967); *Jackson Sav. & Loan Ass'n v. Seabaugh*, 395 S.W.2d 260 (St. L. Mo. App. 1965); *Weber v. Jones*, 240 Mo. App. 914, 222 S.W.2d 957 (1949).

17. Cases dealing with joint bank and trust company accounts under § 362.470 and predecessor statutes: *Ison v. Ison*, 410 S.W.2d 65 (Mo. 1967); *In re Estate of O'Neal*, 409 S.W.2d 85 (Mo. 1966); *Leuzinger v. Merrill Lynch, Pierce, Fenner, & Smith*, 396 S.W.2d 570 (Mo. En Banc 1965); *Dalton v. Amer. Nat'l Bank*, 309 S.W.2d 571 (Mo. 1958); *Commerce Trust Co. v. Watts*, 360 Mo. 971, 231 S.W.2d 817 (1950); *In re Kaimann's Estate*, 360 Mo. 544, 229 S.W.2d 527 (1950); *Clevidence v. Mercantile Home Bank & Trust Co.*, 355 Mo. 904, 199 S.W.2d 1 (1947); *Simon v. St. Louis Union Trust Co.*, 346 Mo. 146, 139 S.W.2d 1002 (1940); *Bunker v. Fidelity Nat'l Bank & Trust Co.*, 335 Mo. 305, 73 S.W.2d 242 (1934); *Murphy v. Wolfe*, 329 Mo. 545, 45 S.W.2d 1079 (En Banc 1932); *Ambruster v. Ambruster*, 326 Mo. 51, 31 S.W.2d 28 (1930); *Mississippi Valley Trust Co. v. Smith*, 320 Mo. 989, 9 S.W.2d 58 (1928); *In re Estate of Kroeger*, 490 S.W.2d 407 (Mo. App., D. St. L. 1972); *In re Estate of Hitchcock*, 483 S.W.2d 617 (Mo. App., D.K.C. 1972); *First Nat'l Bank v. Waller*, 442 S.W.2d 171 (K.C. Mo. App. 1969); *Newcomb v. Farmer*, 360 S.W.2d 272 (St. L. Mo. App. 1962); *Cranford v. Langston*, 356 S.W.2d 581 (St. L. Mo. App. 1962); *Princeton State Bank v. Wayman*, 271 S.W.2d 600 (K.C. Mo. App. 1954); *Connor v. Temm*, 270 S.W.2d 541 (St. L. Mo. App. 1954); *Clay County State Bank v. Simrall*, 259 S.W.2d 422 (K.C. Mo. App. 1953); *State Bank v. Coleman*, 241 Mo. App. 600, 240 S.W.2d 188 (1951); *Mercantile Bank v. Haley*, 179 S.W.2d 916 (St. L. Mo. App. 1944); *In re Geel's Estate*, 143 S.W.2d 327 (St. L. Mo. App. 1940); *Melinik v. Meier*, 124 S.W.2d 594 (St. L. Mo. App. 1939); *Schnur v. Dunker*, 38 S.W.2d 282 (St. L. Mo. App. 1931); *Lafayette-South Side Bank & Trust Co. v. Siefert*, 223 Mo. App. 431, 18 S.W.2d 572 (1929); *Ball v. Mercantile Trust Co.*, 220 Mo. App. 1165, 297 S.W. 415 (1927).

18. *Kepner, The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CALIF. L. REV. 596 (1953); *Kepner, Five More Years Of The Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376 (1959); See Annots., 43 A.L.R.3d 971 (1972), 149 A.L.R. 879 (1944), 135 A.L.R. 993 (1941); 103 A.L.R. 1123 (1936), 66 A.L.R. 881 (1930), 48 A.L.R. 189 (1927).

and do not create any presumption of joint tenancy.¹⁹ Others raise a rebuttable presumption of joint tenancy if the statutory language is used. This second class has three subgroups. First, some hold the presumption vanishes upon any evidence of contrary intent; the burden of going forward with the evidence is then on the party relying on the statutory language.²⁰ The second subgroup holds the presumption can only be overcome by clear and convincing evidence.²¹ The third subgroup finds that absence of the elements of a completed gift rebuts the presumption.²² The third major interpretation finds intent to create a joint tenancy conclusive when the statutory language is used.²³ This can be overcome by showing fraud, duress, undue influence, or mistake.²⁴

Before *LaGarce* the effect of the Missouri statutes was to create a rebuttable presumption of a joint tenancy²⁵ based on the theory that the transaction represented a gift from the depositor to the named co-depositor(s).²⁶ The effect of this presumption was simply to relieve the surviving co-depositor from the burden of proving the elements of a common law gift. The presumption was rebutted by evidence that a trust or some other disposition had been intended or that a valid gift was in fact not made.²⁷

19. *O'Hair v. O'Hair*, 109 Ariz. 236, 508 P.2d 66 (1973); *Stewart v. Stewart*, 228 Ga. 517, 186 S.E.2d 746 (1972); *In re Estate of Stamets*, 260 Iowa 93, 148 N.W.2d 468 (1967); *Chase v. Reid*, 82 Idaho 1, 348 P.2d 473 (1960).

20. *Erickson v. Kalman*, 291 Minn. 41, 189 N.W.2d 381 (1971).

21. *Guilds v. Monroe County Bank*, 41 Mich. 616, 200 N.W.2d 769 (1972); *Klostergaard v. Peterson*, 169 N.W.2d 259 (S.D. 1969); *In re Estate of Michaels*, 26 Wis. 2d 382, 132 N.W.2d 557 (1965).

22. *Maier v. Brown*, 189 So. 2d 380 (Fla. App. 1966); *Murgic v. Granite City Trust & Sav. Bank*, 31 Ill. 2d 587, 202 N.E.2d 470 (1964).

23. *Tesch v. Miller*, 227 Ark. 74, 296 S.W.2d 392 (1956); *Van Pelt v. West Essex Sav. & Loan Ass'n*, 91 N.J. Super. 164, 219 A.2d 527 (1966).

24. Cases cited note 23 *supra*.

25. *Ball v. Mercantile Trust Co.*, 220 Mo. App. 1165, 297 S.W. 415 (1927); cases cited note 16 *supra*. The notion that the presumption was rebuttable was borrowed from *Clary v. Fitzgerald*, 155 App. Div. 659, 140 N.Y.S. 539 (1913). *Clary* interpreted § 249, para. 3, CONSOLIDATED LAWS OF NEW YORK (1909), from which then § 11779, RSMo 1919, predecessor to § 362.470, RSMo 1969, was derived.

26. *Jenkins v. Meyer*, 380 S.W.2d 315 (Mo. 1964), and cases therein cited.

The following cases hold that no statutory presumption arises where "right of survivorship" is not expressly reserved: *Ison v. Ison*, 410 S.W.2d 65 (Mo. 1967); *Leuzinger v. Merrill Lynch, Pierce, Fenner, & Smith*, 396 S.W.2d 570 (Mo. En Banc 1965); *Jenkins v. Meyer*, 380 S.W.2d 315 (Mo. 1964); *Murphy v. Wolfe*, 329 Mo. 545, 45 S.W.2d 1079 (En Banc 1932); *Jackson Sav. & Loan Ass'n v. Seabaugh*, 395 S.W.2d 260 (St. L. Mo. App. 1965); *Newcomb v. Farmer*, 360 S.W.2d 272 (St. L. Mo. App. 1962); *Crawford v. Langston*, 356 S.W.2d 581 (St. L. Mo. App. 1962); *Princeton State Bank v. Wayman*, 271 S.W.2d 600 (K.C. Mo. App. 1954).

27. See, e.g., *Schnur v. Dunker*, 38 S.W.2d 282 (St. L. Mo. App. 1931), where the intention to create an agency account was proved. In *Wantuck v. United Sav. & Loan Ass'n*, 461 S.W.2d 692 (Mo. En Banc 1971), the court required, for an effective delivery, that the survivor, a church, have knowledge of the account. This rendered uncertain the cases that presumed delivery where a close family relationship existed. *Longacre v. Knowles*, 333 S.W.2d 67 (Mo. 1960); *Wahl v. Wahl*, 357 Mo. 89, 206 S.W.2d 334 (1937); *Napier v. Eigel*, 350 Mo. 111, 164 S.W.2d 908 (1942); *Commonwealth Trust Co. v. DuMontimer*, 193 Mo. App. 290, 183 S.W. 1137 (1916).

Thus, in *Jenkins v. Meyer*²⁸ the presumption was rebutted and the gift failed when the executrix proved a lack of delivery and donative intent.²⁹

The interpretation of the joint bank account statutes was further complicated by the common law rule that a gift to one in a confidential relationship with the donor was presumed to be invalid.³⁰ This presumption was based on the donee's supposed opportunity to exert undue influence on the donor to procure the gift.³¹ The donee in such cases could sustain the gift by proving a lack of undue influence, *i.e.*, by proving donative intent.³² The presumption of a valid gift in the joint bank account statutes thus conflicted with the common law presumption of invalidity of the gift where the confidential relationship existed. In *In re Estate of Barcikowski*³³ the Missouri Supreme Court held that in such a case the statutory presumption of a joint tenancy did not come into play; the donee must establish the validity of the gift.³⁴

In *LaGarce* the court found that treating the statutes as creating a rebuttable presumption of a valid gift violated the statutes' plain meaning, and cases so treating them were overruled.³⁵ *La Garce* held that compliance with the statutes conclusively establishes a "statutory" joint tenancy, *in the absence of fraud, undue influence, mental incapacity, or mistake*.³⁶ Under this holding survivorship is not defeated by a showing that the transaction lacked the elements of a gift or that another result was intended. The italicized phrase, however, leaves in doubt the status of *Barcikowski* and similar cases. The doubt is primarily as to the burden of going forward with the

28. 380 S.W.2d 315 (Mo. 1964).

29. *Id.* at 321.

30. *In re Estate of Barcikowski*, 480 S.W.2d 877 (Mo. 1972) (son-donee cashed checks, paid bills, and drove for his father); *In re Patterson's Estate*, 348 S.W.2d 6 (Mo. 1961) (cousin-donee managed invalid donor's financial affairs and performed personal services); *In re Kaimann's Estate*, 360 Mo. 54, 229 S.W.2d 527 (1950) (son-donee made decedent's income tax returns, kept his books, and managed his affairs generally). In all three cases the donor's illness or infirmity was a factor.

The Missouri definition of a confidential relationship is from *Selle v. Wrigley*, 233 Mo. App. 43, 116 S.W.2d 217 (K.C. Ct. App. 1938):

It may therefore be said that a confidential relationship exists between two persons, whether their relations be such as are technically fiduciary or merely informal, whenever one trusts in and relies on the other. The question in such case is always whether or not trust is reposed.

Id. at 50, 116 S.W.2d at 221.

31. Cases cited note 30 *supra*.

32. See, *e.g.*, *In re Kaimann's Estate*, 360 Mo. 544, 551, 229 S.W.2d 527, 530 (1950).

33. 480 S.W.2d 877 (Mo. 1972).

34. *Id.* at 879. Other cases in which undue influence invalidated the joint tenancy are *Clay County State Bank v. Simrall*, 259 S.W.2d 422 (K.C. Mo. App. 1953); *Weber v. Jones*, 240 Mo. App. 914, 222 S.W.2d 957 (1949); *In re Geel's Estate*, 143 S.W.2d 327 (St. L. Mo. App. 1940).

35. 487 S.W.2d at 501.

36. *Id.*

evidence,³⁷ but also includes the validity of the common law presumption which arises from proof of a confidential relationship.³⁸

LaGarce makes available in Missouri a new and convenient method of avoiding probate.³⁹ When the statutory language is used "the surviving joint tenant should . . . be held . . . owner of the deposit even though the donor may have intended to retain the beneficial interest in the account during his life time."⁴⁰ A depositor can thus retain a beneficial interest for life, cash in the certificate at any time,⁴¹ and be assured that ownership of the account will pass to the surviving joint tenants on his death.

Missouri looks to the parties' intent to determine who controls the account during the depositor's lifetime.⁴² Any doubts can be resolved by requiring possession of the certificate to make withdrawals while the depositor is still alive.⁴³ The question of the rights of creditors to the funds while the depositor is alive remains unresolved.

Where nonstatutory language is used common law joint tenancy requirements must be satisfied.⁴⁴ Although mistake of law may be a ground for defeating a statutory joint tenancy,⁴⁵ it is doubtful that this theory could be used to establish a joint tenancy where the statutory language was mistakenly omitted.⁴⁶ Therefore, it is necessary that depositors be aware of the implications of the language used.

37. It would be logical to infer from *LaGarce* that the estate would have to come forward with evidence of undue influence, etc., once the survivor has established the statutory account. The burden of persuasion in such circumstances is unclear.

38. See note 30 *supra*.

39. Thus, Missouri estate planners have a new "poor man's trust" device. Insurance policies may avoid probate; United States savings bonds can be payable to A if living, and, if not, to B [*see* Treas. Reg. 1.315.7a; *Valentine v. St. Louis Union Trust Co.*, 250 S.W.2d 167 (Mo. 1952)]; realty can be conveyed by quit claim deed as in *Julius v. Buckner*, 452 S.W.2d 139 (Mo. 1970), enabling the grantor to retain most incidents of ownership, including power to convey the land, and pass the residue to the named grantees. Trustees' fees may be avoided through these techniques, which are adequate for most moderate estates.

40. 487 S.W.2d at 500-01.

41. *Id.* at 500. See *Carroll v. Hahn*, 498 S.W.2d 602, 606 (Mo. App., D. St. L. 1973).

42. *Carroll v. Hahn*, 498 S.W.2d 602, 607 (Mo. App., D. St. L. 1973).

43. *Welch v. North Hills Bank*, 442 S.W.2d 98, (K.C. Mo. App. 1969).

44. Common law joint tenancy theory has been unsuccessful because no unity of interest exists where one depositor controls the account. *Jenkins v. Meyer*, 380 S.W.2d 315 (Mo. 1964). Attempts to establish a third party beneficiary contract payable on death have been unsuccessful. *Longacre v. Knowles*, 333 S.W.2d 67 (Mo. 1960). See *Fratcher, Trusts and Succession in Missouri*, 25 Mo. L. REV. 417 (1960), suggesting that such a theory could be allowed if *Kansas City Life Ins. Co. v. Rainey*, 353 Mo. 477, 182 S.W.2d 624 (1944) is followed. See generally *Schrader, supra* note 7.

45. 487 S.W.2d at 500.

46. *Jenkins v. Meyer*, 380 S.W.2d 315 (Mo. 1964); *Melton v. Ensley*, 421 S.W.2d 44 (Spr. Mo. App. 1967).

Under the Uniform Probate Code⁴⁷ nonprobate transfers⁴⁸ can be made through joint accounts, payment on death accounts, and trust accounts. Joint accounts become the property of the survivor⁴⁹ absent clear and convincing evidence of other intent.⁵⁰ Payment on death accounts⁵¹ effectively transfer ownership to the survivor.⁵² Trust accounts in the form of *Matter of Totten*⁵³ also pass title to beneficiaries on the "trustee's" death, absent clear and convincing evidence of contrary intent.⁵⁴

The Uniform Probate Code provides for lifetime ownership of joint accounts to the extent of the net contribution of each party,⁵⁵ absent clear and convincing evidence of contrary intent.⁵⁶ Payment on death accounts conclusively belong to the original depositor during his lifetime. If two or more are named as original depositors, joint account rules apply.⁵⁷ Trust accounts are presumed revocable during the trustee's lifetime absent clear and convincing evidence of an irrevocable trust.⁵⁸

In conclusion, using "to either/or the survivor" in a joint savings and loan account now conclusively establishes joint tenancy, absent fraud, mistake, undue influence, or mental incapacity. Dictum in *LaGarce* implies that the same treatment would be given to bank and trust accounts in statutory form.⁵⁹ As a result, a depositor may now safely create a joint tenancy, control the funds for life, and pass them to the survivor.

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47. H.B. 293 §§ 6-101-6-113, which have been adopted in Alaska, Arizona, Colorado, Idaho, and North Dakota.

48. See *Greenfield & Vandivort, Non-Probate Transfers Under the Uniform Probate Code*, 29 J. Mo. BAR 109 (March 1973). The UNIFORM PROBATE CODE prefers creditors of the transferor's estate over survivors if the estate is insolvent, § 6-107. Financial institutions are not liable for payments made to transferors after death of the depositor under §§ 6-108-6-112. In addition, financial institutions have a right of set-off against any party that has or had before his death a right to immediate withdrawal, § 6-113.

49. UNIFORM PROBATE CODE § 6-104 (a).

50. *Id.* § 6-101 (4).

51. *Id.* § 6-103.

52. *Id.* § 6-104 (b).

53. 179 N.Y. 112, 71 N.E. 748 (1904).

54. UNIFORM PROBATE CODE § 6-104 (c).

55. *Id.* § 6-103 (a).

56. *Id.* § 6-103 comment.

57. *Id.* § 6-103 (b).

58. *Id.* § 6-103 (c).

59. 487 S.W.2d at 499.

OVERBREADTH AND VAGUENESS—KANSAS CITY, MISSOURI,
REVISED ORDINANCE SECTION 26.10(c) (1967)*Kansas City v. Thorpe*¹

During the first two weeks of September, 1970, there were many fights between groups of black and white students in the vicinity of East High School in Kansas City. The Kansas City police attempted to prevent young people from congregating. At 3:30 p.m. on September 18 approximately 150 whites and 25 to 40 blacks gathered in separate groups approximately one block apart. When police arrested five students a crowd formed around them. Officers placed the arrested students in a paddy wagon and directed the group to move on. When they refused to disperse, Officer Baker specifically requested a young girl to move on and arrested her when she failed to do so. While the officer attempted to place the girl in a patrol car, defendant Thorpe came to within six to eight inches of him and repeatedly claimed the girl had done nothing and could not be arrested. The officer ordered defendant to move on; when he failed to do so and continued his assertions he was arrested. Meanwhile, the girl escaped. At the time of the arrest, 25 to 40 people remained assembled about the parties.

Defendant was charged with a violation of Kansas City, Missouri, Revised Ordinance section 26.10(c) (1967), which provides:

Any person who, with intent to cause a breach of the peace or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: . . . Congregates with others on a public street and refuses to move on when ordered by the police.²

Defendant was convicted and fined twenty dollars.³

On appeal to the Missouri Supreme Court, defendant contended that the ordinance was unconstitutional as vague and overbroad under the due process clause of the 14th amendment of the United States Constitution and section 10 of article I of the Missouri Constitution.⁴ The Missouri Supreme Court ruled that the ordinance was valid.⁵

A statute is overbroad if it prohibits activity protected by the constitution as well as unprotected activity.⁶ The overbreadth test has only been applied to invalidate statutes which forbid activities protected under the first amendment, like free speech or assembly. These rights are protected from invasion by the states through the due process clause of the 14th amendment.⁷

1. 499 S.W.2d 454 (Mo. 1973).

2. Defendant was charged with violation of the ordinance "with intent to provoke a breach of the peace." *Id.* at 459.

3. *Id.* at 456.

4. *Id.*

5. *Id.* at 460 (Morgan, J., not participating).

6. *United States v. Robel*, 389 U.S. 258, 266 (1967).

7. *Herndon v. Lowry*, 301 U.S. 242 (1937); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

Vagueness is a separate concept which requires that a statute be sufficiently explicit to inform possible offenders of what conduct is prohibited.⁸ The standard applied is that of a man of common intelligence. If such a man must guess at the statute's meaning, or if men of common intelligence may reasonably differ as to its application, the statute violates the due process clause⁹ of the 5th¹⁰ or 14th¹¹ amendments, which require fair notice of prohibited conduct.¹² In addition to "fair notice", statutes must contain reasonable guidelines to prevent arbitrary and discriminatory enforcement.¹³ The language should be sufficiently specific to limit the discretion exercisable by police, judges, or juries.¹⁴

Ordinarily, a defendant has standing to challenge a statute¹⁵ only if his conduct was constitutionally protected;¹⁶ thus, the statute would be invalid "as applied" to him.¹⁷ In the first amendment area,¹⁸ however, the defendant can challenge a statute as void on its face¹⁹ even if his conduct is unprotected and could have been prohibited by a properly drawn law.²⁰ This departure from normal standing requirements is justified by the importance of first amendment rights and the "chilling" effect on those rights of overbroad or vague statutes.²¹ A "chilling" effect is one that restrains people from exercising their constitutional rights, particularly in the area of freedom of expression.²² "[S]tandards of permissible statutory vagueness [and overbreadth] are strict in the area of free expression . . . [G]overnment may regulate in the area only with narrow specificity."²³

8. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Statutes need not be meticulously specific, but only as explicit as is reasonably possible. *Grayned v. Rockford*, 408 U.S. 104, 110 (1972).

9. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

10. *Screws v. United States*, 325 U.S. 91 (1945).

11. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

12. The proper interpretation of a statute is a question for the courts. *In re H-S-*, 236 Mo. App. 1296, 1301, 165 S.W.2d 300, 302 (St. L. Ct. App. 1942). Thus, a statute or ordinance that is vague or overbroad on its face can be cured by court construction limiting its application. Similarly, a statute that facially appears constitutional can become overbroad or vague through court construction. *Poulos v. New Hampshire*, 345 U.S. 395 (1953). Federal courts are, of course, bound by constructions given state laws by state courts. *Snyder v. State-Wide Properties, Inc.*, 311 F.2d 33, 35 (7th Cir. 1962).

13. *Grayned v. Rockford*, 408 U.S. 104, 108 (1972).

14. *Id.* at 108-10.

15. See Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

16. *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

17. Note, *supra* note 15, at 846. This is to be distinguished from the unconstitutional execution of an otherwise valid statute by police and the courts, sometimes also referred to as overbroad as applied.

18. *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972).

19. *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940).

20. *Gooding v. Wilson*, 405 U.S. 518, 520 (1972); *Aptheker v. Secretary of State*, 378 U.S. 500, 516-17 (1964).

21. *Gooding v. Wilson*, 405 U.S. 518, 521 (1972); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

22. *Walker v. Birmingham*, 388 U.S. 307, 344-45 (1967) (Brennan, J., dissenting).

23. *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33 (1963); *accord*, *Scull v. Virginia*, 379 U.S. 344 (1959).

In *Thorpe*, the court found that breach of the peace in Missouri was restricted to "acts or conduct inciting violence or intended to provoke others to violence."²⁴ This distinguishes *Thorpe* from *Cox v. Louisiana*,²⁵ in which a similar statute was struck down. The Louisiana court had defined²⁶ breach of the peace as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, [or] to disquiet."²⁷ This definition was overbroad because it included speech protected by the first amendment, which might often "agitate" or "disquiet" the listener.²⁸

24. 499 S.W.2d at 458.

25. 379 U.S. 536 (1965).

26. Disorderly conduct was not an offense at common law. *State v. Reynolds*, 243 Minn. 196, 201, 66 N.W.2d 886, 890 (1954); *State v. Labato*, 7 N.J. 137, 150, 80 A.2d 617, 623 (1951). Thus, its definition is based solely on the statute in question and court constructions thereof. *State v. Reynolds*, *supra* at 201-02, 66 N.W.2d at 890.

27. 379 U.S. 536, 551 (1965). LA. REV. STAT. § 14:103.1 (Supp. 1974) provides:

Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . congregates with others . . . upon . . . a public street . . . and . . . refuses to . . . move . . . when ordered so to do by any law enforcement officer . . . shall be guilty of disturbing the peace.

Reverend Elton Cox led a demonstration of 2,000 students in a march to the Baton Rouge courthouse. The Chief of Police instructed Cox to confine his followers to the west side of the street. After a short program, Cox announced that they would begin sitting at lunch counters. A nearby crowd of 100 to 300 curious whites began to mutter and grumble. Seventy-five policemen were present, but the sheriff ordered the demonstrators to disperse because they were disturbing the peace. When they failed to obey they were tear-gassed; Cox was arrested the following day (*Cox v. Louisiana*, 379 U.S. 536, 539-44 (1965)) and subsequently convicted for breach of the peace. *Id.* at 554. The Supreme Court, invalidating the conviction, said that the Louisiana court's definition "would allow persons to be punished merely for *peacefully* expressing unpopular views." *Id.* at 551 (emphasis added).

Infringement of first amendment rights by statutory uncertainty was first recognized in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Newton Cantwell, a Jehovah's Witness, stopped two men on a street and received their permission to play a record for them. The record attacked the Roman Catholic religion; since both men were Catholic they became angered and ordered Cantwell to leave. Both were tempted to strike him if he remained, but fortunately he left. Cantwell was later arrested and charged with inciting others to breach the peace. *Id.* at 300, 302-03. His conviction was overturned because the statute was of "a general and indefinite characterization . . . leaving to the executive and judicial branches too wide a discretion in its application." *Id.* at 308.

28. The Court cited *Terminiello v. Chicago*, 337 U.S. 1 (1949):

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Id. at 4.

In *Gooding v. Wilson*, 405 U.S. 518 (1972), defendant was in a group which picketed an Army headquarters building. A scuffle ensued, during which defendant uttered profanity toward two officers. He was charged with use of opprobrious

Thorpe relied on *St. Louis v. Slupsky*,²⁹ which upheld an ordinance that prohibited a very broad range of conduct.³⁰ The court in *Slupsky* limited the ordinance by holding that, unless otherwise provided, "language³¹ will not constitute a breach of the peace . . . unless . . . [it] tend[s] to excite immediate violence"³² Even this definition may be too broad today. Speech which, although not intended to do so, has a tendency to incite violence has normally been punishable only in two cases, where the language falls within the concept of "fighting words" or where "hostile audiences" are involved.³³ "Fighting words" are "those personally abusive epithets which . . . are, as a matter of common knowledge, inherently likely to provoke violent reaction."³⁴ A "hostile audience" is likely to be involved when the speaker's words have agitated his audience to the point that there is an imminent danger of violence, which the police present cannot control.³⁵

words or abusive language tending to cause a breach of the peace. *Id.* at 519-20 n.1. The statute was held to be vague and overbroad because Georgia courts had construed it to include any "offensive" conduct. *Id.* at 520, 527.

Missouri courts have never defined *breach* of the peace to include non-violent acts. *But cf.* *St. Louis v. Goldman*, 467 S.W.2d 99 (St. L. Mo. App. 1971), *cert. denied*, 404 U.S. 1040 (1972). Defendant was convicted of *disturbing* the peace by disorderly conduct in a public place. Her conduct consisted of handcuffing herself to a department store door and remaining mute while a crowd gathered. The court, affirming the conviction, stated: "Missouri courts have not specifically defined 'disturbing the peace.'" *Id.* at 102. Although the courts sometimes use *disturbing* the peace and *breach* of the peace interchangeably, the former is a broader term including conduct that falls short of incitement to violence.

29. 254 Mo. 309, 162 S.W. 155 (1913). *Slupsky* conducted a loud and profane tirade toward a young girl and her family over a common backyard fence. His speech would probably be considered "fighting words" today. *See* text accompanying notes 32-34 *infra*.

30. ST. LOUIS, MISSOURI, ORD. § 1537 (1907) provides:

Any person who . . . shall disturb the peace of others by . . . loud and unusual noises, or by unseemly, profane, obscene or offensive language, calculated to provoke a breach of the peace . . . shall be deemed guilty of [disturbance of the peace]

31. *Thorpe* extends this construction to "acts or conduct." 499 S.W.2d at 458.

32. *St. Louis v. Slupsky*, 254 Mo. 309, 318, 162 S.W. 155, 157 (1913) (emphasis added). One basis for the court's conclusion was that the statute used the word "provoke" in referring to breach of the peace. This indicated to the court some sort of physical encounter. *Id.* The Kansas City ordinance in *Thorpe* also uses this term. The *Slupsky* definition has been cited in other Missouri decisions, *Louisiana v. Bottoms*, 300 S.W. 316 (St. L. Mo. App. 1927); *Plattsburg v. Smarr*, 216 S.W. 538 (K.C. Mo. App. 1919), and never criticized. Further, all breach of the peace convictions in Missouri seem to have involved violence or threats of violence. *Slupsky*, *Plattsburg & Bottoms*, *supra*; *Taaffe v. Kyne*, 9 Mo. App. 15, 17 (St. L. Ct. App. 1880). *See* *State v. Brothers*, 445 S.W.2d 308 (1969); *Martin v. Martin*, 160 S.W.2d 457 (St. L. Mo. App. 1942).

33. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (the first definition of "fighting words"); *Feiner v. New York*, 340 U.S. 315 (1951) ("hostile audience").

34. *See also* *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15, 20 (1971).

35. *Feiner v. New York*, 340 U.S. 315, 319-21 (1951). Arguably, the police must first request the speaker to desist and warn him of arrest if he continues. *Id.* They must protect his right to speak if they can. *See, e.g., Cox v. Louisiana*, 379 U.S. 536, 550-51 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 232-33 (1963).

Unless covered by one of these categories, mere resulting violence arguably does not make the causative act punishable, and hence a statute that proscribes such acts may be overbroad.³⁶

In *Thorpe* the defendant was convicted under the "intent" provision of the statute; thus, it was not necessary to find "fighting words" or a "hostile audience."³⁷ Intentional incitement of violence is not a protected function of free expression, and the state's power to prevent it is generally accepted.³⁸ This is because the function of free speech is communication of ideas; it is communication that the first amendment protects. In *Colten v. Kentucky*³⁹ the Court found that defendant's actions "appear[ed] to have had no purpose other than to cause inconvenience and annoyance,"⁴⁰ and thus his activity was not constitutionally protected.⁴¹ Similarly, intentional incitement of violence has no communicative purpose and can be prohibited.

The supreme court found that the element of intent could be inferred from the circumstances surrounding the arrest, stating that any "sane person" would have expected violence to result from the defendant's act.⁴² The judge, therefore, could properly infer that defendant intended that consequence.⁴³ If the defendant intended violence to occur and continued his conduct he was exercising no constitutionally protected freedom.⁴⁴

The Missouri Supreme Court dismissed the "vagueness" contention summarily, stating that the ordinance "conveys a sufficiently defined warning . . . when measured by common understanding . . ."⁴⁵ Thorpe's under-

36. The provision of the Kansas City ordinance which prohibits activity "whereby a breach of the peace may be occasioned" could be constitutionally defective even though limited to speech which tends to incite immediate violence. The provision should be limited to cases involving "fighting words" and "hostile audiences," or by the standard of a reasonable man—would a reasonable man have expected violence to result—otherwise, the statute would prohibit activity encompassed by the first amendment and punish one who has no criminal intent. It would thus create absolute liability. See *United States v. Dotterweich*, 320 U.S. 277 (1943). Further, under procedural notions of due process, the statute would not give "fair notice" of prohibited conduct. Due process may require that the actor at least negligently miscalculate the likelihood of violence. See *Lambert v. California*, 355 U.S. 225 (1957).

37. See statute quoted at note 2 *supra*.

38. *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). See Note, *Public Disorder Statutes in Iowa: An Evaluation of Existing Statutes and the Proposed Revisions*, 57 IOWA L. REV. 862, 880-81 (1972).

39. 407 U.S. 104 (1972).

40. *Id.* at 109. Colten and friends stopped their cars on the roadside to protest the issuance of a ticket to one of their group. Colten was convicted of disorderly conduct for congregating with others and refusing to disperse. Colten claimed his actions were protected by the free speech and freedom of assembly provisions. The court held that his activity was not protected by the first amendment and that "[h]e had no constitutional right to observe the issuance of a traffic ticket or to engage the issuing officer in conversation at that time." *Id.*

41. *Id.*

42. 499 S.W.2d at 459.

43. *Id.* The case was tried without a jury.

44. *Id.* See text accompanying notes 37-41 *supra*.

45. 499 S.W.2d at 456.

standing of the statute is irrelevant because he is held to the standard of a reasonable man.⁴⁶

Thorpe establishes a state-wide standard for future breach of the peace and disorderly conduct cases. The standard is that breach of the peace covers only actions which tend to incite violence or intended to provoke violence. Although the prohibition of *all* actions which merely incite violence may be questionable,⁴⁷ law enforcement officials are put on notice that existing ordinances may be overly broad⁴⁸ if they are not limited in accordance with *Thorpe*. It is submitted that the court is correct in concluding that the 1st and 14th amendments do not protect speech or conduct used to incite violent reactions.

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46. A lower federal court has held that a Memphis, Tennessee, ordinance worded almost exactly as the Kansas City ordinance is both vague and overbroad on its face. No mention was made of any state court constructions of the ordinance. *Kirkwood v. Loeb*, 323 F. Supp. 611 (W.D. Tenn. 1971). MEMPHIS, TENN., CITY CODE § 22-12(3) provides:

Any person, who with intent to provoke a breach of the peace, or where-by a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct . . . Congregates with others on a street, and refuses to move on when ordered by the police.

The court held:

Subsection . . . 3 . . . of the disorderly conduct ordinance [is] conditioned upon the failure to "move" when directed to do so by a policeman and include[s] standards which are vague and overbroad. Therefore, by [its] very terms [this] subsection . . . make[s] an individual's continued presence on a public street conditioned upon the permission of a policeman.

Id. at 616. Dicta in *Cox v. Louisiana*, 379 U.S. 536 (1965), stated that a provision proscribing a refusal to move on after being ordered to by a law enforcement officer "is narrow and specific." *Id.* at 551. DISTRICT OF COLUMBIA, CODE § 22-1121(2) (1961), is similar to the Kansas City ordinance:

Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . congregates with others on a public street and refuses to move on when ordered by the police . . . [shall be guilty of disorderly conduct.]

This ordinance was found not to be vague and indefinite in *Scott v. District of Columbia*, 184 A.2d 849 (Mun. Ct. App. 1962). The court said:

The statute . . . does no more than give the police the right, within reasonable limitations, to keep the public sidewalks free of unnecessary obstructions and prevent groups from congregating in such a way that a breach of peace may result.

Id. at 852. Two recent decisions of the District of Columbia Court of Appeals have reaffirmed *Scott*. *Feeley v. District of Columbia*, 220 A.2d 325 (Ct. App. 1966); *Jalbert v. District of Columbia*, 221 A.2d 94 (Ct. App. 1966).

47. See text accompanying notes 29-36 *supra*.

48. Recent Supreme Court decisions have indicated some dissatisfaction with the overbreadth doctrine. Justice White registered dissatisfaction in his dissent in *Coates v. Cincinnati*, 402 U.S. 611 (1971). The newer members of the Court would apply the overbreadth doctrine only in "substantial" cases, if at all. *Gooding v. Wilson*, 405 U.S. 518, 530-32 (1972) (Burger, C.J., dissenting); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) (Powell & Rehnquist, J.J., dissenting); *Plummer v. Columbus*, 94 S. Ct. 17 (1973) (Burger, C.J., Blackmun, Powell & Rehnquist, J.J., dissenting). The dissenters apparently favor the "as applied" approach. See text accompanying note 17 *supra*.

SECURITIES REGULATION—DEFINITION OF A SECURITY—
PYRAMID PROMOTION AS AN INVESTMENT CONTRACT*Securities & Exchange Commission v. Glenn W. Turner Enterprises, Inc.*¹

Glenn W. Turner Enterprises, Inc., through its Dare to Be Great, Inc., subsidiary (Dare), offered a program of self-improvement courses coupled with a pyramid sales feature.² These programs, called "Adventures,"³ were comprised of diverse sales instruction materials and revival-style meetings where Dare speakers preached their technique. Participants in the higher-priced programs could sell the "Adventures" to others and were led to expect lucrative commissions on such sales. As business developed, stock options in the promoting corporation were to become available to successful participants. Although no guarantees were made, Dare speakers stressed that hard work with the correct "philosophy" would inevitably bring success.

As "independent sales trainees," participants in the courses did no more than bring prospects to the Dare meetings. There the speakers flaunted cash, flashy clothes, and new automobiles to convince prospects of the wealth to be won.⁴ The meetings were apparently spontaneous but were

1. 474 F.2d 476 (9th Cir. 1973).

2. A pyramid sales promotion is a plan in which participant investors expect to make most or all of their returns by recruiting others to participate. Typically, the participant pays the promoter a fee and must sell the plan to at least two others to make a profit. Since pyramid promotions require geometric expansion of the number of participants, market saturation and losses to the last level of participants are inevitable. The SEC has therefore characterized pyramid schemes as "inherently fraudulent." Securities Act Release No. 33-5211, Exchange Act Release No. 9387, 36 Fed. Reg. 23289, 23291, CCH FED. SEC. L. REP. [71-72 Transfer Binder] ¶78,446 at 80,976. The chain letter scheme is a pure form of pyramid promotion. Other plans involve the sale of services, as in *Turner*, or retail goods, as in *SEC v. Koscot Interplanetary*, note 59 *infra*, but these benefits are incident to the main opportunity to recruit others, and their price includes a substantial overcharge representing the fee for entry into the plan.

3. The lessons were advertised as "Adventures" and "The Plan". Their market value, if any, was far below the stated prices. Adventure I sold for \$300. It included a tape recorder, 12 taped lessons, written notebook material, and 12-16 hours of group sessions. Adventure II sold for \$700 and contained 12 more hours of taped lessons and 80 more hours of group sessions. Adventure III cost \$2,000. It included Adventure II plus 6 additional hours of taped lessons, 30 hours of group sessions, and extra written material. Furthermore, the purchaser could become an "independent sales trainee" with the right to sell Adventures I, II, and III with commissions of \$100, \$300, and \$900 each, respectively. Adventure IV cost \$5,000. Besides 6 additional tapes, 30 more hours of group sessions, a movie projector with 6 films, and the right to attend 2 other week-long seminars in Florida, the purchaser received the right to sell Adventure IV for a \$2,500 commission. The \$1,000 Plan included the taped instructional materials of Adventure II and a 24-hour group session. If he could bring in two other purchasers, he could sell the Plan for a \$400 commission on each additional sale. Procuring three other purchasers would win him the right to sell the Plan without buying it himself. Only Adventures III and IV and the Plan were enjoined. 474 F.2d at 478.

4. Dare employees urged investors to go in debt, if necessary, to create the illusion of affluence, saying "Fake it 'til you make it." 474 F.2d at 480.

actually conducted according to a script. Participants were forbidden to disclose the content of the meetings, in which the Dare personnel undertook the main sales effort. Few participants recovered their initial outlay.

The Securities and Exchange Commission sought an injunction against certain of Dare's activities as offerings of unregistered securities under the Securities Act of 1933⁵ and the Securities Exchange Act of 1934.⁶ The trial court granted the injunction, finding that those programs offering returns via resale commissions⁷ fell within three defined categories of securities common to both statutes: "investment contract," "certificate of interest or participation in a profit sharing plan," and "instrument commonly known as a 'security'." Dare appealed, contending that for purposes of the federal statute, a security exists only where the investor expects to receive profits derived solely from the efforts of others.⁸ The Ninth Circuit Court of Appeals, however, held that Dare's scheme was an investment contract within the coverage of the securities acts, and therefore was subject to registration requirements.⁹

The Federal Acts of 1933 and 1934 were enacted to remedy abuses in the financial markets thought to have contributed to the crash of 1929. Their purpose is to ensure disclosure of relevant information to investors and to prevent and punish misrepresentation in the sale of securities.¹⁰ The 1933 act deals with initial offerings of securities to the public. It requires the issuer to register the securities with the SEC by filing a statement disclosing specified data and to furnish the buyer with a prospectus containing the same basic information.¹¹ Some securities are exempt from registration, but all offerings are subject to a general antifraud provision

5. Section 5 of the 1933 Act, 15 U.S.C. § 77e (1970), requires registration of nonexempt securities. Section 20, 15 U.S.C. § 77t, authorizes the SEC to seek injunctions against the offering of such securities.

6. Section 12(a) of the 1934 Act, 15 U.S.C. § 781(a), imposes a registration requirement, and § 21, 15 U.S.C. § 78u, authorizes the injunction remedy.

7. These were Adventures III and IV and the Plan, in which purchasers expected to recover a profit from recruiting other purchasers.

8. See *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

9. 474 F.2d at 482.

10. See 1 L. LOSS, *SECURITIES REGULATION* 107-58 (2d ed. 1961). The acts do not purport to regulate regarding the soundness of investments. In his message of March 29, 1933, President Roosevelt stated:

Of course, the Federal Government cannot and should not take any action which might be construed as approving or guaranteeing that newly issued securities are sound in the sense that their value will be maintained or that the properties which they represent will earn profit.

There is, however, an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public.

This proposal adds to the ancient rule of caveat emptor, the further doctrine "let the seller also beware."

H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933).

11. See 1 L. LOSS, *SECURITIES REGULATION* 130 (2d ed. 1961). For the legislative history of the 1933 Act see S. Rep. No. 47, 73d Cong., 2d Sess. 13 (1933), and H.R. Doc. No. 122, 73d Cong., 2d Sess. 13 (1933). See also Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29 (1959).

with civil and criminal remedies. The 1934 Securities and Exchange Act extends similar requirements to post-distribution trading in securities on stock exchanges.¹²

In drafting these laws, Congress was impressed with the need for an inclusive definition of security. Imaginative entrepreneurs might quickly render obsolete a definition—limited to traditional forms of securities.¹³ The definitional sections of both acts open with lists of recognized forms of securities,¹⁴ and conclude with several catchall categories.¹⁵ Courts have frequently stated that these catchall definitions should remain vague to preclude giving a “guidepost to wrongdoers,”¹⁶ and to provide investor protection.¹⁷ They emphasize the reality of the transaction and give short shrift

12. See H.R. Rep. No. 1383, 73d Cong., 2d Sess. 15 (1934). See also Loomis, *The Securities Exchange Act of 1934 and the Investment Advisers Act of 1940*, 28 GEO. WASH. L. REV. 214 (1959).

13. SEC v. Crude Oil Corp., 93 F.2d 844 (7th Cir. 1937).

Section 2(1) followed the enactment of what has generally been called the Blue Sky laws of the various states, and the ingenuity and fertility of those dealers in securities who deliberately attempted to avoid their application supplied the experience against which this legislation was written.

Id. at 847.

14. Section 2(1) of the 1933 Act, 15 U.S.C. § 77b(1) (1970), defines “security” as:

[a]ny note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Section 3(a)(10) of the 1934 Act, 15 U.S.C. § 78c(a)(10) (1973), defines “security” as:

[a]ny note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, or in general, any instrument commonly known as a “security”; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to any purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

15. See Long, *Partnership, Limited Partnership, and Joint Venture Interests as Securities*, 37 MO. L. REV. 581, 596 (1972), and 1 LOSS, *SECURITIES REGULATION* 483 (2d ed. 1961). See also § 409.401(1), RSMo 1969, the Missouri Uniform Securities Act, adopted in 1967. For an example of a Blue Sky statutory definition section antedating the federal statutes see ILL. REV. STAT. Ch. 32, §255 (Cahill 1931).

16. *Commonwealth v. Consumers Research Consultants*, 199 A.2d 428, 429 (Pa. 1964). See Annot., 163 A.L.R. 1050, 1053 (1946).

17. “The statutory purpose of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae.” SEC v. W.J. Howey, Inc., 328 U.S. 293, 301 (1946).

to the terms the parties use.¹⁸ Thus, stock in a cooperative residential apartment, while within the wording of the definitions, is not a security.¹⁹ Fractional undivided interests in income producing realty sold to nonresidents on a lease-back arrangement, however, have been held to be securities.²⁰

In defining securities under these catchall phrases, state and federal courts have frequently borrowed from each other. For example, federal courts have looked to pre-1933 state cases for definition of "investment contract,"²¹ and the *Turner* court indicated that "instrument commonly known as a security" (a term which has not been developed in the cases) might encompass evolving state court definitions of a security.²² State courts have reciprocated and followed federal tests for investment contracts.²³ The

18. *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 211 (1967); *SEC v. C.M. Joiner Leasing Co.*, 320 U.S. 344, 352-53 (1943); *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 56, 177 N.W. 937, 938 (1920).

19. *Polikoff v. Levy*, 55 Ill. App. 2d 229, 204 N.E.2d 807, *cert. denied*, 382 U.S. 903 (1965); *State v. Silberberg*, 166 Ohio St. 101, 139 N.E.2d 342 (1956).
20. *Sire Plan Portfolios v. Carpenter*, 8 Ill. App. 2d 354, 132 N.E.2d 78 (Ill. 1956). See L. Loss, note 10 *supra*, at 492-95.

21. *Id.* at 298. *SEC v. W.J. Howe Co.*, 328 U.S. 293 (1946).

By including an investment contract within the scope of § 2(1) of the 1933 Securities Act the Congress was using a term the meaning of which had been crystallized by this prior judicial interpretation. It is therefore reasonable to attach that meaning to the term as used by Congress

See note 4 of the Court's opinion for the state cases relied on; see also Long, *An Attempt to Return "Investment Contracts" to the Mainstream of Securities Regulation*, 24 OKLA. L. REV. 135, 146 (1971), for analysis of the extent to which those cases actually support the test for investment contract formulated by Justice Murphy in the *Howe* opinion.

The phrase "investment contract" was first drafted in an Arkansas statute regulating building and loan companies. ARK. ACTS. § 18 (1913). The Minnesota Blue Sky Law of 1917 contained the first use of the term in a statutory definition of a security. MINN. GEN. LAW ch. 429, § 3 (1917). Use of the term became general after its inclusion in the definitional section of a 1927 draft of the Uniform Securities Sales Act, and it now appears in 30 Blue Sky statutes. See Coleman, *A Franchise Agreement: Not a "Security" Under the Securities Act of 1933*, 22 BUS. LAWYER 493 (1967).

22. *SEC v. Glenn W. Turner, Inc.*, 348 F. Supp. 766, 773 (D. Oregon 1972), citing the California "risk capital" test of *Silver Hills Country Club v. Sobieski*, 55 Cal. 2d 811, 13 Cal. Rptr. 186, 361 P.2d 906 (1961). See text accompanying notes 55-58 *infra*. For a state case construing the category "any instrument commonly known as a security" in a blue sky statute see *First Nat'l. Savings Foundation, Inc. v. Samp*, 274 Wis. 118, 129, 80 N.W.2d 249, 256 (1956).

23. State court cases cited note 45 *infra*.

The other major definitional category, profit-sharing plans, has generally been formed on the same facts as investment contracts. *SEC v. Glenn W. Turner, Inc.*, 348 F. Supp. 766, 776 (D. Ore. 1972); *SEC v. Addison*, 194 F.Supp. 709 (N.D. Tex. 1961); *SEC v. Payne*, 35 F.Supp. 873 (S.D.N.Y. 1940). Some courts have imposed an additional requirement that the "investor" receive a fixed share of profits. See *SEC v. Koscot Interplanetary, Inc.*, No. 17134, CCH FED. SEC. L. REP. ¶93,960 (N.D. Ga. 1973). The various categories of the definitional sections are not mutually exclusive. *Tcherepnin v. Knight*, 371 F.2d 374, 381 (7th Cir.) (dissenting opinion), *rev'd*, 389 U.S. 332 (1967). See cases cited note 48 *supra*.

issue in *Turner* was whether the "Adventures" were securities and thus enjoined as unregistered offerings.

Investment contract securities have been found under various financing schemes.²⁴ Sales of income-producing orchard real estate,²⁵ fractional assignments of mineral leases,²⁶ whiskey warehouse receipts,²⁷ agreements for resale of merchandise for inactive "distributors",²⁸ contracts for the sale and care of fur-bearing animals,²⁹ promissory notes secured by deeds of trust,³⁰ insurance annuity contracts,³¹ coin collection investment programs,³² franchises,³³ and even subscriptions for shares in the proceeds of an estate contest litigation³⁴ have been found to be investment contracts. Efforts to obscure the nature of a transaction by tying it to sales or tangible property interests³⁵ or by dispersing it among a series of agreements between related entities³⁶ have failed to avoid this result.

24. See Annot., 3 A.L.R. Fed. 592 (1970).

25. *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946); *Blackwell v. Bentsen*, 203 F.2d 690 (5th Cir. 1953), *cert. dismissed* 347 U.S. 925 (1954); *SEC v. Orange Grove Tracts*, 210 F. Supp. 81 (D. Mass. 1962); *SEC v. Tung Corp.*, 32 F. Supp. 371 (N.D. Ill. 1940).

26. *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943); *Johns Hopkins Univ. v. Hutton*, 422 F.2d 1124 (4th Cir. 1970); *SEC v. MacElvain*, 417 F.2d 1134 (5th Cir. 1969), *cert. denied*, 397 U.S. 972 (1970); *United States v. Herr*, 338 F.2d 607 (7th Cir. 1964), *cert. denied*, 382 U.S. 999, *reh. denied*, 383 U.S. 922 (1966); *United States v. Wernes*, 157 F.2d 797, (7th Cir. 1946).

27. *United States v. Vidaver*, 73 F. Supp. 382, (E.D. Va. 1947); *Penfield Co. of California v. SEC*, 143 F.2d 746 (9th Cir.), *cert. denied*, 323 U.S. 768 (1944); *SEC v. Bourbon Sales Corp.*, 47 F. Supp. 70 (W.D. Ky. 1942).

28. *United States v. Herr*, 338 F.2d 607 (7th Cir. 1964), *cert. denied*, 382 U.S. 999, *reh. denied*, 383 U.S. 922 (1966).

29. *Kemmerer v. Weaver*, 445 F.2d 76 (7th Cir. 1971) (beavers); *Continental Marketing Corp. v. SEC*, 387 F.2d 466 (10th Cir. 1967), *cert. denied*, 391 U.S. 905 (1968) (beaver); *SEC v. Payne*, 35 F. Supp. 873, 2 S.E.C. Jud. Dec. 212 (S.D.N.Y. 1940) (silver foxes).

30. *Los Angeles Trust Deed & Mortgage Exch. v. SEC*, 285 F.2d 162 (9th Cir. 1960), *cert. denied*, 366 U.S. 919 (1961). Defendant sellers offered their facilities in selecting the mortgaged properties, servicing the notes, and collecting payments and making foreclosures.

31. *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967).

32. *SEC v. Comstock Coin Co.*, [1964-1966 Transfer Binder] CCH Fed. SEC. L. REP. ¶91,414 (D. Nev. 1964).

33. *Huberman v. Donny's Restaurants, Inc.*, 337 F. Supp. 1249 (N.D. Cal. 1972) (plaintiff lessee bought lease and franchisee corporation upon lessor's promise to operate the business); *In re Tucker Corp.*, 26 S.E.C. 249, [1945-1947 Transfer Binder] CCH Fed. SEC. L. REP. ¶75,802 (1947) (automobile dealership and distributorship franchise agreements providing for future repayment of franchise purchase proceeds).

34. *SEC v. Latta*, 250 F. Supp. 170, (N.D. Cal. 1965), *aff'd*, 356 F.2d 103 (9th Cir. 1965), *cert. denied*, 384 U.S. 940 (1966).

35. The cases cited in notes 24-32 involved purported sales of property linked to management agreements whereby the promoter or a third party under his influence would retain management control of the property and be responsible for generating income. See 1 LOSS, SECURITIES REGULATION 489-90 (2d ed. 1961).

36. See *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), where orchard management services were provided by a service corporation controlled by the seller. See also *Continental Marketing Corp. v. SEC*, 387 F.2d 466 (10th Cir.

Yet, courts³⁷ and commentators³⁸ have criticized the law's failure to deal effectively with novel forms of financing such as franchising, founder-member distributorships, and pyramid sales schemes. Although such devices are tied to retail marketing and are not associated with the basic notion of securities instruments,³⁹ they are popular with shoestring operators who solicit the less educated members of the community.

The majority definition of investment contract derives from two landmark Supreme Court decisions. In *SEC v. C.M. Joiner Leasing Corp.*,⁴⁰ an oil prospector obtained assignments of mineral leases on 3,000 acres of land and undertook to finance his drilling by a widely advertised campaign of reassignment sales in lots of two to five acres. These portions were too small for economical drilling by individual lessors, so the prospector proposed to drill for them. The Court upheld an injunction against the sales and noted that without the common drilling enterprise, the leaseholds would have little value. Instead of stating a rule, however, the Court said that the defendants' enterprise had colored the leasehold transactions with "all the evils inherent in the securities transactions which it was the aim of the Securities Act to end."⁴¹

Three years later in *SEC v. W.J. Howey Co.*,⁴² the Court struck down a similar scheme for the cultivation of orange groves.⁴³ The Court held that an investment contract exists wherever "the scheme involves an investment of money in a common enterprise with profits to come *solely* from the efforts of others."⁴⁴ The Court established what makes a particular invest-

1967), *cert. denied*, 391 U.S. 905 (1968). *But see* *Belhumeur v. Dawson*, 229 F. Supp. 78 (D. Mont. 1964), where a division of the parties into different legal entities was held to negate the common enterprise element of the *Howey* test, set forth in text accompanying notes 45-47 *infra*.

37. *State ex rel. Comm'r of Securities v. Hawaii Mkt. Center, Inc.*, 52 Hawaii 642, 485 P.2d 105 (1971).

38. Coffey, *The Economic Realities of a "Security": Is There a More Meaningful Formula?*, 18 W. RES. L. REV. 367 (1967); Long, *An Attempt to Return "Investment Contracts" to the Mainstream of Securities Regulation*, 24 OKLA. L. REV. 135, 160 (1971).

39. *SEC v. Koscot Interplanetary, Inc.*, CCH FED. SEC. L. REP. ¶93,960.

40. 320 U.S. 344 (1943).

41. *Id.* at 349.

42. 328 U.S. 293 (1946).

43. Investors purchased the fee in small parcels averaging 1.33 acres of citrus grove land, then leased them back to a service corporation with authority to cultivate and market the crop. The individual parcels were thus too small for profitable cultivation.

44. 328 U.S. at 301 (emphasis added). The problem was to provide adequate, flexible protection to the investing public in the face of constantly evolving modes of enterprise financing while maintaining some integrity for the concept of a security and thus a limit on the scope of relief. Presumably, Congress did not intend to make the liberal remedies of the securities acts available to plaintiffs in all business transactions to the exclusion of regular statutory and common law remedies for fraud. H.R. Rep. No. 85, 73d Cong., 1st Sess., 11. Securities must be distinguished from ordinary sales and employment contracts. Offerors may characterize the transaction as a sale by insisting on the passing of property rights with some inherent value independent of the success or failure of the venture. The *Howey* Court looked to two factors to overcome this reasoning: the investors' expectation of gain and their reliance on the efforts and skill of others to procure it. Although the law ordinarily will not remake a bad bargain for the parties, the

ment agreement an investment contract: (1) a common enterprise; (2) an expectation of profits; and (3) reliance (by the investor) solely on the efforts of others.⁴⁵

The *Howey* three-element test of investment contract has proven popular with state and federal courts.⁴⁶ These courts have refused to find a security "where neither the element of a common enterprise nor the element of reliance on the efforts of another is present,"⁴⁷ thus adopting reasonable limits on the scope of securities regulation.

Yet difficulties persist even where all three elements are present. Common enterprise as an element is vague. Emphasis on expected profits may slight the importance of the initial investment risk, especially where the investor receives nonmaterial benefits.⁴⁸ Most disputes, however, have involved the third element: Is the requirement of reliance solely on the efforts of others to be read literally? The issue is whether the investor's activity is consistent with a security transaction.⁴⁹ A strict interpretation of the requirement would apparently preclude finding a security if the investor participated to an appreciable extent in the common enterprise.

In *Turner* the defense urged a strict view of this third element, as

linkage of an excessive overcharge to the buyers' expectation of gain through the enterprise of the promoter presents a different case from the mere sale of property. The purchasers from *Howey* expected to profit from their participation without assuming any responsibilities. The consideration for their investment was a promise of a return from *Howey's* future cultivation of their land, as well as the property itself. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299-300.

45. *Id.* at 298-99.

46. *Tcherepnin v. Knight*, 389 U.S. 332 (1967), *rev'g* 371 F.2d 374 (7th Cir. 1967); *United States v. Herr*, 338 F.2d 607, 609-10 (7th Cir. 1964), *cert. denied*, 382 U.S. 999 (1966), *reh. denied*, 383 U.S. 922 (1966); *Roe v. United States*, 287 F.2d 435, 438 (5th Cir. 1961); *Blackwell v. Bentsen*, 203 F.2d 690, 693 (5th Cir. 1953), *cert. dismissed*, 347 U.S. 925 (1954); *SEC v. Orange Grove Tracts*, 210 F. Supp. 81, 83 (D. Mass. 1962); *Commonwealth ex rel. Pa. Sec. Comm'n v. Consumers Research Consultants*, 414 Pa. 253, 199 A.2d 428 (1964); *Emery v. So-Soft, Inc.*, 199 N.E.2d 120, 123 (Ohio Ct. App. 1964); *Bruner v. State*, 463 S.W.2d 205 (Tex. Crim. App. 1970). *Contra*, *State ex rel. Comm'r of Securities v. Hawaii Mkt. Center*, 52 Hawaii 642, 485 P.2d 105 (1971) (*Howey* test too narrow).

47. 1 L. LOSS, *SECURITIES REGULATION* 491 (2d ed. 1961). The other element, hope of profits, is present in all investment transactions.

48. *Silver Hills Country Club v. Sobieski*, 55 Cal. 2d 811, 13 Cal. Rptr. 186, 361 P.2d 906 (1961), is the leading case standing for the proposition that a security may exist where the benefits that the investor expects to receive are non-material, rather than a cash return. The investors in *Sobieski* expected to be able to use the facilities of a proposed commercial country club. The case also established the first risk capital rule in a state jurisdiction, as discussed in note 55 *infra*.

49.

[T]he assignment of nominal or limited responsibilities to the participant does not negative the existence of an investment contract; where the duties assigned are so narrowly circumscribed as to involve little real choice of action or where the duties assigned would in any event have little direct effect upon receipt by the participant of the benefits promised by the promoters, a security may be found to exist.

Securities Act Release No. 5211, Exchange Act Release No. 9387, 36 Fed. Reg. 23289, 23291, CCH FED. SEC. L. REP. [1971-1972 Transfer Binder] ¶78,446 at 80,974.

adopted in several state cases involving pyramid promotions.⁵⁰ In these cases investors had had the burden of soliciting other participants. Yet even where their efforts were limited to referral and the sales pitch was left entirely to the promoter, no investment contracts were found because "if the party executing such agreement does nothing . . . he receives nothing."⁵¹ Likewise, argued Turner, the Dare sales trainees were active to the extent of contacting new prospects and persuading them to come to meetings. These labors, though insignificant, were necessary to an investor's success, so the investor did not rely *solely* on the efforts of Dare personnel.

The *Turner* court rejected the strict *Howey* test as a defense. The efforts of Dare purchasers, no matter how great, became irrelevant at the point when Dare permitted saturation of an area. Withholding of this information from the purchasers was essential to Dare's continued operation.⁵² The promoters could not, the court reasoned, be allowed to shield their activities by having purchasers perform insignificant functions. Thus, the court held that investors who rely on essential managerial efforts of others require the protection of disclosure under the Securities Acts.⁵³ *Turner* thus represents a broadening of the third element of the *Howey* test to include transactions in which investors do participate in the common enterprise, yet rely essentially on the managerial acumen of the enterprise promoters for a successful return.⁵⁴

Recent state court cases have broadened the test of investment contract, also. Following the lead of a California case,⁵⁵ some states have adopted a

50. *Gallion v. Alabama Mkt. Centers, Inc.*, 282 Ala. 679, 213 So. 2d 841 (1968); *Georgia Mkt. Centers, Inc. v. Fortson*, 225 Ga. 854, 171 S.E.2d 620 (1969); *Fidelity Credit Co. v. Bradford*, 177 So. 2d 635 (La. Ct. App. 1965); *Emery v. So-Soft of Ohio, Inc.*, 199 N.E.2d 120 (Ohio Ct. App. 1964); *Commonwealth ex rel. Pa. Sec. Comm'n v. Consumers Research Consultants*, 414 Pa. 253, 199 N.E.2d 428 (1964); *Bruner v. State*, 463 S.W.2d 205 (Tex. Crim. App. 1970), *Koscot Interplanetary, Inc. v. King*, 452 S.W.2d 531 (Tex. Civ. App. 1970). These cases dealt with multilevel distributorships and pyramid plans substantially similar to those in *Turner*. They stand for the proposition that an investment contract exists only where the work performed by investors is token or nonexistent.

51. *Emery v. So-Soft of Ohio, Inc.*, 199 N.E.2d 120, 125 (Ohio Ct. App. 1964).

52. 474 F.2d 476, 479 (9th Cir. 1973).

53. *Id.* at 482.

54. The language of *Howey* hardly suggested a rigid test of the "solely" element. Besides warning against mechanical application of "irrelevant formulae", the Court indicated that the "efforts of others" to which it referred in the test were *managerial* efforts which were essential to the investors' anticipated return.

Such tracts gain utility . . . only when cultivated . . . as component parts of a larger area. A common enterprise *managed* by respondents or third parties with adequate personnel and equipment is therefore essential

. . . The investors provide the capital and share in the earnings and profits; the promoters *manage, control and operate* the enterprise.

328 U.S. at 300 (emphasis added).

55. *Silver Hills Country Club v. Sobieski*, 55 Cal. 2d 811, 13 Cal. Rptr. 186, 361 P.2d 906 (1961). In *Silver Hills*, developers of a commercial country club sold memberships with authorization to use the proceeds of the sale to help finance the construction of club facilities. The participants' expectation of using the club was held to be a nonmaterial, beneficial interest in the venture, and the

"risk capital" approach,⁵⁶ finding that an investment contract or other form of security exists where the investor's money is subjected to risk in an enterprise over which the individual investor exercises no managerial control.⁵⁷

risk to which this interest was subjected through the uncertainties of the enterprise was held to be a sufficient ground for application of securities regulation.

56. D.M.C. of Colorado, Inc. v. Hays, [1954-1971 Transfer Binder] 3 BLUE SKY L. REP. ¶70,897 (Colo. Dist. Ct. 1971); Bond v. Koscot Interplanetary, Inc., 246 So. 2d 631 (Fla. App. 1971); Florida Discount Centers, Inc. v. Antinori, 226 So. 2d 693 (Fla. App. 1969), *aff'd*, 232 So. 2d 17 (Fla. 1970); State *ex rel.* Fisher v. World Mkt. Center, 3 BLUE SKY L. REP. ¶71,034 (Okla. Dist. Ct. 1972); State *ex rel.* Healy v. Consumer Business Systems, Inc., 5 Ore. App. 19, 482 P.2d 549 (1971); See State *ex rel.* Park v. Glenn Turner Enterprises, Inc., 3 BLUE SKY L. REP. ¶71,023 (4th Dist. Ct. Idaho 1972), where the Idaho court expands the risk capital test to include offerings to raise capital for a continuing business as well as for initial capital. The court also adverted to the "two-tier" theory of investment through a franchise, in which the investor's capital outlay is viewed as going partly to his own business and partly to a common venture with the franchisor in his national level enterprise over which the franchisee has no control. *Id.* at 67,201. For discussion of the double investment theory, see Note, *Franchise Regulation Under the California Corporate Securities Law*, 5 SAN DIEGO L. REV. 140 at 169-70 (1968); Note, *Regulation of the Franchise as a Security*, 19 J. PUBLIC L. 105, 125-27 (1970). For a case adopting risk capital principles under federal law, although restricted to high-risk, speculative franchises, see Mr. Steak, Inc. v. River City Steak, Inc., 324 F. Supp. 640 (D. Colo. 1970), *aff'd*, 460 F.2d 666 (10th Cir. 1972).

57. State v. Hawaii Mkt. Center, Inc., 52 Hawaii 642, 485 P.2d 105 (1971), illustrates the application of the risk capital analysis to facts similar to those in *Turner*. The promotion was a founder-member purchasing agreement whereby investors (who became eligible by purchasing a cookware set at an inflated price) hoped to realize commissions by recruiting others and receiving override payments on sales by salesmen they hired, by their recruits, and by their recruits' salesmen's sales. Staff-run recruitment meetings were the chief source of new investors. The court read the profit-sharing clause of its statute broadly to cover these investors who relied on commissions. Recognizing that the quality of an investor's participation is more important than the intensity of his work, it disapproved the cases holding that a minor operational role for investors takes the case out of *Howey*. Foreshadowing the test adopted in *Turner*, the Hawaii court held that "practical and actual control over the managerial decisions of the enterprise" was the only investor effort that would afford investors the necessary disclosure to avoid application of the Blue Sky statute. *Id.* at 651-52, 485 P.2d at 111. The court adopted a test drawn from Coffey's article, *supra* note 38:

[A]n investment contract is created whenever:

- (1) An offeree furnishes initial value to an offeror, and
- (2) a portion of this initial value is subjected to the risks of the enterprise, and
- (3) the furnishing of initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and
- (4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.

52 Hawaii at 649, 485 P.2d at 109. Compare the test proposed in Long, *supra* note 38, at 174:

A security is the investment of money or money's worth in the risk capital of a venture with the expectation of some benefit to the investor where the investor has no direct control over the investment or policy decisions of the venture.

These courts reason that no matter how active investors are, they have limited access to information necessary to intelligent investment decision making, and thus need the protection of the disclosure requirements and liberal fraud remedies of the securities acts.⁵⁸ The risk capital test may at some point be incorporated into the federal acts as instruments "commonly known as a security," as the lower court suggested in *Turner*.⁵⁹ Although *Turner* did not deal with the risk capital test directly, its essential managerial efforts gloss on the *Howey* test results in a definition of investment contract indistinguishable from the risk capital test.

The *Turner* view, however, is not universal, even at the federal level. In *SEC v. Koscot Interplanetary, Inc.*,⁶⁰ the SEC sought an injunction against a cosmetics distributor business that had survived attack under state legislation.⁶¹ Buyers paid the defendants a fee to become "distributors" and could earn profits on retail sales by developing a sales organization of their own. The chief inducement, however, was a commission on the recruitment of other distributors, as with *Dare*. The court recognized state risk capital decisions as a trend in the law but refused to endorse that definition of an instrument "commonly known" as a security. As to investment contracts, the court viewed the essential managerial efforts test of *Turner* as a departure from authority and, in any event, inapplicable because the efforts of Koscot distributors were found to be substantial.⁶²

With increasing adoption of the risk capital test in state cases, federal courts will be more likely to find that pyramid and multilevel franchise schemes are commonly known as securities, even though they continue to follow the strict *Howey* test of an investment contract. Because even in the strict view promoters cannot avoid injunctions merely by requiring token efforts by their investors,⁶³ the issue is whether substantial yet nonmanagerial investor efforts should preclude the finding of a security. In *Turner*, the Ninth Circuit posed this issue through the hypothetical of a *Howey*-type citrus grove promoter who has the buyers of his tracts plant the trees themselves before he begins cultivation.⁶⁴ Such labor would be extensive and a condition precedent to earnings. *Koscot* treated substantial investor labors as a manifestation of the common enterprise requirement; as such it did not

Coffey also argued that a security should be found where the investor has a share of control but is not familiar with the business at the time he invests. The Hawaii court ignored this element of his test. Its adoption would make the finding of whether a security exists depend on whom a franchise was sold to, rather than the terms of the offer.

58. See *State v. Hawaii Mkt. Center, Inc.*, 52 Hawaii 642, 646-47, 485 P.2d 105, 108 (1971).

59. *SEC v. Glenn W. Turner Enterprises, Inc.*, 348 F. Supp. 766, 774 (D.C. Ore. 1972).

60. CCH FED. SEC. L. REP. ¶93,960 (N.D. Ga. 1973). *Koscot Interplanetary* was another wholly-owned subsidiary of Glenn W. Turner Enterprises, Inc., and hence featured a scheme similar to that of the principal case.

61. *Koscot Interplanetary, Inc. v. King*, 452 S.W.2d 531 (Tex. Civ. App. 1970).

62. *SEC v. Koscot Interplanetary, Inc.*, CCH FED. SEC. L. REP. ¶93,960 at 93,846 (N.D. Ga. 1973).

63. *Id.*

64. 474 F.2d 476, 482-83 (9th Cir. 1973). See note 43 *supra*.

negate the proposition that the investor had relied solely on the efforts of others. The *Turner* court treated the investor effort in this hypothetical as part of the consideration paid in, and thus did not preclude a finding that the investors were relying solely on the efforts (managerial) of others.⁶⁵ Such analytic separation of initial, nonmanagerial efforts from managerial efforts may be justified in the hypothetical of the labor as part of the initial value furnished and by the limited role of the investors in *Turner*.⁶⁶ It may, however, be harder to sustain in cases where investors assume a greater degree of responsibility for continuing operations.

The vagueness of the *Turner* test may prove burdensome in the development of securities rules for franchising. Its distinction of essential managerial versus nondiscretionary investor efforts involves subjective judgments by the trier of fact similar to the ministerial/discretionary rubric of administrative law. Less abusive fact situations than that in *Turner* may not evoke its rule.

Still, no black letter test can be created for this area; the various tests can serve only as a checklist of policy concerns to which the courts must refer in appraising novel schemes. The exclusion of Adventures I and II from the security category because they offered no commissions for recruiting other investors or overrides on sales made by other participants demonstrates the limits of the *Turner* test. *Howey* has been too restrictively applied; its expansion in *Turner* is warranted as an effort to preserve the effectiveness of the federal securities acts.

HUGH R. LAW

TORT—SURVIVAL DAMAGES IN WRONGFUL DEATH

*State ex rel. Smith v. Greene*¹

On September 30, 1970, John Galt was driving an explosives truck in defiance of a strike called by Teamsters Union Local No. 823. A member of the union, allegedly attempting only to disable the truck, fired on it and detonated the 42,800 pound cargo. Galt was killed, and his clothing and personal effects, valued at \$100, were destroyed.² Galt's administrator filed a survival action against the union seeking personal property damages of \$100 and punitive damages of \$80,000, alleging that since union officials

65. *Id.* at 482. The investor exchanges money, labor, and trees for a share in what he hoped would be the company's success.

66. Long, *supra* note 38.

These courts [holding that the founder-membership contract is not an investment contract] have failed to distinguish between labor performed as a prerequisite to entitlement to receive the return on the investment (a partial investment by labor rather than money) and labor performed in the generation of the actual return to be paid.

Id. at 162.

1. 494 S.W.2d 55 (Mo. En Banc 1973).

2. For a more detailed statement of the facts see the related criminal case of *State v. Shuler*, 486 S.W.2d 505 (Mo. 1972).

had ordered physical assaults on drivers who defied the strike, the member had fired the shots as the union's agent.³ The union moved to strike the punitive damages portion of the petition, and the trial court expressed its intent to sustain the motion. The administrator then sought successfully a writ of prohibition from the Missouri Supreme Court preserving the punitive damage portion of the petition.

The union contended that any one of three Missouri statutes precluded an administrator from recovering punitive damages for malicious destruction of a decedent's personal property. These three statutes are discussed below.

Missouri has allowed unlimited punitive damages in suits for personal property damage.⁴ When the damage is done maliciously, however, a statute⁵ provides for a recovery of punitive damages equal to the value of the property.⁶ Missouri courts had never before determined whether this statute was the exclusive remedy in such cases, thereby precluding an award of unlimited punitive damages at common law.⁷ *Greene* held that since the statute contained no language indicating that it was to be the exclusive measure of damages or exclusive remedy, there was no clear legislative intent to abrogate the common law right to punitive damages.⁸ This holding accords with the Missouri view that punitive damages are awarded to punish the wrongdoer,⁹ with the degree of culpability determining the size of the award.¹⁰ Under a different holding the wrongdoer would have been punished at a fixed amount regardless of his culpability.

The court considered next the effect which the injured party's death would have on the general rule that allows unlimited punitive damages.

3. 494 S.W.2d at 57.

4. *Coonis v. Rogers*, 429 S.W.2d 709, 716 (Mo. 1968); *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719, 724 (Mo. 1966).

5. § 537.330, RSMo 1969, states:

If any person shall maliciously or wantonly damage or destroy any personal property, goods, chattels, furniture or livestock, the person so offending shall pay to the party injured double the value of the things so damaged or destroyed

6. This statute is punitive because it calls for payment of damages in excess of actual loss. *Click v. Ballentine Produce Inc.*, 396 S.W.2d 609, 616 (Mo. 1965); *May v. Bradford*, 369 S.W.2d 225, 229 (Mo. 1963); *Contestible v. Brookshire*, 355 S.W.2d 36, 42 (Mo. 1962).

7. Two similar statutes, §§ 537.340-.350, RSMo 1969, have been interpreted. § 537.340 deals with trespassory damage to trees, timber, or parts of realty, and requires the offending party to pay treble damages to the injured party. *Walther v. Warner*, 26 Mo. 143 (1858), and *Tackett v. Huesman*, 19 Mo. 525 (1854), held that this statute did not preempt the common law remedy and that, in any case, the statutory remedy must be pleaded. Section 537.350 requires a person removing another's fences to pay double damages. *Albi v. Reed*, 281 S.W.2d 882, 886 (Mo. 1955), held that the statute did not preempt the common law remedy.

8. 494 S.W.2d at 59.

9. *Chappell v. City of Springfield*, 423 S.W.2d 810, 814 (Mo. 1968); *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719, 724 (Mo. 1966); *Peak v. W.T. Grant Co.*, 386 S.W.2d 685, 693 (K.C. Mo. App. 1964); *State ex rel. Boswell v. Curtis*, 334 S.W.2d 757, 761 (Spr. Mo. App. 1960).

10. *Johnson v. Am. Mut. Liab. Ins. Co.*, 385 F. Supp. 390 (W.D. Mo. 1971); *Wehrman v. Liberty Petroleum Co.*, 382 S.W.2d 56 (St. L. Mo. App. 1964).

Missouri's property damage survival statute¹¹ does not mention punitive damages.¹² The union argued that Missouri should adopt the position of several other states that regard punitive damages as strictly personal and thus prohibit their recovery when the injured party is dead.¹³ But, this position ignores the purpose of imposing punitive damages, *i.e.*, to punish the wrongdoer and to deter others from engaging in similar conduct.¹⁴ The supreme court held that the punitive damage portion of the administrator's petition was neither strictly personal nor outside the scope of the Missouri property damage survival statute.¹⁵

The pre-eminent issue in *Greene* was the effect of Missouri's wrongful death statute.¹⁶ Recovery under that statute is normally limited to actual pecuniary loss. In assessing damages, however, the jury may increase the award above the pecuniary loss if it finds aggravating circumstances attending defendant's wrongful act.¹⁷ Although these excess damages are essentially punitive in nature,¹⁸ Missouri courts have insisted that the concepts of aggravated damages and punitive damages are different.¹⁹ Because the difference is merely procedural,²⁰ however, it is arguable that allowing both

11. § 537.010, RSMo 1969.

12. § 537.010 provides:

For all wrongs done to property rights, or interest of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer, and, after his death, against his executor or administrator, in the same manner and with like effect, in all respects, as actions founded upon contracts.

13. Some of these prohibitions are statutory, such as R.I. GEN. LAWS ANN. § 9-1-8 (1956). This statute allows survival of property damage claims, but the personal representative can recover only actual damages. Punitive damages cannot be awarded to the deceased's estate.

14. As expressed in *Greene*, "Logic dictates that if the wrongdoer may be punished if his victim lives, then surely he should not escape retribution if his wrongful act causes a death." 494 S.W.2d at 60, *quoting* *Leahy v. Morgan*, 275 F. Supp. 424, 425 (N.D. Iowa 1967).

15. 494 S.W.2d at 59-60.

16. § 537.080, RSMo 1969.

17. § 537.090, RSMo 1969 (now repealed), stated:

In every action brought under § 537.080, the jury may give to the surviving party or parties who may be entitled to sue such damages, not exceeding fifty thousand dollars, as the jury may deem fair and just for the death and loss thus occasioned, with reference to the necessary injury resulting from such death, and having regard for the mitigating or aggravating circumstances attending the wrongful act, neglect or default resulting in such death.

18. See note 6 *supra*.

19. See note 20 *infra*.

20. Substantively, punitive damages may be awarded only if the defendant acted wilfully or wantonly. *Warner v. Southwestern Bell Tel. Co.*, 428 S.W.2d 596, 603 (Mo. 1968); *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719, 724 (Mo. 1966). Aggravated damages are awarded only if the deceased, had he lived, would have been entitled to punitive damages. *Dougherty v. Smith*, 480 S.W.2d 519 (K.C. Mo. App. 1970). The only differences between the two are that § 509.200, RSMo 1969 requires a prayer for punitive damages to be stated separately in the petition, and § 510.270, RSMo 1969 requires the jury to state the amount of a punitive award separately in the verdict. Neither requirement has been applied to aggravated damages. *Contestible v. Brookshire*, 355 S.W.2d 36,

when one act causes death, as well as property damage, would be a double award. Ordinarily there can be no duplication of damages where, as in *Greene*, there are two causes of action.²¹ This proposition is valid in regard to actual damages because there are two separate injuries to be redressed. This reasoning does not support recovery of punitive and aggravated damages as retribution for a single act; to allow recovery of both is to allow the jury to punish the defendant twice for a single act.²²

The *Greene* court summarily rejected this argument by simply stating that because there are two causes of action there could be no duplication of damages.²³

The court may have been prompted by the opportunity to avoid the statutory \$50,000 limit on wrongful death recoveries which governed the case at that time.²⁴ The court could also have been recognizing that Missouri's exclusion of personal injury damages when the injured party dies from those injuries²⁵ unjustly deprives the plaintiff of a considerable recovery.²⁶ Significantly, the court acknowledged that the wrongful death action and the survival action seek to redress different injuries and thus implied that

42 (Mo. 1962); *Spalding v. Robertson*, 357 Mo. 37, 48, 206 S.W.2d 517, 521 (Mo. 1947). For a good discussion of the difference between aggravated and punitive damages see *Davis, Wrongful Death*, 1973 WASH. U. L. Q. 327, 347.

21. One action is for John Galt's wrongful death, the other is for the destruction of Galt's personal property.

22. In the case of a wilful or wanton tort involving mass transit, a party can logically be punished more than once for a single wrongful act because the wrongful act is directed toward more than one plaintiff. In *Greene*, however, the defendant is being punished twice because there is only one individual toward which the wrongful act is directed.

23. 494 S.W.2d at 60. See also *St. Louis, I. M. & S. Ry. v. Craft*, 237 U.S. 648 (1915).

24. § 537.090, RSMo 1969. This statute has been repealed and replaced by § 537.090, RSMo 1974 Supp. The present statute removes the \$50,000 limit on wrongful death recoveries and allows the jury to consider aggravating or mitigating circumstances in awarding damages. The new statute reads:

In every action brought under section 537.080 the trier of the facts may give to the party or parties entitled thereto such damages as will fairly and justly compensate such party or parties for any damages he or they have sustained and are reasonably certain to sustain in the future as a direct result of such death. The mitigating or aggravating circumstances attending the death may be considered by the trier of facts.

25. § 537.020, RSMo 1969, states:

Causes of actions for personal injuries, other than those resulting in death, whether such injuries be to the health or to the person of the injured party, shall not abate by reason of his death

This clause is interpreted to bar either the personal injury survival action or the wrongful death action, depending upon the cause of death. Thus, the two actions are mutually exclusive. *Harris v. Goggins*, 374 S.W.2d 6, 16 (Mo. En Banc 1963); *Plaza Express Co. v. Galloway*, 365 Mo. 166, 172-73, 280 S.W.2d 17, 22 (Mo. 1955).

26. For example: A is injured by D's wrongful act. A lives for two weeks, incurring \$60,000 in medical expenses, lost wages, and pain and suffering, but dies as a direct result of his injury. A's personal representative cannot recover any of these losses because an action for such recovery is barred by § 537.020, RSMo 1969.

Missouri's exclusion policy is inappropriate.²⁷ Since the right to bring a personal property survival action is not contingent on the cause of death,²⁸ the court has provided an additional source of damages with which he may offset damages "lost" due to the exclusion of the personal injury survival claim.²⁹

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27. The court stated:

The wrongful death damages begin with the death of the person wronged. The survival action damages end with the death of the person wronged. There is no overlap or duplication of damages.

494 S.W.2d at 60.

28. See note 12 *supra*.

29. The wrongful death and property damage claims were settled with the Teamster's Union for a reported \$220,000. John Galt's widow received the \$50,000 statutory limit in the wrongful death settlement, and Galt's estate settled the property damage claim for \$170,000. Springfield *Leader-Press*, Oct. 25, 1973, at 12, col. 4.

Judge Seiler, in writing the majority opinion, seems to admit that there is some likelihood of clothing damage in every wrongful death case, but he points out that *Greene* will not result in a rash of large recoveries because of the great difficulty in proving that a defendant acted so carelessly as to be susceptible to a punitive damages award. 494 S.W. 2d at 55.

The administrator cannot, of course, introduce evidence of personal injury damages or present jury instructions on them in the property damage action.

