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## Recent Cases

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## Recent Cases

### ABA CODE OF PROFESSIONAL RESPONSIBILITY: AN ATTORNEY'S RIGHT TO SELF-DEFENSE

*Meyerhoffer v. Empire Fire & Marine Insurance Co.*<sup>1</sup>

Empire Fire & Marine Insurance Co. made a registered public offering of 500,000 shares of its stock. When Empire filed a Form 10-K with the Securities and Exchange Commission revealing that the registration statement did not disclose features of the compensation arrangements between Empire and its law firm, Sitomer, the plaintiffs brought a class action suit alleging the registration statement and the prospectus under which the Empire stock had been issued were materially false and misleading. Included as defendants were Empire, the three partners of the Sitomer law firm, and Stuart Goldberg, a former member of the Sitomer firm.<sup>2</sup>

Goldberg had resigned from the Sitomer firm in January 1973, when the Sitomer partners refused to make a full disclosure of allegedly excessive fees in the Empire registration statement. Upon resigning Goldberg immediately appeared before the Securities and Exchange Commission and furnished information subsequently embodied in an affidavit.<sup>3</sup> When he learned that he had been named as a defendant in the civil suit, he asked the plaintiffs' attorney for an opportunity to demonstrate that he had been unaware of the fee arrangement. He met with the attorney and, after consulting his own attorney and the Special Counsel with the Securities and Exchange Commission, gave plaintiffs' counsel a copy of the affidavit he had given to the Commission. Thereupon, the plaintiffs dropped Goldberg as a defendant and amended their complaint to include more specific facts.<sup>4</sup>

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1. 497 F.2d 1190 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3280 (Dec. 12, 1974).

2. *Id.* at 1192.

3. Several writers have noted that when a securities attorney follows the SEC's position that lawyers have a duty to report their clients' securities law violations, he faces the possibility that his action will be challenged as a violation of the Code of Professional Responsibility. Goldberg, *Ethical Dilemma: Attorney-Client Privilege v. The National Student Marketing Doctrine*, 1 SEC. REG. L.J. 297 (1974); Lipman, *The SEC's Reluctant Police Force: A New Role for Lawyers*, 49 N.Y.U.L. REV. 437 (1974). The *Meyerhoffer* case does not discuss the propriety of an attorney reporting his clients' securities laws violations to the SEC.

4. 497 F.2d at 1193.

Two days after this amended complaint the remaining defendants moved pursuant to Canons 4 and 9 of the Code of Professional Responsibility and the supervisory power of the court for an order of disqualification. The district court ordered that the plaintiffs' firm and Goldberg be barred from acting as counsel or participating with counsel for plaintiffs in this or any future action against Empire involving the transactions placed in issue in this lawsuit and from disclosing confidential information to others.<sup>5</sup>

On appeal by the plaintiffs' attorneys and Goldberg as intervenor, the Court of Appeals for the Second Circuit noted that the basis for the district court's decision to bar the plaintiffs' firm was the premise that Goldberg had breached the relevant ethical canons by revealing confidential information to plaintiffs' attorneys for use in their suit against Empire.<sup>6</sup> The court reversed this portion of the district court's opinion, holding that Goldberg had not violated the Code of Professional Responsibility so there was no sound basis for disqualifying the plaintiffs' firm. The court did affirm that portion of the district court holding which enjoined Goldberg from acting as counsel for the plaintiffs because of his prior representation of the defendants.<sup>7</sup>

In reversing that portion of the district court's holding which found violations of the Code of Professional Responsibility, the court stated that DR 4-101(C) recognizes that a lawyer may reveal confidences or secrets necessary to defend himself against "an accusation of wrongful conduct."<sup>8</sup> In its petition for certiorari, Empire contended that the court of appeal decision would undermine "public confidence in the legal system."<sup>9</sup> Empire further asserted that under such a rule "an adverse party may effectively strip the client of the protection of the attorney-client privilege and subject him to unsupervised disclosure of prejudicial information by the simple device of naming the client's lawyer as co-defendant."<sup>10</sup>

Under the old ABA Canons of Professional Ethics, which were in effect in most states until September, 1969,<sup>11</sup> the device of accusing an opponent's lawyer of wrongdoing to secure the disclosure of previously privileged communications between the attorney and his client was prohibited. Canon 37 addressed the question of when a

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5. *Id.*

6. *Id.* at 1194.

7. *Id.* at 1196.

8. *Id.* at 1194-95.

9. 273 BNA SEC. REG. & L. REP. A-8, A-9 (1974).

10. *Id.* at A-9.

11. R. WISE, LEGAL ETHICS at ix (2d ed. 1970).

lawyer might reveal confidences or secrets of his client. It gave a lawyer a limited right of disclosure: "If a lawyer is accused by *his client*, he is not precluded from disclosing the truth in respect to the accusation."<sup>12</sup>

ABA Opinion 202 applied this canon to a fact situation similar to that in *Meyerhoffer*. In the opinion the ethics committee decided that an attorney could not initiate any proceeding to protect himself which would involve a disclosure of confidential communications without the consent of his client.<sup>13</sup> It is apparent from the language of Canon 37 and ABA Opinion 202, as well as other opinions,<sup>14</sup> that under the old Canons of Professional Ethics an attorney would only be justified in revealing confidential communication to defend himself when the client or former client is the accuser. Consequently it would appear that Goldberg would have violated the old canons when he gave the plaintiffs' attorneys his affidavit<sup>15</sup> since the plaintiff, who had made the accusation of wrongful conduct, had never been his client.<sup>16</sup>

Similarly, the court of appeals decision is likely wrong when considered solely in light of the attorney-client privilege.<sup>17</sup> Canon 4 of the Code of Professional Responsibility states "[a] lawyer should preserve the confidences and secrets of a client." The term "confidences" is defined as "information protected by the attorney-client

12. ABA Canons of Professional Ethics No. 37 (emphasis added).

13. ABA Comm. on Professional Ethics, Opinion No. 202 (1940).

14. See ABA Comm. on Professional Ethics, Opinions 250 (1943) and 19 (1930).

15. This is assuming that there are no other grounds, such as an intention of the client to commit a crime, on which Goldberg would be justified in disclosing the confidential communications. The court of appeals makes no mention of the possibility of any other exceptions being applicable. *But see* text accompanying notes 26-27 *infra*.

16. See ABA Canons, *supra* note 12; ABA Opinions, *supra* note 13.

17. Wigmore states the evidentiary privilege as follows:

Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.

8 J. WIGMORE, EVIDENCE § 2292 (McNaughton rev. 1961).

ABA Code of Professional Responsibility [hereinafter cited as ABA Code] DR 4-101, Preservation of Confidences and Secrets of a Client provides:

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

In EC 4-4 it is explained that:

the attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.

privilege under applicable law."<sup>18</sup> The applicable law in the *Meyerhoffer* case is that of New York which provides that only the client may waive the attorney-client privilege.<sup>19</sup> Because of the privilege, the confidential communications between the client and his attorneys could not be introduced into evidence in *Meyerhoffer* unless the client had waived the privilege or the court had ruled otherwise.<sup>20</sup> If a client were to accuse his attorney of wrongful conduct there would be a waiver of the privilege,<sup>21</sup> but in a situation similar to that in *Meyerhoffer*, where the attorney is accused by someone other than his client, the client has done nothing to waive his privilege.<sup>22</sup> Neither the attorney nor the opposition can waive the client's privilege for him.<sup>23</sup> In *Meyerhoffer* the attorney was allowed to reveal confidences and secrets of his client without a waiver of the attorney-client privilege, and without any prior judicial supervision as to what might be revealed. The decision in this aspect goes beyond both the attorney-client privilege<sup>24</sup> and the old Canons of Professional Ethics.<sup>25</sup>

In reaching its decision, the court of appeals relied solely on its interpretation of DR 4-101(C)(4) of the Code of Professional Responsibility, the successor to the Canons of Professional Ethics.<sup>26</sup> Under

18. *Id.*

19. Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication . . . .

N.Y. CIV. PRAC. L. & RULES § 4503(a) (1963).

20. See C. McCORMICK, LAW OF EVIDENCE §§ 87-91 (2d ed. 1972).

21. For a consideration of acts sufficient to constitute a waiver by the client see 8 J. WIGMORE, EVIDENCE § 2328 (McNaughton rev. 1961).

22. Most of the reported cases where an attorney is accused of wrongful conduct involve an accusation by the client himself. See, e.g., *State v. Kruchten*, 101 Ariz. 186, 417 P.2d 510 (1966); *Olmstead v. Webb*, 5 App. D.C. 38 (1894); *Nave v. Baird*, 12 Ind. 318 (1859); *In re Arnson Estate*, 2 Mich. App. 473, 140 N.W.2d 546 (1966). In those few reported cases where an attorney was accused of wrongdoing by someone other than his client, the attorney was allowed to reveal confidences and secrets of his client only because the client acted in some manner which waived his privilege or because the communication was not privileged. See, e.g., *Strickland v. Capital City Mills*, 74 S.C. 16, 54 S.E. 220 (1906); *Koeber v. Somers*, 108 Wis. 497, 84 N.W. 991 (1901).

23. See 8 WIGMORE, *supra* note 21, at § 2321.

24. See text accompanying notes 19-23 *supra*.

25. See text accompanying notes 12-16 *supra*.

26. The Code of Professional Responsibility was adopted by the American Bar Association at its annual meeting on August 12, 1969, to replace the Canons which were first adopted in 1908. The Missouri Supreme Court accepted the new Code, repealing its rule which embodied the Canons and adopted the Code of Professional Responsibility as new Supreme Court Rule 4, effective January 1, 1971.

the Code of Professional Responsibility an attorney in the position of Goldberg could rely on at least three Code sections as exceptions to the general rule that an attorney should preserve the confidences and secrets of his client: DR 4-101(C)(3),<sup>27</sup> DR 4-101(C)(4),<sup>28</sup> and DR 7-102(B)(1).<sup>29</sup> Apparently, because of the difficulties of proving his "former client's intention to commit a crime" or "that in the course of the representation his client has perpetrated a fraud,"<sup>30</sup> Goldberg and his attorneys chose to defend his action on the basis of DR 4-101(C)(4). The court of appeals accepted the argument that this section was applicable and reached what was probably the correct result. Whether the means used to reach this result are correct is questionable; it is doubtful that the authors of the Code of Professional Responsibility intended this section to be read so broadly as to cover unsupervised disclosure of confidential communications by an attorney accused of wrongful conduct by someone other than his client.

Probably the most persuasive evidence of the intent of the authors can be found by examining the public policy basis of the attorney-client privilege and of Canon 4 of the Code.<sup>31</sup> The policy

27. "A lawyer may reveal: . . . (3) The intention of his client to commit a crime and the information necessary to prevent the crime."

28. "A lawyer may reveal: . . . (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."

29. A lawyer who receives information clearly establishing that: . . . (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

A recent amendment adds the following language to DR 7-102 (B)(1): "except when the information is protected as a privileged communication." ABA, SUMMARY OF ACTION AND REPORTS TO THE HOUSE OF DELEGATES, 1974 MIDYEAR MEETING 3. One commentator has noted that the continuous disclosure system embodied in the Exchange Act § 13, 15 U.S.C. § 78(m) (1970), deprives this 1974 amendment to the Code of any major effect in securities matters. Lipman, *The SEC's Reluctant Police Force: A New Role For Lawyers*, 49 N.Y.U.L. REV. 437, 457 (1974). While it is clear from the language of DR-102(B)(1) that an attorney who receives information clearly establishing that his client has perpetrated a fraud upon a person or tribunal shall reveal the fraud to that affected person or tribunal, it is not clear from the language of DR 4-101(C)(3) to whom an attorney may reveal the intent of his client to commit a crime.

In *Meyerhoffer*, Goldberg revealed the alleged securities law violations to both the SEC and the plaintiffs. If the purpose of DR 4-101(C)(3) is to permit disclosure to prevent the commission of intended crimes, it may be questionable whether disclosure to the plaintiffs could have served that purpose. However the language of DR 4-101(C)(3) does not seem so restrictive. See note 38 *infra* for a further discussion of DR 4-101(C)(3).

30. See text accompanying notes 39-41 *infra*.

31. The ABA CODE OF PROFESSIONAL RESPONSIBILITY 2-3 (1969), Preliminary Statement provides: "An enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations."

basis behind the attorney-client privilege and old Canon 37 was clear: The administration of justice is furthered if the client is encouraged to freely discuss whatever he wishes with his attorney; to encourage such discussion the law must not allow an attorney, without the consent or waiver of his client, to reveal confidential communications.<sup>32</sup> The Canons of Professional Ethics and previous case law recognized that the privilege was the client's and only he could waive that privilege or consent to a disclosure of his confidences.<sup>33</sup> A rule that permitted an attorney to reveal privileged information would clearly run against the public policy behind the privilege.

If the authors of the Code of Professional Responsibility had rejected the public policy on which old Canon 37 and the attorney-client privilege were based, or if they had said that an attorney has broader obligations to preserve confidences under the attorney-client privilege than under Canon 4, the court of appeals' interpretation would be less open for criticism, but the opposite is true.<sup>34</sup> In EC 4-1 the public policy underlying Canon 4 is stated in terms very similar to that underlying old Canon 37 and the attorney-client privilege. A device which allows an attorney to reveal the confidences of his client without supervision of a court, simply because the opposition has been astute enough to accuse both the client and the attorney of wrongdoing, does not encourage clients to fully confide in their attorneys. Indeed, this unsupervised and arbitrary practice might have the tendency to discourage clients from fully confiding in their attorneys. Such a device is not allowed under the attorney-client privilege,<sup>35</sup> was not allowed under the old canons,<sup>36</sup> and if it discourages clients from fully confiding in their attorneys, it is in conflict with the ethical considerations of Canon 4.<sup>37</sup>

None of the other exceptions recognized by the Code of Professional Responsibility to the general rule that a lawyer should preserve the confidences of a client involve an arbitrary or unsupervised disclosure of confidences, and they are all exceptions which were recognized under both the old Canons of Professional Ethics and the attorney-client privilege. Furthermore, none of the other exceptions conflict with the public policy of encouraging clients to fully

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32. Compare McCORMICK, *supra* note 20, with ABA Comm. on Professional Ethics, Opinions, No. 250 (1943).

33. See text accompanying notes 14-23 *supra*.

34. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 4-1 and EC 4-4 (1969).

35. See text accompanying notes 17-22 *supra*.

36. See text accompanying notes 11-16 *supra*.

37. See EC 4-1.

confide in their attorneys.<sup>38</sup> The court of appeals' interpretation of DR 4-101(C)(4) breaks this pattern.

No doubt this court's interpretation of DR 4-101(C)(4) was influenced by the particular factual situation of *Meyerhoffer*. Goldberg had resigned from the Sitomer firm because he felt that the firm's relations with Empire involved some illegal activity or misrepresentation.<sup>39</sup> Because of the fraudulent nature of Empire's activities, Goldberg might have been able to defend himself against accusations of violation of ethics under DR 4-101(C)(3) or DR 7-102(B)(1), but Goldberg did not rely on either of these sections. A securities attorney may hesitate to rely on either of these sections "due to the almost insurmountable difficulty in establishing his former client's 'intention to commit a crime' or that 'in the course of the representation his client has perpetrated a fraud.'"<sup>40</sup> This

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38. DR 4-101(C)(1): a lawyer may reveal confidences if his client consents. This exception, recognized under the attorney-client privilege, McCORMICK, *supra* note 20, was recognized under the old Canons of Professional Ethics. See Canon 37 and ABA Comm. on Professional Ethics, Opinions, No. 202 (1940). Since the client must consent before the attorney can reveal confidences, the client is assured that those communications he wants to remain confidential will remain so.

DR 4-101(C)(2): a lawyer may reveal confidences when required by law or court order. This exception is recognized under the attorney-client privilege, McCORMICK, *supra* note 20, and was recognized under the old Canons of Professional Ethics. See ABA Comm. on Professional Ethics, Opinions, No. 155 (1936). Since under this exception an attorney can not reveal confidences unless a court so orders or the law so requires, the disclosure of confidences is supervised and the client is protected against arbitrary disclosures.

DR 4-101(C)(3): a lawyer may reveal the intention of a client to commit a crime. This exception is also recognized under the attorney-client privilege, McCORMICK, *supra* note 20, at § 95 and was recognized under the old Canons of Professional Ethics. See Canon 37 and ABA Comm. on Professional Ethics, Opinions, No. 202 (1940). For this section to be invoked, the client must have the intention of committing a crime and the facts in the attorney's possession must indicate beyond a reasonable doubt that a crime will be committed. See ABA Comm. on Professional Ethics, Opinions, No. 314 (1965).

DR 4-101(C)(4): an attorney can reveal confidences or secrets necessary to establish or collect his fee. This portion of the section is recognized under the attorney-client privilege, McCORMICK, *supra* note 20, at § 91, and was recognized under the old Canons of Professional Ethics. Cf. ABA Comm. on Professional Ethics, Opinions, No. 250 (1943). This exception is most often based on the notion that the communication was not privileged because, between attorney and client, the intention was to disclose rather than withhold the matters communicated. McCORMICK, note 20 *supra*, at § 91. This exception might also be construed as a waiver of the privilege by the client.

That portion of DR 4-101(C)(4) which provides that a lawyer may reveal confidences and secrets necessary to defend himself against an accusation of wrongful conduct is an exception recognized under the attorney-client privilege only to the extent the client waives his privilege by personally accusing the attorney. Likewise it was allowed under the old Canons of Professional Ethics only when the client made the accusations. This follows from the assumption that the privilege is the client's, and he is assured that his communications will remain confidential if he knows that only he can waive this privilege.

39. 497 F.2d at 1193.

40. Goldberg, *Ethical Dilemma: Attorney-Client Privilege v. The National Student*



difficulty of proof, which is most apparent in the securities field,<sup>41</sup> may have influenced this court to give DR 4-101(C)(4) a broad interpretation to reach the same result the court might have reached under DR 4-101(C)(3) or DR 7-102(B)(1).

The court, however, did not limit its holding to the securities regulation field, nor did it limit its holding to the case where the result is endorsed by other sections of the Code of Professional Responsibility. Conceivably a case might arise where an attorney is guilty of wrongful conduct and the client is totally innocent, or where both the client and attorney are innocent; under this court's holding, if a plaintiff sues both the client and attorney, the attorney, while he probably could not be compelled to reveal the confidences and secrets of his client, might reveal them if necessary to defend himself. Such a result does not encourage clients to fully confide in their attorneys.

At best it is implicit in the court of appeals' holding that some preliminary showing of what is to be revealed is required.<sup>42</sup> For DR 4-101(C)(4) to be in accord with the ethical considerations of Canon 4 and the public policy of encouraging clients to fully confide in their attorneys, courts should require a preliminary showing of what is to be revealed. The decision of what is to be revealed should rest with the court, not solely with an attorney. Courts should be hesitant to expand DR 4-101(C)(4) beyond its explicit limits; it is an exception to the general obligations of Canon 4 and, as applied in the *Meyerhoffer* case, it is in derogation of the primary purpose of Canon 4, the public policy of encouraging clients to fully confide in their attorneys.

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*Marketing Doctrine*, 1 SEC. REG. L.J. 297, 307 (1974).

41. In the securities field, wholly apart from the attorney's problem of formulating an opinion regarding his client's intention to commit a crime or perpetrate a fraud, is the attorney's practical inability to prove these elements without a protracted and costly litigation in which the attorney is a sure loser if for no other reason than the cost, time and adverse publicity involved.

Goldberg, *Policing Responsibilities of the Securities Bar*, 19 N.Y.L.F. 221, 247 (1973).

42. The court of appeals emphasized the fact that Goldberg consulted with two attorneys and that the affidavit given to the plaintiff's attorney was written at an earlier date so the story was not simply fabricated in response to plaintiff's complaint. 497 F.2d. at 1195.

**ALIMONY—FULL FAITH AND CREDIT—  
RECOGNITION OF RETROACTIVELY MODIFIABLE  
FOREIGN ALIMONY DECREES DENIED**

*Overman v. Overman*<sup>1</sup>

Husband and wife were divorced in Tennessee. The divorce decree provided that the husband pay the wife alimony of \$9,300 annually, payable in equal monthly installments. Subsequently, the wife petitioned the Circuit Court of St. Louis County, Missouri to register the Tennessee decree pursuant to the Missouri Uniform Enforcement of Foreign Judgments Law.<sup>2</sup> In that petition, the wife alleged that the husband was \$8,000 in arrears in alimony payments. The court registered the decree, and ordered execution and a writ of garnishment to issue. The husband moved to set aside the registration and to stay or quash the execution and garnishment. The motion was denied and the husband appealed. The Missouri Court of Appeals, St. Louis District, first determined that, under the relevant Tennessee statutes<sup>3</sup> and cases,<sup>4</sup> the alimony decree was subject to retroactive modification of the accrued, unpaid installments. Since the Missouri Uniform Enforcement of Foreign Judgments Law allows only registration of judgments that are entitled to full faith and credit,<sup>5</sup> the court faced the issue whether accrued, unpaid installments due under an alimony decree are entitled to full faith and credit if those installments are subject to retroactive modification in the state where the decree was rendered. The court held that the decree was not entitled to full faith and credit and, therefore, was not entitled to registration under the Missouri Uniform Enforcement of Foreign Judgments Law.

The problem of applying the Full Faith and Credit Clause<sup>6</sup> to modifiable alimony decrees was considered by the United States Supreme Court in *Sistare v. Sistare*.<sup>7</sup> In that case, an ex-wife sought to enforce a New York alimony decree in Connecticut courts. The

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1. 514 S.W.2d 625 (Mo. App., D. St. L. 1974).

2. § 511.760, RSMo 1969; Mo. SUP. CT. R. 74.79.

3. TENN. CODE §§ 36-820, 36-828 (1955).

4. Daugherty v. Dixon, 41 Tenn. App. 623, 297 S.W.2d 944 (1956); Gossett v. Gossett, 34 Tenn. App. 654, 241 S.W.2d 934 (1951); Crane v. Crane, 26 Tenn. App. 227, 170 S.W.2d 663 (1942).

5. § 511.760(1)(1), RSMo 1969; Mo. SUP. CT. R. 74.79(a)(1).

6. U.S. CONST. art. IV, § 1.

7. 218 U.S. 1 (1910).

Supreme Court interpreted the New York statute in question as not authorizing retroactive modification, and held that the accrued, unpaid installments were entitled to full faith and credit. In dicta, the Court said that an alimony decree is entitled to full faith and credit as to accrued, unpaid installments unless the court in the rendering state can annul or modify the decree with respect to those installments. This broad language has come to stand for the proposition that, unless an alimony decree is "final"—*i.e.* not subject to modification, it is not entitled to full faith and credit. This concept of finality as a prerequisite to interstate recognition of alimony decrees under the Full Faith and Credit Clause has been criticized by several members of the Court<sup>8</sup> and by scholars,<sup>9</sup> but has, nonetheless, been adhered to in most state court decisions.<sup>10</sup> However, two recent decisions have rejected this finality doctrine. In *Hill v. Hill*<sup>11</sup> the West Virginia Supreme Court held that a retroactively modifica-

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8. In *Barber v. Barber*, 323 U.S. 77 (1944), Justice Jackson said:

Neither the full faith and credit clause of the Constitution nor the Act of Congress implementing it says anything about final judgments or, for that matter, about any judgments. Both require that full faith and credit be given to "judicial proceedings" without limitation as to finality. Upon recognition of the broad meaning of that term much may some day depend.

*Id.* at 87 (concurring opinion). In *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947) Justice Frankfurter said:

Conflicts arising out of family relations raise problems and involve considerations very different from controversies to which debtor-creditor relations give rise. Such cardinal differences in life are properly reflected in law. And so, the use of the same legal words and phrases in enforcing full faith and credit for judgments involving the two types of relations ought not to obliterate the great difference between the interests affected by them, and should not lead to an irrelevant identity in result.

. . . [I]n judgments affecting domestic relations technical questions of "finality" as to alimony and custody seem to me irrelevant in deciding the respect to be accorded by a State to a valid prior judgment touching custody and alimony rendered by another State.

*Id.* at 616-617 (concurring opinion).

9. See, *e.g.*, Ehrenzweig, *Interstate Recognition of Support Duties*, 42 CAL. L. REV. 382 (1954); Note, *Recognition of Foreign Modifiable Alimony Decrees*, 72 W. VA. L. REV. 291 (1970).

10. See, *e.g.*, *McGregor v. McGregor*, 52 Colo. 292, 122 P. 390 (1912) (dictum); *Lechner v. Lechner*, 154 Fla. 114, 16 So. 2d 816 (1944); *Cureton v. Cureton*, 132 Ga. 745, 65 S.E. 65 (1909); *Getz v. Getz*, 30 Hawaii 637 (1928), *overruled on other grounds*, 41 Hawaii 397, 416 (1953); *Lape v. Miller*, 203 Ky. 742, 263 S.W. 22 (1924); *Weston v. Weston*, 177 La. 305, 148 So. 241 (1933); *Wilson v. Wilson*, 143 Me. 113, 56 A.2d 453 (1947); *Gallant v. Gallant*, 154 Miss. 832, 123 So. 883 (1929); *Espeland v. Espeland*, 111 Mont. 365, 109 P.2d 792 (1941); *Coumans v. Albaugh*, 36 N.J. Super. 308, 115 A.2d 641 (Juv. & Dom. Rel. Ct. 1955); *Bentley v. Calabrese*, 155 Misc. 843, 280 N.Y.S. 454 (1935); *Collard v. Collard*, 7 Ohio App. 53 (1915); *Levine v. Levine*, 95 Ore. 94, 187 P. 609 (1920); *Hewett v. Hewett*, 44 R.I. 308, 116 A. 883 (1922).

11. 168 S.E.2d 803 (W. Va. 1969).

ble Pennsylvania child support decree<sup>12</sup> was entitled to full faith and credit, so long as no actual modification has been made. The court, emphasizing that the underlying purpose of the Full Faith and Credit Clause was to facilitate interstate recognition of judicial proceedings,<sup>13</sup> based its decision expressly on public policy considerations. In *Light v. Light*,<sup>14</sup> the Illinois Supreme Court went even farther, holding that a Missouri alimony decree was entitled to full faith and credit and registration under the Illinois Uniform Enforcement of Foreign Judgments Law,<sup>15</sup> as to installments yet to fall due, even though the Missouri courts had the power to modify the installments to be due in the future. Since the Illinois court held that prospectively modifiable installments are entitled to the full faith and credit, it would logically follow that retroactively modifiable decrees should also be entitled to full faith and credit.<sup>16</sup>

As the above discussion suggests, the unique nature of decrees ordering the periodic payment of alimony makes it very difficult to fit such decrees into the theoretical framework of the Full Faith and Credit Clause, and renders the Uniform Enforcement of Foreign Judgments Law an ineffective method of enforcing modifiable alimony decrees. Perhaps the most desirable solution to this problem would be to state openly that overriding considerations of public policy in the area of family support decrees should render such decrees *sui generis* and entitle them to more protection under the Full Faith and Credit Clause.<sup>17</sup> Unfortunately, the *Overman* court did not choose this alternative. Indeed, the court did not even refer to the serious policy implications of the case. Instead, in a single sentence and without citation or analysis, it held that retroactively modifiable alimony decrees are not entitled to full faith and credit.<sup>18</sup> This decision undoubtedly will have a significant impact, because more than one-fourth of the states presently allow retroactive modification of alimony decrees.<sup>19</sup>

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12. With respect to full faith and credit problems, alimony decrees and child support decrees involve the same considerations. See Annot., 157 A.L.R. 170, 171 (1945).

13. *Accord*, *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935).

14. 12 Ill.2d 502, 147 N.E.2d 34 (1957).

15. ILL. REV. STAT., ch. 77, 88 § 1(a) (1969).

16. However, the *Light* court said in dictum that a retroactively modifiable alimony decree would not be entitled to full faith and credit. This statement is logically inconsistent with the main thrust of the opinion, which is a rejection of the finality doctrine and an emphasis on the social need for effective enforcement of support orders. Furthermore, the court inexplicably cited *Sistare* as authority for its dictum.

17. See the concurring opinion of Justice Frankfurter in *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 616-17 (1946), quoted note 8 *supra*.

18. 514 S.W.2d 625, 633 (Mo. App., D. St. L. 1974).

19. *Scudder v. Scudder*, 11 Alaska 303 (1947); *Wilson v. Wilson*, 143 Me. 113, 56 A.2d

The *Overman* decision does not, however, completely preclude recognition and enforcement of retroactively modifiable alimony decrees in Missouri. There are at least three alternative methods of recognition and enforcement of such decrees. The first, and least satisfactory, method is the traditional process of bringing suit for the arrearages of alimony in the state where the decree was rendered, obtaining a judgment for money due and owing, and then suing in the forum state to enforce that judgment. Obviously, this method is expensive, time-consuming, and necessitates repetitive litigation. Moreover, there is the initial problem of obtaining jurisdiction over the obligor spouse in the state where the decree was originally rendered.<sup>20</sup> Assuming personal jurisdiction is obtained, the obligor spouse can move for modification of the decree. Even if the obligee spouse obtains a judgment and brings suit to enforce the judgment in the forum state, the forum state may deny certain statutory remedies available to enforce a local decree for alimony rendered in conjunction with a divorce, such as contempt, sequestration, or receivership, since the action is not one for divorce, but one to enforce a foreign judgment for money due and owing.<sup>21</sup>

The second method of recognition and enforcement of a retro-

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453 (1947); *Winkel v. Winkel*, 178 Md. 489, 15 A.2d 914 (1940); *Knapp v. Knapp*, 134 Mass. 353 (1883); *Beyerlein v. Ashburn*, 334 Mich. 13, 53 N.W.2d 666 (1952); *Conklin v. Conklin*, 223 Minn. 449, 27 N.W.2d 275 (1947); *Welser v. Welser*, 54 N.J. Super. 555, 149 A.2d 814 (1959); *Renkoff v. Renkoff*, 285 App. Div. 876, 137 N.Y.S.2d 428 (1955); *Mather v. Mather*, 143 Pa. Super. 608, 18 A.2d 492 (1941); *Ex parte Jeter*, 193 S.C. 278, 8 S.E.2d 490 (1940); *Eggers v. Eggers*, 82 S.D. 675, 153 N.W.2d 187 (1967); *Crane v. Crane*, 26 Tenn. App. 227, 170 S.W.2d 663 (1942); *Ashby v. Ashby*, 174 Wis. 549, 183 N.W. 965 (1921). English law also allows retroactive modification. *Herczog v. Herczog*, 186 Cal. App.2d 318, 9 Cal. Rptr. 5 (1960) (applying English law). In Ohio, the rule is in doubt. *McPherson v. McPherson*, 153 Ohio St. 82, 90 N.E.2d 675 (Sup. Ct. 1950); *Martin v. Martin*, 49 Ohio L. Abs. 488, 76 N.E.2d 99 (Ct. App. 1947); *Pace v. Pace*, 41 Ohio App. 130, 180 N.E. 81 (1931); *Meister v. Day*, 20 Ohio App. 224, 151 N.E. 786 (1925); *Wolfe v. Wolfe*, 55 Ohio Op. 465, 124 N.E.2d 485 (C.P. 1954). See Annot., 6 A.L.R.2d 1277 (1949).

Missouri does not allow retroactive modification of alimony decrees. *Nelson v. Nelson*, 282 Mo. 412, 221 S.W. 1066 (1920). *But cf. Maxey v. Maxey*, 212 S.W.2d 810 (1948) (court will not order payment of arrearages where wife has assented to or acquiesced in reduced payments by husband).

20. Unless the obligor spouse has property subject to attachment in the rendering state, obtaining personal jurisdiction may be difficult. This problem has been rendered less severe by the recent development of comprehensive long-arm statutes and the "continuing jurisdiction" over divorce actions.

21. *Harrington v. Harrington*, 233 Mo. App. 390, 121 S.W.2d 291 (1938). In states that have statutory provisions authorizing enforcement of decrees for alimony by equitable remedies, some courts hold that such statutes do not apply in a local action to collect arrears of alimony due under a foreign judgment, since the judgment which is enforced locally is not one for alimony, but is one for a debt due under a foreign judgment. See generally 24 AM. Jur.2d *Divorce and Separation* §§ 985-988 (1966); Annot., 18 A.L.R.2d 892 (1951).

actively modifiable foreign alimony decree is based on the principle of interstate comity.<sup>22</sup> The *Overman* court expressly refused to rule on the comity issue, because it was not argued on appeal.<sup>23</sup> The majority of states allow recognition and enforcement of foreign alimony decrees on the basis of comity.<sup>24</sup> The primary problem with the comity method is that it is purely discretionary.<sup>25</sup> A decree that does not conform to the state's public policy will not be enforced by comity.<sup>26</sup> Moreover, due process requires that the obligor spouse be allowed to present such defenses as he could have presented in the state where the decree was rendered and also that the obligor spouse be allowed to seek modification.<sup>27</sup> There is also a suggestion that certain remedies available in the state where the decree was rendered might not be available in the forum state, especially if the forum state's public policy or statutes do not make such remedies available.<sup>28</sup>

The final, and most promising, method of recognition and enforcement of retroactively modifiable foreign alimony decrees is to petition for registration of the decree pursuant to the Uniform Reciprocal Enforcement of Support Law.<sup>29</sup> One of the most attractive features of this statute is that decrees need not be entitled to full faith and credit to be entitled to registration.<sup>30</sup> After the decree is

22. A state court, in conformity with state policy, may by comity give a remedy which the Full Faith and Credit Clause does not compel. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935).

23. 514 S.W.2d 625, at 633-34 (Mo. App., D. St. L. 1974).

24. *Hollinrake v. Hollinrake*, 40 Hawaii 397 (1953); *Rule v. Rule*, 313 Ill. App. 108, 39 N.E.2d 379 (1942) ("equity and justice" require enforcement); *Franchier v. Gammill*, 148 Miss. 723, 114 So. 813 (1927); *Bolton v. Bolton*, 86 N.J.L. 69, 89 A. 1014 (1914), *aff'd on other grounds*, 86 N.J.L. 622, 92 A. 389, (Ct. Err. & App. 1914); *Sorenson v. Spence*, 65 S.D. 134, 272 N.W. 179 (1937)(child support payments); *Thones v. Thones*, 185 Tenn. 124, 203 S.W.2d 597 (1947). *Contra*, *Cureton v. Cureton*, 132 Ga. 745, 65 S.E. 65 (1909); *Lape v. Miller*, 203 Ky. 742, 263 S.W. 22 (1924); *Levine v. Levine*, 95 Ore. 94, 187 P. 609 (1920). *See Annot.*, 132 A.L.R. 1272 (1941).

25. "[C]omity is a courtesy, the granting of a privilege . . ." *Elliot v. Johnston*, 365 Mo. 881, 886, 292 S.W.2d 589, 593 (1956).

26. *Ferneau v. Armour & Company*, 303 S.W.2d 161, 169 (St. L. Mo. App. 1957); *Carey v. Schmeltz*, 221 Mo. 132, 136, 119 S.W. 946, 947 (1909).

27. *Griffin v. Griffin*, 327 U.S. 220, 233-34 (1946). *See Scoles, Enforcement of Foreign "Non-Final" Alimony and Support Orders*, 53 COLUM. L. REV. 817, 823-25 (1953).

28. "[T]he rule of comity extends to substantive rights and does not in general apply to remedies." *Neve v. Reliance Ins. Co.*, 357 S.W.2d 247, 250 (K.C.Mo. App. 1962)(dictum). *See note 26 and accompanying text supra.*

29. §§ 454.010-.360, RSMo 1969.

30. Section 454.010 allows an obligee spouse to register a foreign "support order." Section 454.020(14) defines a "support order" as "any judgment, decree or order of support whether temporary or final, whether subject to modification, revocation or remission regardless of the kind of action in which it was rendered."

registered by either the obligee spouse or by the prosecuting attorney on behalf of the spouse, a hearing is held. The statute does not define the nature of the hearing. However, the statutory purpose of facilitating interstate enforcement of support orders compels the conclusion that the hearing should be expedited,<sup>31</sup> so long as the obligor spouse's due process rights are not infringed. The decree is confirmed if the obligor spouse defaults or if the obligee spouse prevails on the issues of the existence and amount of the support obligation in a contested hearing.<sup>32</sup> As confirmed, the decree "shall have the same effect and may be enforced as if originally entered in the court of this state."<sup>33</sup> Although there is no Missouri case law applying this statute to the problem of retroactively modifiable foreign alimony decrees, the leading case of *Worthley v. Worthley*<sup>34</sup> held that such a decree is entitled to registration under the equivalent California statute.<sup>35</sup> This well-reasoned opinion provides a comprehensive plan for enforcing retroactively modifiable foreign alimony decrees under the Uniform Reciprocal Enforcement of Support Law,<sup>36</sup> and such plan should be influential in Missouri courts, because of its inherent logic and the desirability of uniform interpre-

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31. An expedited hearing is one that is docketed as early as possible and one in which procedural and evidentiary requirements are relaxed.

32. § 454.330, RSMo 1969.

33. § 454.340, RSMo 1969. In *Mangold v. Mangold*, 294 S.W.2d 368, 369 (K.C. Mo. App. 1956), similar language of the Uniform Enforcement of Foreign Judgments Law ("the registered judgment shall become a final personal judgment of the court in which it was registered") was said to make the full panoply of statutory remedies available to enforce the registered judgment. This avoids the possible problems posed by *Harrington v. Harrington*, 233 Mo. App. 390, 121 S.W.2d 291 (1938), discussed at note 21 and accompanying text *supra*.

34. 44 Cal. 2d 465, 283 P.2d 19 (1955) (opinion by Judge Traynor).

35. Although *Worthley* allowed registration, it required that the obligor spouse be allowed to litigate the issue of modification in the confirmation hearing. The statute itself merely provides that the obligor spouse "may assert any defense available to a defendant in an action on a foreign judgment." § 454.330, RSMo 1969. But since the confirmed decree has the same effect as a local decree, a later action for modification by either party would be allowed. Thus, to save time and money, either spouse should be allowed to raise the issue of modification in the confirmation hearing. McLarney, *Uniform Reciprocal Enforcement of Support Act in Missouri*, 27 Mo. L. REV. 481, 501 (1962); Kelso, *Reciprocal Enforcement of Support: 1958 Dimensions*, 43 MINN. L. REV. 875, 885 (1959). The latter commentator also suggests that retroactive modification be allowed. Kelso, *supra* at 886.

36. The *Worthley* plan requires that the issue of modification be litigated in the confirmation hearing if it is raised by the parties. See note 35 *supra*. The grounds for, and limits on, modification should be governed by the law of the state where the decree was first rendered. Where the registering state has determined the issue of retroactive modification of accrued, unpaid installments, the judgment for a liquidated sum is final and entitled to full faith and credit in other states. Finally, issues determined with respect to prospective modification will be *res judicata* so long as the circumstances remain unchanged. See Comment, *According Full Faith and Credit to Foreign Modifiable Alimony Decrees*, 26 U. CHI. L. REV. 136, 143 (1958).

tation of the statute.<sup>37</sup>

In conclusion, although *Overman* was correctly decided based on the weight of authority in other jurisdictions, the court's failure to consider the policy issues involved in the case is a serious shortcoming. The effect of the decision is to deny to obligee spouses the expedited, inexpensive procedures that are a practical necessity to enforce support obligations created in other states. Fortunately, the Missouri Uniform Reciprocal Enforcement of Support Law provides a relatively satisfactory method for enforcing such obligations. Because of the absence of any full faith and credit requirement, the binding nature of the confirmed decree, and the availability of the full panoply of remedies to enforce it, Missouri attorneys would be well-advised to consider using the uniform law when confronted with modifiable alimony decrees from other states.<sup>38</sup>

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37. § 454.350, RSMo 1969.

38. At least one commentator believes that, at the time of divorce, the obligee spouse should have the alimony decree registered in every state where the obligor spouse resides or has property, and that this should be a routine step in every divorce proceeding. Kelso, *Enforcement of Support: 1958 Dimensions*, 43 MINN. L. REV. 875, 883 (1959).



## CONSTITUTIONAL LAW—AN UNQUALIFIED POLICY ON PUBLIC AID TO NON-PUBLIC SCHOOLS

*Paster v. Tussey*<sup>1</sup>

Parents of students in the St. Louis County public schools filed a declaratory judgment action to challenge the constitutionality of sections 170.051 and 170.055, RSMo 1973 (Supplement), which provided that the state would purchase and gratuitously lend school textbooks to pupils and teachers in non-public, as well as public, schools.<sup>2</sup> The trial court upheld the constitutionality of the statutes as applied to students, but not as to teachers. On appeal, the Supreme Court of Missouri reversed the judgment as to pupils, deciding that article IX, section 8 of the Missouri constitution prohibits the lending of school textbooks to non-public school pupils.<sup>3</sup> The decision has important legal, social, economic, political, and human implications for state aid to non-public schools and thereby the future of non-public education in Missouri.

Litigation over public aid to non-public schools centers on the issue of church-state relationship. Aid to non-public schools essentially amounts to giving aid to institutions associated with religions, since approximately 93 percent of all children enrolled in non-public schools are in religious schools.<sup>4</sup> Any proposal for increased state aid must satisfy the constitution of the state in which it will operate and the United States Constitution.<sup>5</sup> The Missouri constitution contains a Bill of Rights with provisions for the free exercise of religion<sup>6</sup> and

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1. 512 S.W.2d 97 (Mo. En Banc 1974), *cert. denied*, 43 U.S. L.W. 3389 (U.S. Jan. 14, 1975).

2. §170.051 RSMo 1973 Supp., provided in part:

1. As used in this section, . . . (1) "School" means any elementary or secondary school, public or non-public, nonprofit, within this state . . . .

2. Each public school board shall purchase and loan free all textbooks for all children who reside in the district and attend an elementary or secondary school in this state.

3. Textbooks shall be loaned to all pupils residing in the district on an equitable basis and without discrimination on the grounds of race, creed, color, national origin, or school attended.

4. [T]extbooks . . . shall be loaned free to pupils and teachers upon their request.

3. 512 S.W.2d at 105. The court also found the lending of school textbooks to non-public school teachers to be prohibited by article I, section 6 of the Missouri constitution.

4. THE PRESIDENT'S COMMISSION ON SCHOOL FINANCE, SCHOOLS, PEOPLE, & MONEY—THE NEED FOR EDUCATIONAL REFORM 53 (1972).

5. A good discussion on this subject is contained in C. ANTIEAU, P. CARROLL, & T. BURKE, RELIGION UNDER THE STATE CONSTITUTIONS (1965).

6. MO. CONST. art. I, § 5:

[A]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their consciences; . . . no human authority can control or

against the establishment of religion.<sup>7</sup> At least five other constitutional sections are also relevant to the issue here considered: the General Assembly's duty to establish and maintain free public schools;<sup>8</sup> the creation of a "public school fund;"<sup>9</sup> prohibition on governmental aid to "any religious creed, church or sectarian purpose;"<sup>10</sup> and taxing for "public purposes only."<sup>11</sup> The existence of the latter provisions partially derives from the belief held at the time of the creation of the public educational process<sup>12</sup> that constitutional amendments and revisions were needed to apply the principle of church-state separation, already existent with regard to governmental matters, specifically to education.<sup>13</sup> Even Missouri's most recent constitutional convention in 1943-1944 included the explicit decision that such "double coverage" should be given.<sup>14</sup>

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interfere with the rights of conscience; . . . no person shall, on account of his religious persuasion or belief, . . . be molested in his person or estate . . . .

This section was not considered in *Paster*.

7. Mo. CONST. art. I, § 6:

That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same.

Mo. CONST. art. I, § 7:

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

8. Mo. CONST. art. IX, § 1(a).

9. Mo. CONST. art. IX, § 5: "[T]he annual income of [the 'public school fund'] shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever."

10. Mo. CONST. art. IX, § 8:

Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever . . . .

11. Mo. CONST. art. X, §§ 1, 3.

12. The need for a public school system was not recognized throughout the United States until the middle of the 19th Century. 1 C. BEARD, *THE RISE OF AMERICAN CIVILIZATION* 809-18 (1927).

13. This belief is reflected in the historical development of constitutional amendments and revisions in Missouri. See *THE STATE HISTORICAL SOC'Y OF MO., JOURNAL, MO. CONSTITUTIONAL CONVENTION OF 1875* (1921). The debates at the 1943-44 constitutional convention are contained in typewritten copy which is the property of the Law Library Association of St. Louis. Tockman, *The Constitutionality of Furnishing Publicly Financed Transportation to Private and Parochial School Students in Missouri*, 1963 WASH. U.L.Q. 455, 474 n.52.

14. Tockman, *The Constitutionality of Furnishing Publicly Financed Transportation to*

The Missouri courts, not called upon to construe the church-state provisions for many years, began to formulate a definite approach with the decision in *Harfst v. Hoegen*:<sup>15</sup>

The constitutional policy of our State has decreed the absolute separation of church and state, not only in governmental matters, but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise.<sup>16</sup>

Missouri thus created a policy of "absolute separation" with strong and unambiguous words. After a mild reaffirmation of this approach in *McVey v. Hawkins*,<sup>17</sup> the court strengthened it even further in *Behorn v. Reorganized School Dist. No. 8*:<sup>18</sup>

[I]t is the unqualified policy of the State of Missouri that no public funds or properties, either directly or indirectly, be used to support or sustain any school affected by religious influences or teachings or by any sectarian or religious beliefs or conducted in such a manner as to influence or predispose a school child towards the acceptance of any particular religion or religious beliefs . . .<sup>19</sup>

Thus, the "absolute separation of church and state" in the educational realm became the unqualified policy of the State of Missouri.<sup>20</sup>

The Missouri constitution is the basis of the *Paster* decision, but the United States Constitution remains in point as the source from which many of the case's concepts are derived. The most significant limitations imposed by the United States Constitution upon any proposed governmental aid to non-public education are the Establishment of Religion and Free Exercise Clauses of the first amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."<sup>21</sup> In

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*Private and Parochial School Students in Missouri*, 1963 WASH. U.L.Q. 455, 473-74 n.52.

15. 349 Mo. 808, 163 S.W.2d 609 (En Banc 1942); see Annot., 141 A.L.R. 1136 (1942).

16. 349 Mo. at 817, 163 S.W.2d at 614.

17. 364 Mo. 44, 258 S.W.2d 927 (En Banc 1953).

18. 364 Mo. 121, 260 S.W.2d 573 (1953).

19. *Id.* at 138, 260 S.W.2d at 582-83.

20. The position was reaffirmed in *Special Dist. for Educ. & Training of Handicapped Children v. Wheeler*, 408 S.W.2d 60 (Mo. En Banc 1966). See also *McDonough v. Aylward*, 500 S.W.2d 721 (Mo. 1973).

21. The first amendment's limitations were originally applied only to Congress and not to the states. *Permoli v. First Municipality*, 44 U.S. (3 How.) 561 (1844). They have, however, been applied to the states through the fourteenth amendment in more recent decisions. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Hamilton v. Regents of the Univ. of Calif.*, 293 U.S. 245 (1934).

1802, Thomas Jefferson stated that the American people's declaration in the first amendment had built "a wall of separation between church and State."<sup>22</sup> Mr. Jefferson's "wall" was granted judicial recognition in *Reynolds v. United States* when Mr. Chief Justice Waite announced that, "[I]t may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured."<sup>23</sup>

The history of the Supreme Court decisions on government aid to parochial schools, however, demonstrates that any "wall" which perhaps once existed has long since been altered by countless breaches. In *Everson v. Board of Education*,<sup>24</sup> the Court recognized this fact in its first substantial interpretation of the Establishment Clause. Although Mr. Justice Black declared that clause stood for the proposition that, "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions,"<sup>25</sup> he sustained the constitutionality of government payments for parochial students' bus fares by employing the "child benefit theory."<sup>26</sup> He said that the *children*—not the religious activities or institutions—were the recipients of the benefit. The applicability of this distinction has been involved in almost every subsequent federal and state court decision on public aid to non-public education.<sup>27</sup>

The twenty-four years immediately succeeding *Everson* included many important decisions by the Court, each one offering greater comfort to those desiring increased public aid.<sup>28</sup> To avoid the

22. Moehlman, *The Wall of Separation: The Law and the Facts*, 38 A.B.A.J. 281, 284 (1952).

23. 98 U.S. 145, 164 (1878). Other discussions of the Establishment Clause's historical background, including its pre-judicial history, may be found in Mr. Justice Black's opinion and Mr. Justice Rutledge's dissent in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), and in Sky, *The Establishment Clause, The Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395 (1966).

24. 330 U.S. 1 (1947).

25. *Id.* at 16.

26. The "child benefit theory" first appeared in *Borden v. Louisiana State Bd. of Educ.*, 168 La. 1005, 123 So. 655 (1929), and was adopted in *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930).

27. Mr. Justice Jackson's dissent in *Everson* was the first indication that many legal minds would not be able to accept coexistence of the Establishment Clause and the "child benefit theory". He wrote of Mr. Justice Black's opinion that "[t]he case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.'" *Everson v. United States*, 330 U.S. 1, 19 (1947).

28. *Zorach v. Clauson*, 343 U.S. 306 (1952), rejecting *Everson's* strict "no-aid" dicta was followed by *School Dist. v. Schempp*, 374 U.S. 203 (1963), creating a test of constitutional neutrality. See text accompanying notes 29-30 *infra*. This test was first applied in *Board of Educ. v. Allen*, 392 U.S. 236 (1968), where a New York statute permitting textbook loans to

Establishment Clause prohibition, legislation must meet three recognized criteria: (1) the statute must have a secular legislative purpose,<sup>29</sup> (2) the principal or primary effect must be one that neither advances nor inhibits religion,<sup>30</sup> and (3) the statute must not foster an excessive government entanglement with religion.<sup>31</sup> These criteria, however, do not provide clear-cut results. The central idea emerging from all the litigation is that the United States Constitution permits the giving of some, but not too much, public assistance to non-public schools—a construction still considerably less strict than that which has been given to the Missouri constitution.

The Missouri court's decision in *Paster* is an understandable extension of its prior interpretations of the state constitution. The court cited with approval "the absolute separation of church and state doctrine evidenced throughout the Missouri Constitution . . . ."<sup>32</sup> It specifically said that the portion of the textbook loan statute requiring public school boards to provide textbooks to teachers in private schools "upon their request"<sup>33</sup> is violative of article I, section 6 of the Missouri constitution which the court cited as "prohibiting the 'support' of any 'teacher of any sect.'"<sup>34</sup> The section regarding support of teachers indeed seems to fit the facts of the principal case so well that this portion of the court's finding was inevitable. As a result, this point was the single one of agreement between the trial court and the supreme court<sup>35</sup> and received relatively little attention in the dissenting opinion.<sup>36</sup>

The truly controversial part of the opinion is the decision that the portions of the textbook loan law "requiring public boards to provide textbooks to pupils attending private schools . . . ."<sup>37</sup> violate article IX, section 8 of the Missouri constitution prohibiting governmental appropriations "from any public fund whatever [for] anything in aid of any religious creed, church or sectarian purpose

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parochial school children was held constitutional. These cases all evidenced a growing concern for parochial institutions and a trend toward increased public aid, with *Allen* effectively replacing *Everson* as the main precedent in this area of constitutional law.

29. *School Dist. v. Schempp*, 374 U.S. 203, 222 (1963).

30. *Id.*

31. *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970).

32. 512 S.W.2d at 104.

33. § 170.051(4) RSMo 1973 Supp.

34. 512 S.W.2d at 104. The constitution actually prohibits not the support, but the compulsion of support from a person. *See note 7 supra*. The result is the same, however, since it is tax funds that are involved.

35. 512 S.W.2d at 97-98, 105.

36. *Id.* at 110.

37. *Id.* at 104.

. . . .”<sup>38</sup> The court’s discussion on this point is rather obviously designed to show that the elsewhere fecund<sup>39</sup> “child benefit theory” will bear no fruit in Missouri. Without acknowledging that concept’s legitimacy, the court posed the question, “Is the expenditure of funds to the pupil [or] parent in aid of a sectarian purpose?” In answer, the court stated that, by attending a school established to promote a sectarian objective, students help promote that objective.<sup>40</sup> Article IX, section 8 does not allow the expenditure of any public funds to aid these students in promoting the school’s sectarian purpose. The court would thus seem to be laying to rest, as regards state litigation in Missouri, both the idea that the “child benefit theory” will ever be accepted and the concept that parochial schools can perform secular functions for which public aid might be allowable.

The reasoning of the Missouri Supreme Court and the United States Supreme Court here becomes diametrically opposed on two central issues. The United States Supreme Court’s careful acceptance of the “child benefit theory” from *Everson* to *Allen* and beyond was apparently deemed inapplicable to the Missouri situation by the *Paster* court. This can be explained on the basis of Missouri’s stricter church-state policies; but the court’s implied denial of the possibility of secular functions in private education is more difficult to explain in view of the Supreme Court’s recognition of that very possibility.<sup>41</sup> Certainly, differences of opinion may be expected on such a perplexing question, and legal scholars can be found on both sides of the issue.<sup>42</sup> The legal reasoning in *Paster*, however, estab-

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38. See note 10 *supra*.

39. The “child benefit theory” has been widely accepted. See *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961); *Borden v. Louisiana State Bd. of Educ.*, 168 La. 1005, 123 So. 655 (1929); *Zellers v. Huff*, 55 N.M. 501, 236 P.2d 949 (1951); *Gurney v. Ferguson*, 190 Okla. 254, 122 P.2d 1002 (1941); *Mitchell v. Consolidated School Dist.*, 17 Wash. 2d 61, 135 P.2d 79 (1943).

40. 512 S.W.2d at 104-05.

41. The United States Supreme Court first distinguished secular purposes as separable from religiously oriented activities of an institution administered by a religious group in *Bradfield v. Roberts*, 175 U.S. 291 (1899). The Court acknowledged in *Allen* that, “[P]arochial schools are performing, in addition to their sectarian function, the task of secular education,” and refused to agree that, “[a]ll teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to the students by the public are in fact instrumental in the teaching of religion.” 392 U.S. 236, 248 (1968).

42. Professor Freund seems to argue for a constitutional presumption that all education in church-related schools amounts to sectarian activity. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969). Professors Valente and Stanmeyer have countered with arguments for the premise that secular and nonsecular functions of parochial schools may be constitutionally distinguished for purposes of analysis and state involvement. Valente &

lishes Missouri as a state which has rejected some constitutional reasoning accepted by the United States Supreme Court and a state with one of the most unqualified and absolute positions on the subject of church-state separation in the educational field.<sup>43</sup>

The Missouri textbook loan law under review<sup>44</sup> is almost identical with the textbook loan law of New York<sup>45</sup> which the United States Supreme Court approved in *Board of Education v. Allen*<sup>46</sup> on the "child benefit theory." *Paster*, however, includes only the most cursory attention to *Allen* and related Supreme Court cases before concluding that, "[D]isposition of the instant case is not controlled by federal law . . ."<sup>47</sup> It was left for Judge Bardgett's dissenting opinion to demonstrate that a first amendment case against the law would be extremely difficult, if not impossible, to make, since *Allen* had indeed upheld the constitutionality (under the first amendment) of a New York statute which is substantially the same as the Missouri law.<sup>48</sup> Furthermore, the most recent Court decisions include specific dicta on the continued constitutional acceptability of textbook loans<sup>49</sup> and general statements on the constitutionality of

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Stanmeyer, *Public Aid to Parochial Schools—A Reply to Professor Freund*, 59 GEO. L.J. 59 (1970).

43. The dissent in *Paster* pointed out that the majority opinion puts Missouri at loggerheads with Louisiana, Mississippi, and other states which have recognized the possibility of valid secular purposes in non-public schools and therefore upheld public aid. 512 S.W.2d at 108-10.

44. See note 2 *supra*.

45. See *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967), for the New York Court of Appeals' discussion of its own statute.

46. 392 U.S. 236 (1968).

47. 512 S.W.2d at 104.

48. *Id.* at 105. The following excerpt from the New York statute, N.Y. Educ. Law § 701 (McKinney 1969), demonstrates its similarity with the Missouri statute, § 170.051, RSMo 1973 Supp. (see note 2 *supra*):

[B]oards of education . . . shall have the power and duty to purchase and to loan upon individual request, to all children . . . enrolled in . . . a public or private school which complies with the compulsory education law, textbooks.

N.Y. Educ. Law § 701 (McKinney 1969). The dissent furthermore clarified the Supreme Court's decision in *Norwood v. Harrison*, 413 U.S. 455 (1973). The *Paster* majority opinion noted appellants' contention that *Norwood* placed a limitation on prior Supreme Court theories by holding against a textbook lending program. 512 S.W.2d at 103. The dissent hastens to explain that *Norwood* was an equal protection case, a federal case finding no first amendment violation but rather a racial discrimination violation of the fourteenth amendment, and therefore that it signals no change in the Supreme Court's tendency to uphold textbook loan laws. *Id.* at 106.

49. *Lemon v. Kurtzman*, 403 U.S. 602, 616-17 (1971). The single contrary indication came when the Court affirmed without opinion a United States District Court ruling that a New Jersey statute on the provision of textbooks to private schools violates the Establishment Clause. However, the statute in question also allowed for the provision of auxiliary services to private schools through public school personnel. This latter element is most likely the

states' assisting church-related schools in performing their secular functions.<sup>50</sup>

The *Paster* majority did find support to conclude that federal constitutional law was not controlling. In *Luetkemeyer v. Kaufmann*,<sup>51</sup> it was asserted that Missouri's determination "to enforce a more strict policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question."<sup>52</sup> Still, the very next sentence in *Luetkemeyer*, not cited by the *Paster* court, implies that a state's ability to be more strict in this area has at least some boundaries, though they probably remain undefined:

The Supreme Court has clearly indicated that there is an *area* of activity which falls *between* the Establishment Clause and the Free Exercise Clause in which action by a State will not violate the former nor inaction, the latter.<sup>53</sup>

The Supreme Court has gone even further, in *Walz v. Tax Commission*,<sup>54</sup> to admonish explicitly that there are federal constitutional boundaries which cannot be exceeded: "[T]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."<sup>55</sup> The Court, in *Committee for Public Education v. Nyquist*,<sup>56</sup> added

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constitutionally objectionable component of the statute. In any event, the absence of an opinion makes the case of little precedential value. *Marburger v. Pub. Funds for Pub. Schools*, *aff'd mem.*, 42 U.S.L.W. 3690 (U.S. June 18, 1974). The Court's 1974-75 docket contains a similar textbook-auxiliary services case. *Meek v. Pittenger*, *appeal docketed*, 42 U.S.L.W. 3706 (U.S. June 24, 1974).

50. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 774-75 (1973); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472, 481 (1973).

51. 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd mem.*, 43 U.S.L.W. 3230 (U.S. Oct. 22, 1974).

52. *Id.* at 386; cited in 512 S.W.2d at 104. Judge Bardgett, dissenting in *Paster*, stated that he disagreed "with the suggestion in the principal opinion that the establishment clause of the U.S. Constitution, as construed by the U. S. Supreme Court, is less restrictive than the provisions of the Missouri Constitution." 512 S.W.2d at 108. However, he made no attempt to justify his disagreement. There is support available for his position, for the Supreme Court of Missouri is on record as stating the polar opposite of what is asserted in *Paster*: "[T]he First Amendment is a stronger constitutional provision than that in our constitution concerning public schools . . ." *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451, 454 (Mo. 1959). This statement was made in the court's finding that both constitutions prohibited a state zoning act from being interpreted as granting authority to cities to prohibit building either churches or schools in residential districts.

53. 364 F. Supp. at 386 (emphasis added).

54. 397 U.S. 664 (1970).

55. *Id.* at 668-69.

56. 413 U.S. 756 (1973) (dictum).



that "[i]t has never been thought either possible or desirable to enforce a regime of total separation."<sup>57</sup> This all tends to indicate that Missouri's "unqualified policy" of "absolute separation" may not be as far from conflicting with federal constitutional principles as one reading *Paster* might conclude.

Free exercise of religion,<sup>58</sup> as well as freedom of association,<sup>59</sup> have been declared to be fundamental constitutional rights. Governmental classifications affecting such previously declared rights are subject to the strictest scrutiny; and equal protection is violated unless there is a "compelling" state interest to justify them and the state has no alternative means to attain its end which do not burden rights.<sup>60</sup> The state may not invidiously discriminate in classifying persons for participation in a public program.<sup>61</sup> Missouri's textbook loan law declared that all children should be treated "on an equitable basis and without discrimination on the grounds of race, creed, color, national origin, or school attended."<sup>62</sup> The *Paster* court eliminated one class of children, those attending church-related schools, solely on the basis of their exercise of their religion and their association with certain educational institutions. An argument could clearly be made that there is no compelling state interest to justify the exclusion or denial of legislated benefits to a child merely because of an incidental benefit which may accrue not to a church but to a parochial educational institution.<sup>63</sup> The predicted clash between taking the anti-establishment reasoning to its "logical extreme" and the integrity of the first amendment freedoms has al-

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57. *Id.* at 760.

58. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

59. *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963).

60. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

61. *Id.*

62. § 170.051(3), RSMo 1975 Supp.

63. The Attorney General of Missouri has made a similar argument for the logic of the equal protection approach:

[W]e believe that to exclude private school children . . . from receiving shared time instruction in an area vocational school for the sole reason that such children choose to attend a private school for the basic school curriculum amounts to a denial of equal protection in violation of Article I, Section 2, Missouri Constitution and the Fourteenth Amendment to the United States Constitution. The right of the pupil to attend a public school in Missouri is one founded upon our state constitution. Having offered a public education to all children, the state must make it available on non-discriminatory terms.

28 Mo. ATT'Y GEN. OP. No. 133 at 10 (Oct. 28, 1971). The only mention of the fourteenth amendment in *Paster* is the assertion in the first sentence of the opinion that it was a question involved in the appeal. Neither the majority nor the dissent return to it thereafter.

ready surfaced once in *Brusca v. State of Missouri ex rel. State Board of Education*.<sup>64</sup> Although no relief was granted therein, Missouri's continued strengthening of its "wall" by stricter interpretations at least enhances the chance that some Missouri plaintiff may in the future have a bona fide federal case of equal protection infringement.

The *Paster* decision, as it stands, means that Missouri's absolute separation policy has reached a new peak which will effectively prevent almost all state aid to non-public education. The court's definite refusal to have any of its prior decisions or this decision limited to their facts provides notice that broad anti-establishment of religion "guidelines" now exist in Missouri.<sup>65</sup> Non-public schools will likely suffer greater hardships due to restrictions against public aid, with the prospect of their virtual disappearance from the Missouri educational scene at least plausible.<sup>66</sup> The tragedy of deteriorating quality in non-public education is compounded when it is realized that the children involved are primarily located in the areas where educational needs are the very greatest—the general metro-

64. 332 F. Supp. 275 (E.D.Mo. 1971), *aff'd mem.*, 405 U.S. 1050 (1972). *Brusca* held that provisions of the Missouri constitution and implementing statutes, which establish and provide for funding of a free public school system and which prohibit the use of public funds to aid directly or indirectly religious or sectarian schools, do not violate either the Free Exercise Clause or the Equal Protection Clause. *Id.* at 280.

65. "[T]hat none of [the previous decisions] involved providing textbooks . . . is certainly true, but, even though such cases may be distinguished factually it does not follow that they do not provide guidelines for construing the constitution of this state in resolving the instant case." 512 S.W.2d at 102.

66. Enrollment losses in the private schools during a period when public school enrollment has grown indicate the hardships being experienced by non-public schools in Missouri even prior to *Paster*:

(Mo.) Enrollment in Elementary and Second Schools, 1965 & 1971

	Fall 1965	Fall 1971
Non-Public Schools	176,273	163,100
Public Schools	964,351	1,038,000

NATIONAL CENTER FOR ED. STATISTICS, U.S. DEPT. OF HEALTH, EDUC., & WELFARE, DIGEST OF ED. STATISTICS—1971 EDITION Tables 27 at 24, 39 at 33, and 40 at 34 (1972).

NATIONAL CENTER FOR ED. STATISTICS, U.S. DEPT. OF HEALTH, EDUC., & WELFARE, DIGEST OF ED. STATISTICS—1966 EDITION Table 26 at 22 (1966).

67. THE PRESIDENT'S COMMISSION ON SCHOOL FINANCE, SCHOOLS, PEOPLE, & MONEY—THE NEED FOR EDUCATIONAL REFORM 54 (1972):

One of every 10 American children attends a nonpublic school; the proportion is much higher in urban areas where the nonpublic school is a much more significant part of American education than it is in the Nation as a whole. Roughly 83 percent of all nonpublic school children are found in . . . Standard Metropolitan Statistical Areas . . . and nearly half (47.5 percent) of all nonpublic children attend schools in center cities. Of the total elementary and secondary school enrollment in our 10 largest cities, 24.6 percent is found in nonpublic schools.

politan areas and the inner cities.<sup>67</sup> Political implications<sup>68</sup> could include agitation by constituents, the disappointment of state legislators in the invalidation of their textbook loan statute, and a resultant review of any possible remaining avenues of approach to public aid, including a movement to amend the Missouri constitution as the only means of establishing the legitimacy of state aid to non-public schools.<sup>69</sup>

The United States Supreme Court has, since *Everson*, attempted to consider the social realities of non-public education and its relationship to the general welfare in deciding the legal issues of important Establishment Clause cases.<sup>70</sup> The decisions of the Missouri Supreme Court, on other hand, have been confined almost without exception to legal and historical precedent with little or no attention paid to possible shifts in public policy.<sup>71</sup> *Paster* is no exception to this trend. Unless the court reconsiders its position, it seems rather certain that Missouri's unqualified policy of absolute separation will continue to withstand all attacks in the Missouri

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68. It is worthy of note in the discussion of political implications that Missouri has what the Supreme Court of the United States has termed a "rather fundamental intrastate legal rift" in the area of public aid to non-public schools. *Wheeler v. Barrera*, \_\_\_ U.S. \_\_\_, 94 S.Ct. 2274, 2282 n.9 (1974). This has occurred because the Attorney General of Missouri has repeatedly issued opinions advising in favor of various forms of such public aid. *E.g.*, 28 Mo. ATT'Y GEN. OP. No. 133 (Oct. 28, 1971); 28 Mo. ATT'Y GEN. OP. No. 156 (May 3, 1971); 27 Mo. ATT'Y GEN. OP. No. 56 (Feb. 4, 1970); 27 Mo. ATT'Y GEN. OP. No. 26 (Jan. 29, 1970).

69. The Court in *Paster* included such a hint for those aggrieved by the decision, saying that the court "is bound in the resolution of legal conflicts . . . to follow the dictates of the Missouri Constitution as now written." 512 S.W.2d at 105. Indeed, the first steps toward a constitutional amendment have already been taken in the Missouri General Assembly. *Kansas City Times*, Feb. 27, 1975, at 9D, col. 1 (state ed.).

70. *E.g.*, *Board of Educ., v. Allen*, 392 U.S. 236, 247 (1968):

Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of secular education available to their children.

Furthermore, the federal judiciary has openly expressed its concern for the children in noting the unhappy situation in Missouri. The Supreme Court in *Wheeler v. Barrera*, \_\_\_ U.S. \_\_\_, 94 S.Ct. 2274 (1974), recognizing Missouri's extraordinarily strict policy of church-state separation, lamented what may yet come to pass—this state's resultant nonparticipation in the federal Elementary and Secondary Education Act programs. *Id.* at \_\_\_, 94 S.Ct. at 2287. The dissent in *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D.Mo. 1973) (Gibson, J., dissenting), said that the denial of health and safety measures to parochial school students because of Missouri's policy "appears narrow and insensitive of the welfare of nonpublic school attendees." *Id.* at 387.

71. One Missouri case, however, did contain some consideration of public policy, though limited somewhat to its particular facts (*i.e.*, taking a Catholic parish school into a public school system). *Harfst v. Hoegen*, 349 Mo. 808, 817, 163 S.W.2d 609, 614 (En Banc 1942).

courts. Furthermore, the federal courts will continue to yield to the state court's interpretation of the state constitution—at least up to the point where some other federal constitutional limitation is violated. Anomalies and injustices will probably become more visible if the present policy goes unaltered.<sup>72</sup> If the review of legal doctrine and public policy cannot achieve an amicable solution, then the “logical extreme” may have finally been reached where resort may be had to the Free Exercise and Equal Protection Clauses of the United States Constitution.

The magnitude of the controversy was not unexpected. The Supreme Court has deemed public schools to be “perhaps the most important function of state and local governments.”<sup>73</sup> Likewise, many would say that religion is the most important activity in America's private sector. In *Paster*, as in so many previous cases, those two forces came together. The Supreme Court of Missouri has therein written an opinion on an issue which will undoubtedly return for further review in future cases. If the injustices have occurred by then and the federal courts have not intervened, the Missouri court should consider whether the Missouri constitution actually demands an “unqualified policy” of “absolute separation” any more than does the United States Constitution, and whether enlightened public policy may indeed demand something less.

JOHN KURTZ

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72. An anomaly may be perceived in Missouri's newly enacted “financial assistance program” providing state funds for tuition payments of students at “public or private institution[s] of higher education . . .” § 173.200, RSMo 1975 Supp. An injustice may arise concerning Missouri's new “special educational services” for “all handicapped and severely handicapped children . . .” (emphasis added). § 162.670, RSMo 1975 Supp. Will the “unqualified policy” of “absolute separation” work the seeming injustice of denying needed services (e.g., diagnostic) to a parochial school child? Speech therapy was denied to parochial students in *Special Dist. for Educ. & Training of Handicapped v. Wheeler*, 408 S.W.2d 60 (Mo. En Banc 1966). That case will hopefully not foreclose the issue under the new, much expanded statute. § 162.670, RSMo 1975 Supp.

73. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

## CRIMINAL CONTEMPT—RIGHT TO JURY TRIAL FOR DIRECT CONTEMPT AND AGGREGATED SENTENCES

### *Codispoti v. Pennsylvania*<sup>1</sup>

At the conclusion of their criminal trial, petitioners Dominick Codispoti and Herbert Langnes were given sentences for each of numerous contempt charges against them arising out of their conduct during the trial.<sup>2</sup> Petitioners were subsequently granted a new trial on the contempt charges,<sup>3</sup> but their accompanying demand for a jury trial was refused. At the new trial, the judge found them guilty on each charge, imposing sentences which were to be served consecutively. The sentences aggregated to three years, three months for Codispoti and two years, eight months for Langnes.

The United States Supreme Court granted certiorari limited to consideration of petitioners' contention that they were denied their right to a jury trial. The Court reversed the convictions,<sup>4</sup> holding that when the trial judge waits until after the trial to convict and sentence the accused for various acts of contempt committed during trial, a jury trial is required if the sentences aggregate more than six months, even though no sentence for one contemptuous act alone was for more than six months.<sup>5</sup> The decision also gives an accused contemnor the right to a jury trial even when all of his contemptuous conduct has occurred in open court.

*Codispoti* continues the relatively recent movement toward abandonment of traditional procedures for adjudicating criminal contempts.<sup>6</sup> Historically, a jury trial had never been required or

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1. \_\_\_ U.S. \_\_\_, 94 S.Ct. 2687 (1974).

2. Codispoti and Langnes were sentenced for each of seven and six contempts respectively. The Supreme Court of Pennsylvania affirmed. *Commonwealth v. Mayberry*, 453 Pa. 619, 306 A.2d 294 (1973).

3. The United States Supreme Court had vacated a codefendant's contempt conviction on the grounds that he was entitled to a public trial before a judge other than the one who was reviled by the contemnor's conduct. *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971). Since Codispoti and Langnes were sentenced under the same circumstances, they were also granted a new trial before a different judge, even though they were not parties to *Mayberry*.

4. Mr. Justice White delivered the opinion of the Court, joined by Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Powell. Mr. Justice Marshall filed a concurring opinion in which he joined in Parts I and III of the opinion of the Court, but not Part II. Basically, Marshall thought the right to jury trial extended to situations where multiple sentences resulting from summary punishment aggregated to six months or more in length. Mr. Justice Blackmun dissented, joined by the Chief Justice, Mr. Justice Stewart, and Mr. Justice Rehnquist. Rehnquist filed a separate dissenting opinion, which was joined by the Chief Justice.

5. 94 S.Ct. at 2693.

6. The right to jury trial does not exist at all in "civil contempt" cases. This distinction

even used in criminal contempt proceedings.<sup>7</sup> The right to jury trial for serious offenses in criminal contempt cases in the federal courts was first recognized by the Supreme Court in 1966.<sup>8</sup> A "serious" criminal contempt was determined to be one for which imprisonment of more than six months is authorized or, in the absence of an authorized maximum penalty, one for which an imprisonment of greater than six months is actually imposed.<sup>9</sup> After the sixth amendment's right to jury trial was held to be binding on the states,<sup>10</sup> the Court held in *Bloom v. Illinois*<sup>11</sup> that there is a right to jury trial in state court proceedings involving serious criminal contempts. The Court in *Bloom* reasoned that since convictions for criminal contempt are indistinguishable from ordinary criminal convictions, the fundamental right to jury trial should extend to criminal contempt cases.<sup>12</sup>

The Court in *Codispoti* faced two major questions. The first was whether there is a right to jury trial in cases of post-trial convictions for *direct*<sup>13</sup> serious criminal contempt, that is, in cases where the contemptuous conduct occurred in the presence of the court and was not dealt with by way of summary punishment.<sup>14</sup> The second question was whether there is a right to jury trial where multiple petty contempt convictions result in an aggregated sentence of more than six months.

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has been drawn because of the differences in the nature of the proceedings and of the sentences imposed in civil, as opposed to criminal, contempt actions. Civil contempt proceedings are remedial and coercive in nature and result in sentences which are not definite in term. Thus, there is no determinable length of sentence upon which to base the jury trial right. The classification of contempts as civil or criminal can very often be difficult, and the distinction between them concerning procedural safeguards has been criticized. See Veselich, *Constitutional Law—Jury Trial For Contempt*, 32 Mo. L. Rev. 586 (1967).

7. See, e.g., 4 W. BLACKSTONE, COMMENTARIES 286-87 (1802); 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 391-94 (5th ed. 1942).

8. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

9. *Baldwin v. New York*, 399 U.S. 66 (1970); *Frank v. United States*, 395 U.S. 147 (1969).

10. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

11. 391 U.S. 194 (1968).

12. *Id.* at 207-08.

13. The classification of criminal contempts as direct or indirect has existed for some time. The basic distinction between the two types is that direct contempts occur in the presence of the court, while indirect contempts do not. Not all contempts, though, are easily classified. For a discussion of the direct-indirect test, see Dobbs, *Contempt of Court: A Survey*, 56 CORN. L. REV. 183, 224-27 (1971).

14. FED. R. CRIM. P. 42(a) provides for summary punishment of criminal contempt at the time of its occurrence if the judge certifies that he saw or heard the conduct constituting contempt. The majority of the states also have statutory or judicial provisions regulating summary proceedings in contempt cases. Allen, *Summary Proceedings in Direct Contempt Cases*, 15 VAND. L. REV. 241, 251 (1961).

With regard to the first question, the Court in *Codispoti* made it clear that there is a right to jury trial for all serious criminal contempts, whether direct or indirect, when conviction and sentencing are delayed until after trial. The opinion of the Court relied heavily on *Bloom v. Illinois*. The contempt involved in *Bloom* was the willful petitioning by an attorney to admit to probate a falsely prepared and executed will.<sup>15</sup> The contemptuous acts were committed out of the courtroom and hence constituted an indirect contempt. The Court in *Bloom*, nevertheless, did discuss direct criminal contempts, concluding that there was no reason to distinguish them from indirect contempts as concerns the right to jury trial.<sup>16</sup> The courts have generally followed this dictum,<sup>17</sup> but they have done so despite the argument that *Bloom* on its facts should apply only to indirect criminal contempts. *Codispoti* is a classic instance of direct contempt. The conduct for which *Codispoti* and Langnes were charged all took place in open court, with every detail of their actions entered in the trial record.<sup>18</sup> Since the language in the *Bloom* opinion concerning direct contempts extended beyond the factual situation presented there, the Court could easily have rejected its prior stance on courtroom contempts without overruling its holding in *Bloom*.<sup>19</sup> By holding that the petitioners in *Codispoti* were entitled to a jury trial, the Court has now solidified the *Bloom* dictum.

The principal argument against the right to jury trial for direct contempts is that a jury would be of no value when all the contemptuous conduct takes place in the presence of the court because there would be no questions of fact for a jury to resolve.<sup>20</sup> When the jury brings in a guilty verdict based upon the undisputed facts, the judge would still determine the length of the sentence. Therefore, a jury could in no way lessen the harshness of the punishment imposed upon the accused.<sup>21</sup> This analysis, however, ignores the argument that the jury's role in contempt proceedings goes beyond resolving factual disputes. The mere presence of a jury operates as a moderating influence between the judiciary and the accused, resulting in greater public confidence in our criminal justice system. The Court

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15. 391 U.S. at 195.

16. *Id.* at 209-10.

17. *See, e.g.,* United States v. Seale, 461 F.2d 345 (7th Cir. 1972); Baker v. Eisenstadt, 456 F.2d 382 (1st Cir.), cert. denied, 409 U.S. 846 (1972). *But see In re De Saulnier*, 279 N.E.2d 287 (Mass. 1971).

18. 94 S. Ct. at 2689-90 nn. 1 & 2.

19. *Cf. Kastigar v. United States*, 406 U.S. 441, 454-55 (1972); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 82, 97 (1821).

20. 94 S.Ct. at 2696 (Blackmun, J., dissenting).

21. 94 S.Ct. at 2713 (Rehnquist, J., dissenting).

has stated that "the primary purpose of the jury is to prevent the possibility of oppression by the Government."<sup>22</sup> Furthermore, the jury may also need to determine whether the facts before them, disputed or not, actually constitute a contempt.

Another concern of those who oppose the right to jury trial for direct contempts is that a jury may decide for acquittal in a case of demonstrated guilt. This is not an unlikely possibility in that many contemptuous acts are not criminal in the classic sense, and therefore may not be associated with criminal guilt by the average juror. The risk of unwarranted acquittals is present in all criminal trials, however, and should not be a factor in determining an accused's right to be tried before a jury. Such a risk can be lessened, as in other crimes, by the use of proper instructions.

Those opposed to the right to jury trial for direct contempts may further argue that practical problems will arise from the decision. Contemptuous acts, unlike those which constitute ordinary crimes, are very often performed in view of a large number of witnesses, especially if there is a large courtroom audience. Should either side desire to call upon all available witnesses, the trial could become exceedingly cumbersome. Where there are multiple contemnors in a single trial, separate proceedings may be necessary for each defendant, creating an even greater burden for the courts and the others involved. However, such valid factors affecting judicial efficiency and economy have often been rejected in favor of procedural safeguards for the individual, particularly those involving constitutional rights.<sup>23</sup> To have different standards for direct and indirect contempts would itself create procedural difficulties. It is not always clear what exactly constitutes direct, as opposed to indirect, contempt.<sup>24</sup> If a separate judicial determination of the directness of the contempt were required because of a distinction concerning the right to jury trial, then another procedural step would have to be created to make this determination.

The second question answered by the *Codispoti* decision is whether petty contempt sentences are to be aggregated in determining the right to a jury trial. This question has previously produced conflict among both courts<sup>25</sup> and commentators.<sup>26</sup> In holding that

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22. *Baldwin v. New York*, 399 U.S. 66, 72 (1970).

23. *See, e.g., Bloom v. Illinois*, 391 U.S. 194, 209 (1968).

24. *See Dobbs, supra* note 13, at 225.

25. *Compare United States v. Seale*, 461 F.2d 345 (7th Cir. 1972) *with Commonwealth v. Snyder*, 443 Pa. 433, 275 A.2d 312 (1971) and *In re Puerto Rico Newspaper Guild Local 225*, 476 F.2d 856 (1st Cir. 1973). The *Seale* case, a product of the Chicago conspiracy trial before Judge Hoffman, held that punishments for in-court contempts tried together at the



there is a right to jury trial when such sentences aggregate to more than six months, the Court differentiates between summary punishment for acts of contempt committed during the trial and postponement of conviction and punishment for such acts until after the trial. The power of the trial judge to summarily convict and punish under Rule 42(a) and similar state provisions<sup>27</sup> is unaffected by the decision. An unlimited number of six-month-or-less sentences can be imposed consecutively without a jury trial, provided the judge convicts and sentences upon the occurrence of each contemptuous act.

The Court essentially applied a balancing approach to this matter, weighing the trial court's interest in maintaining order in the courtroom against the contemnor's constitutional right to a jury trial. Since there is no "overriding necessity for instant action to preserve order"<sup>28</sup> when conviction and punishment are postponed until after trial, the contemnor's right to jury trial prevails as the dominant interest. According to the Court, when a defendant is punished at the end of trial for a series of contemptuous acts during the trial, the contempts are to be treated as one serious offense. This rationale has been referred to as the "continuing contempt" theory.<sup>29</sup> However, when the trial judge convicts and punishes summarily, the preservation of courtroom order is the overriding interest. Each contempt in this situation is considered a "discrete and separate matter."<sup>30</sup> Thus, when conviction and sentencing are delayed, the series of contempts are aggregated and treated as a single offense, but when the contempts are summarily punished they are considered to be separate offenses. This apparent contradiction can only be explained by the Court's interest in preserving the trial judge's traditional summary powers. Perhaps there is the fear that total application of the aggregation rule would cause the summary

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conclusion of the trial must be aggregated for purposes of determining the right to a jury trial. To rule otherwise, the court reasoned, would permit a judge to single out and punish discrete instances of contempt, none serious enough individually to require a jury trial, resulting in a theoretically unlimited term of punishment. 416 F.2d at 353.

26. Compare Dibble, *Contempt of Court: Go Directly to Jail. Do Not Pass Go. Do Not Collect Your Constitutional Rights*, 7 *SUF. L. REV.* 517, 535-37 (1973) with Thompson & Stackman, *Multiple Petty Contempts and the Guarantee of Trial by Jury*, 61 *Geo. L. J.* 621, 637 (1973).

27. See note 14 *supra*.

28. 94 S.Ct. at 2692.

29. See, e.g., *Yates v. United States*, 355 U.S. 66, 73-74 (1957) (repeated refusals by a witness to answer questions on the same subject considered to be one contempt of a continuing nature).

30. 94 S.Ct. at 2692.

procedure to lose some of its deterrent effect. If such aggregation were allowed, a person who has been summarily sentenced for six months or less would be tempted to commit further contemptuous acts in order to have enough aggregate punishment to assure himself of the right to a jury trial. Similarly, a contemnor may be inclined to continue his disruptive behavior once his cumulative summary punishment has passed the six-month barrier, because he could then rely on having a separate proceeding where a possibly more lenient jury would determine his fate.

The primary objection to having this distinction between summary and delayed punishment is that trial judges will be encouraged to convict and punish summarily in order to avoid the jury trial requirement.<sup>31</sup> The Court responded to this argument by pointing out that appellate review will discourage unwarranted summary punishment.<sup>32</sup> Prior decisions which narrowly restrict the class of misbehavior subject to summary disposition substantiate this point.<sup>33</sup>

The Court's acceptance of the aggregation rule, limited though it may be, seems well founded in light of the stated purpose behind the constitutional limitations imposed by *Bloom*, the restriction of abuse of the contempt power.<sup>34</sup> A contrary holding would allow trial judges to circumvent the right to jury trial by handing out multiple sentences for petty offenses. Evaluating the rule from the standpoint of the individual contemnor, ten convictions for six months each, to be served consecutively, would certainly seem as "serious" as would one conviction for five years. Furthermore, other procedural rights based upon constitutional law and criminal procedure are determined by the aggregation of sentences.<sup>35</sup>

The relatively recent shift away from the sui generis approach to criminal contempts in favor of the expansion of basic procedural rights<sup>36</sup> has nearly reached the limit in regard to the right to jury trial. The *Codispoti* decision assures that a contemnor will now

31. 94 S.Ct. at 2694-95 (Marshall, J., concurring); 94 S.Ct. at 2714 (Rehnquist, J., dissenting).

32. 94 S.Ct. at 2694.

33. *In re Oliver*, 333 U.S. 257 (1948); *Harris v. United States*, 382 U.S. 162 (1965). In *Harris*, the Court declared that summary punishment should be used only when necessary to achieve a speedy recovery of the court's dignity. *Id.* at 164.

34. 391 U.S. at 202-07.

35. *James v. Headley*, 410 F.2d 325 (5th Cir. 1969) (aggregate punishments authorized by statute determine constitutional right to counsel); *Chambers v. District of Columbia*, 194 F.2d 336 (D.C. Cir. 1952) (right to appeal based on aggregation of sentences).

36. The other rights besides jury trial that have been focused on are the rights to a hearing, an impartial judge, and appellate review. See generally Dibble, *supra* note 26.

receive a jury trial in all cases where his conduct results in a post-trial sentence of more than six months imprisonment.<sup>37</sup> Neither the length of individual multiple contempt sentences nor the nature of the contemptuous acts will affect this right. One possible further step in this area would be application of the six-month rule to the reduction of a sentence for serious contempt to one for petty contempt by a trial or appellate court.<sup>38</sup> The only other significant remaining step would appear to be extension of the aggregation rule, and consequent right to jury trial, to multiple summary sentences,<sup>39</sup> which would effectively do away with the summary procedure.

Such further extensions of the jury trial right may not seem probable for the near future, but they cannot be discounted. The summary punishment procedure itself has been increasingly restricted in recent years and has been attacked for its very existence.<sup>40</sup> Short of doing away with summary disposition entirely, perhaps the suggested alternatives of binding and gagging or removal from the courtroom<sup>41</sup> will be adopted by the courts in order to obviate the need for repetitive summary punishment. However this problem may be resolved in the future, the right to jury trial for criminal contempt has, for the present, been given well-defined parameters.

THOMAS B. BECKER

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37. The use of the six-month dividing line to distinguish between petty and serious offenses was reinforced in *Taylor v. Hayes*, \_\_\_ U.S. \_\_\_, 94 S.Ct. 2697 (1974), a companion case to *Codispoti*. The Court in *Taylor* reversed petitioner's contempt conviction on grounds of due process and failure to have a new judge adjudicate the contempt charges. But, significant to the issues discussed in this note, it rejected his contention that he was entitled to a jury trial. Despite the fact that petitioner was given sentences for his contempts which aggregated to well over 6 months imprisonment, it was held that they constituted mere petty offenses because the appellate court ruled that the sentences were to be served concurrently. The Court reaffirmed its commitment to the basic proposition in *Bloom v. Illinois* that there is no inherent right to jury trial in all criminal contempt proceedings.

The Supreme Court has therefore given approval to the practice of reducing sentences after conviction to imprisonment for six months or less in order to eliminate the requirement for a jury trial. The consequences of having this dividing line, however, are tempered by the fact that many states have provided maximum sentences of less than six months for criminal contempts. Schneider, *Criminal Law — Criminal Contempt—Judge's Dilemma*, 21 DEPAUL L. REV. 1123, 1126 n.19 (1972). Furthermore, those jurisdictions which have no statutory maximum actually impose serious sentences in only a small minority of cases. The Court's determination on the right to jury trial in *Taylor* follows logically from its holding in *Frank v. United States*, 395 U.S. 147 (1969), where it decided that a three-year sentence reduced to probation did not entitle the accused to a jury trial.

38. See 94 S.Ct. at 2706 (Marshall, J., dissenting).

39. See 94 S.Ct. at 2694 (Marshall, J., concurring).

40. See, e.g., Allen, *supra* note 14; Johnson, *The Contemptuous Attorney and Problems Concerning His Summary Punishment Under Rule 42(a) of the Federal Rules of Criminal Procedure*, 4 J. MARSH J. 74 (1970).

41. *Illinois v. Allen*, 397 U.S. 337, 343-44 (1970).

## CRIMINAL LAW—MENTAL DISEASE OR DEFECT REDUCING THE DEGREE OF CRIME—MISSOURI CHANGES THE RULE

*State v. Anderson*<sup>1</sup>

The defendant, Richard Anderson, was charged with first degree murder. At trial, both a psychiatrist and a psychologist testified that the defendant had a severe depression which was characterized as a mental disease or defect. In their opinion, as a result of such defect, defendant was unable to premeditate, which in Missouri means that defendant was unable to form the intent to kill or do grievous bodily harm. The trial court instructed the jury on both first degree and second degree murder.<sup>2</sup> The defendant asked for an instruction on manslaughter,<sup>3</sup> but the court refused to instruct on manslaughter on the basis that such defect or disease could not affect the degree of homicide. The defendant was convicted.

On appeal,<sup>4</sup> the defendant argued that in adopting section 552.030(3)(1), RSMo 1969,<sup>5</sup> Missouri adopted the doctrine of "diminished responsibility." The defendant argued that there was evidence presented at trial that he was not capable of premeditating and that he did not premeditate. The defendant contended that on the basis of that evidence, the jury could have found him guilty of manslaughter since he lacked the state of mind necessary for both

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1. 515 S.W.2d 534 (Mo. En Banc 1974).

2. Murder in the first degree in Missouri is defined by § 559.010, RSMo 1969: Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree.

Murder in the second degree in Missouri is defined by § 559.020, RSMo 1969:

All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree.

3. Manslaughter in Missouri is defined by § 559.070, RSMo 1969:

Every killing of a human being by the act, procurement or culpable negligence of another, not herein declared to be murder or excusable or justifiable homicide, shall be deemed manslaughter.

4. The St. Louis District of the Missouri Court of Appeals reversed and remanded for a new trial, but subsequently sustained defendant's motion to transfer to the Missouri Supreme Court. The motion to transfer was sustained because of the general interest and importance of questions involved in the case. See Mo. Sup. Ct. R. 83.02; Mo. Consr. art. V, § 10.

5. Section 552.030(3)(1) provides as follows:

Evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible (1) To prove that the defendant did or did not have a state of mind which is an element of the offense. . . .

first degree and second degree murder in Missouri.<sup>6</sup> The Missouri Supreme Court accepted the defendant's argument and reversed the conviction and remanded, holding that in adopting section 552.030(3)(1), Missouri adopted the doctrine of "diminished responsibility." Thus, the trial court erred in refusing to instruct on manslaughter.<sup>7</sup>

Under the so-called "diminished or partial responsibility" doctrine,<sup>8</sup> evidence of mental disease or defect, even though not sufficient to acquit the defendant,<sup>9</sup> can be sufficient to show the absence of a state of mind which is an element of the offense charged, and thus reduce the degree of crime for which the defendant is responsible.<sup>10</sup> If the jury finds that the defendant is too disordered to deliberate, he cannot be convicted of first degree murder, but only of sec-

6. The state of mind elements for murder in the first degree in Missouri are deliberation, premeditation and malice. Murder in the second degree is defined as all kinds of murder at common law which are not defined by § 559.010, RSMo 1969, as first degree murder. There are five types: (1) intent-to-kill murder; (2) intent to do grievous bodily harm murder; (3) depraved-heart murder; (4) felony murder, where the felony in question is not listed under first degree murder; and (5) intent to oppose by force a law enforcement officer acting in the execution of his duties. In *Anderson* the type of second degree murder in question is intent-to-kill murder. Missouri courts have used the term premeditation to mean both intent to kill and intent to do grievous bodily harm. Therefore, the state of mind elements for intent-to-kill murder in the second degree are premeditation and malice without deliberation. Manslaughter is any other killing (not justifiable or excusable), which necessarily is without premeditation or malice. *State v. Anderson*, 515 S.W.2d 534, 537 (Mo. En Banc 1974); *State v. Ayers*, 470 S.W.2d 534 (Mo. En Banc 1971); *State v. Williams*, 442 S.W.2d 61 (Mo. En Banc 1968); *State v. Washington*, 368 S.W.2d 439 (Mo. 1963); *State v. Chamineak*, 343 S.W.2d 153 (Mo. 1961).

7. 515 S.W.2d at 539, 542. Judge Henley dissented on the ground that there was not sufficient evidence to require the giving of a manslaughter instruction. *Id.* at 543.

8. This doctrine, often referred to as diminished or partial responsibility, is actually a misnomer. The phrase is misleading because it suggests that a defendant is partially responsible for the commission of some offense. However, the true meaning of the doctrine is that there is not *reduced* responsibility for the greater crime but *no* responsibility for the greater crime and *full* responsibility for the lesser crime. The doctrine will be hereinafter referred to as "diminished responsibility." *State v. Anderson*, 515 S.W.2d 534 (Mo. En Banc 1974); *State v. Padilla*, 66 N.M. 289, 347 P.2d 312 (1959); F. LINDMAN & D. MCINTYRE, JR., *THE MENTALLY DISABLED AND THE LAW* 355 (1961); W. LAFAVE & A. SCOTT, *CRIMINAL LAW* § 42 (1972); Annot., 22 A.L.R.3d 1228, 1238 (1968); Player, *The Mentally Ill in Missouri Criminal Cases*, 30 Mo. L. REV. 514, 523 (1965); Richardson, Reardon & Simeone, *A Symposium: An Analysis of the Law*, 19 J. Mo. B. 677, 712-13 (1963); Taylor, *Partial Insanity as Affecting the Degree of Crime—A Commentary on Fisher v. United States*, 34 CAL. L. REV. 625, 630 n.17 (1946).

9. Section 552.030(1), RSMo 1969 provides for the defense of not guilty by reason of mental disease or defect excluding responsibility as follows:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law.

10. See notes 37-40 and accompanying text *infra*.

ond degree. If the jury finds that the defendant is too disordered to premeditate or lacks malice, he cannot be convicted of second degree murder, but only of manslaughter.<sup>11</sup>

Prior to *State v. Anderson*, the Missouri rule was that a mental disease or defect is either a complete defense or is not a defense at all.<sup>12</sup> This approach is based on the assumption that a defendant who fails to establish a complete defense of insanity must thereby have possessed the requisite mental state for the crime charged.<sup>13</sup> The leading case<sup>14</sup> demonstrating this "all or nothing" approach is *State v. Holloway*.<sup>15</sup> The rule in *Holloway* was subsequently followed by Missouri courts.<sup>16</sup>

In 1963 the Missouri legislature adopted the Mental Responsibility Act.<sup>17</sup> Section 552.030(3)(1) of the Act was taken from the

11. See note 6 *supra*. In *Anderson* the court is not clear whether the mental disease or defect must negate premeditation, malice or both premeditation and malice. The court seems to be saying that if the jury finds that defendant lacks *either* premeditation or malice, then he cannot be convicted of second degree murder, but only of manslaughter. Furthermore, the court is not clear whether the defendant or the state has the burden of persuasion on the issue of diminished responsibility. Some language would indicate that the defendant has the burden of persuasion. 515 S.W.2d at 537, 539, 542. However, the prosecutor normally has the burden of persuading the jury beyond a reasonable doubt that the required state of mind for an offense exists. Therefore, a strong argument can be made that the defendant should have the burden of injecting the issue, but the state should have the burden of persuasion. See Mo. Prop. CRM. CODE §§ 1.100, 1.110, 7.140 (1973).

12. See *State v. Sturdivan*, 497 S.W.2d 139 (Mo. 1973); *State v. Glenn*, 429 S.W.2d 225 (Mo. En Banc 1968); *State v. Garrett*, 391 S.W.2d 235 (Mo. 1965); *State v. Pinski*, 163 S.W.2d 785 (Mo. 1942); *State v. Barbata*, 80 S.W.2d 865, 868 (Mo. 1935); *State v. Paulsgrove*, 203 Mo. 193, 101 S.W. 27 (1907); *State v. Speyer*, 182 Mo. 77, 81 S.W. 430 (1904); *State v. Holloway*, 156 Mo. 222, 56 S.W. 734 (1900); *State v. Kotovsky*, 74 Mo. 247, *aff'g*, 11 Mo. App. 584 (1882); *State v. Huting*, 21 Mo. 464 (1855); *Baldwin v. State*, 12 Mo. 223 (1848).

13. See *State v. Holloway*, 156 Mo. 222, 56 S.W. 734 (1900); *State v. Flint*, 142 W.Va. 509, 96 S.E.2d 677 (1957); W. LaFAVE & A. SCOTT, CRIMINAL LAW § 42 (1972).

14. A few cases prior to *Holloway* also indicated that Missouri followed the "all or nothing" approach. See *State v. Kotovsky*, 74 Mo. 247, *aff'g*, 11 Mo. App. 584 (1882); *State v. Huting*, 21 Mo. 464 (1855); *Baldwin v. State*, 12 Mo. 223 (1848).

15. 156 Mo. 222, 56 S.W. 734 (1900). In *Holloway*, defendant was charged with murder in the first degree and his defense was insanity. The Missouri Supreme Court held that:

If sane, defendant was indubitably guilty of murder in the first degree; if insane, of nothing. No halfway house exists, in a case of this sort, between murder in the first degree and any minor degree of that crime.

*Id.* at 231, 56 S.W. at 737.

16. See *State v. Pinski*, 163 S.W.2d 785 (Mo. 1942); *State v. Barbata*, 80 S.W.2d 865 (Mo. 1935); *State v. Paulsgrove*, 203 Mo. 193, 101 S.W. 27 (1907); *State v. Speyer*, 182 Mo. 77, 81 S.W. 430 (1904).

17. This Act deals with the effect of a mental disease or defect on the outcome of a criminal prosecution under the laws of Missouri. It is contained in Chapter 552, RSMo 1969. For an analysis of the Act, see generally Clapper, *Mental Responsibility and the Criminal Law in Missouri*, 35 Mo. L. REV. 516 (1970); Player, *The Mentally Ill in Missouri Criminal Cases*, 30 Mo. L. REV. 514 (1965); Richardson, Reardon & Simeone, *A Symposium: An Analysis of the Law*, 19 J. Mo. B. 677 (1963).

Model Penal Code, section 4.02(1).<sup>18</sup> In the comment to section 4.02(1), the drafters of the Code explained that psychiatric evidence should be admissible when relevant to prove or disprove the existence of a state of mind, such as premeditation or deliberation, to the same extent as any other relevant evidence.<sup>19</sup> However, Missouri courts construed section 552.030(3)(1) as not changing the "all or nothing" approach of *Holloway*.<sup>20</sup> In *Anderson*, the Missouri Supreme Court reversed directions and held that in adopting section 552.030(3)(1), Missouri had adopted the doctrine of "diminished responsibility." In so holding, the court relied on the comment to the Model Penal Code section. The court reasoned that when a legislature enacts into law a statute taken from a model or uniform code, it adopts the interpretation placed thereon by the drafters of the model code.<sup>21</sup> In placing this interpretation on section

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18. 515 S.W.2d at 538-39; see Clapper, *Mental Responsibility and the Criminal Law in Missouri*, 35 Mo. L. REV. 516, 522 (1970); Beck, *Mental Disorder not Amounting to Insanity as Affecting Criminal Responsibility in Missouri*, 32 Mo. L. REV. 274, 275-76 (1967); Richardson, Reardon & Simeone, *A Symposium: An Analysis of the Law*, 19 J. Mo. B. 677, 696 n. 26, 712-13 (1963). Section 552.030(3)(1), RSMo 1969, is taken from the MODEL PENAL CODE § 4.02(1) (1962) which provides:

(1) Evidence that the defendant suffered from mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

Compare § 552.030(3)(1), RSMo 1969, quoted note 5 *supra*.

19. MODEL PENAL CODE § 4.02(1), comment (Tent. Draft No. 4, 1955). This comment was incorporated by reference in the proposed official draft. See MODEL PENAL CODE § 4.02(1) (Official Draft, 1962).

20. See *State v. Sturdivan*, 497 S.W.2d 139 (Mo. 1973); *State v. Glenn*, 429 S.W.2d 225 (Mo. En Banc 1968); *State v. Garrett*, 391 S.W.2d 235 (Mo. 1965); Clapper, *Mental Responsibility and the Criminal Law in Missouri*, 35 Mo. L. REV. 516, 518-22 (1970); Beck, *Mental Disorder not Amounting to Insanity as Affecting Criminal Responsibility in Missouri*, 32 Mo. L. REV. 274 (1967).

21. The court first reasoned that when a legislature enacts into law a statute taken from another jurisdiction, this is strong evidence that it adopts the interpretation placed thereon by the courts of that jurisdiction. 515 S.W.2d at 539. This rule of construction of statutes adopted from other states has been generally followed by the Missouri courts. See *General Box Co. v. Missouri Util. Co.*, 331 Mo. 845, 55 S.W.2d 442 (1932); *Schott v. Continental Auto Ins. Underwriters*, 326 Mo. 92, 31 S.W.2d 7 (1930); *State ex rel. Nichols v. Fuller*, 449 S.W.2d 11 (St. L. Mo. App. 1969); *Ball v. Mercantile Trust Co.*, 220 Mo. App. 1165, 297 S.W. 415 (St. L. Mo. App. 1916). Other Missouri cases have held that the construction placed upon the statute by courts of the state from which it is adopted is persuasive but not necessarily controlling. See *In re Rosing's Estate*, 337 Mo. 544, 85 S.W.2d 495 (1935); *Northcutt v. Eager*, 132 Mo. 265, 33 S.W. 1125 (1896); *Mid-Continent Aerial Sprayers, Inc. v. Industrial Comm'n*, 420 S.W.2d 354 (Spr. Mo. App. 1967); *Ziervogel v. Royal Packing Co.*, 225 S.W.2d 798 (St. L. Mo. App. 1949); *Mc Kenzie v. Stables*, 225 Mo. App. 64, 34 S.W.2d 136 (1930); *Stephan v. Metzger*, 95 Mo. App. 609, 69 S.W. 625 (1902).

The court in *Anderson* extended this rule to the situation where the statute enacted is a model or uniform code rather than a statute taken from another jurisdiction. The only difference is that the interpretation adopted is the explanation of the drafters rather than that of

552.030(3)(1), the court distinguished or overruled several cases where it had interpreted section 552.030(3)(1) differently.<sup>22</sup>

American jurisdictions are split on whether mental disease or defect insufficient to satisfy the tests of criminal irresponsibility can be used to reduce the degree of crime.<sup>23</sup> Proponents<sup>24</sup> of "diminished responsibility" argue that since certain crimes by definition require particular mental states, any evidence which is relevant, including evidence of mental disease or defect not sufficient to constitute legal insanity, should be admitted to negate the existence of that mental state.<sup>25</sup>

Opponents do not quarrel with the theory behind the doctrine,

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the courts of the other jurisdiction. Although this extension is a matter of first impression in Missouri, the weight of authority in the United States is consistent with the *Anderson* court's application of the rule. See *Layne-Minnesota Co. v. Regents of Univ. of Minn.*, 266 Minn. 284, 123 N.W.2d 371, 376 (1963); *Tinney v. Crosby*, 112 Vt. 95, 22 A.2d 145, 147 (1941); *People's Savings & Trust Co. v. Munsert*, 212 Wis. 449, 249 N.W. 527, 531 (1933); *School District No. 46 v. Del Bianco*, 68 Ill. App. 2d 145, 215 N.E.2d 25 (1966); *Neil B. McGinnis Equip. Co. v. Henson*, 2 Ariz. App. 59, 406 P.2d 409, 411 (1965).

22. 515 S.W.2d at 540-42. The *Anderson* court correctly disapproved the dicta in *State v. Garrett*, 391 S.W.2d 235 (Mo. 1965) (defendant did not argue for the doctrine of diminished responsibility) and *State v. Sturdivan*, 497 S.W.2d 139 (Mo. 1973) (insufficient evidence of a mental disease or defect). The court distinguished *State v. Glenn*, 429 S.W.2d 225 (Mo. En Banc 1968), a felony murder case, as not being "analogous" to *Anderson*. 515 S.W.2d at 541. This perhaps implies that "diminished responsibility" should not be applied to felony murder cases in Missouri. This view would be correct to the extent that no state of mind is required for the murder under felony murder. But the concept of "diminished responsibility" should be applied to negate the state of mind required for the underlying felony. See text accompanying note 40 *infra*.

23. A negative answer has been given to the question by Arizona, Arkansas, District of Columbia, Florida, Maryland, Massachusetts, Nevada, Texas, West Virginia and Wisconsin. However, a growing number of jurisdictions have reached the opposite conclusion: California, Colorado, Connecticut, Indiana, Iowa, Kentucky, Nebraska, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington, and Wyoming. For a collection of cases, see Annot., 22 A.L.R.3d 1228 (1968); Note, 43 CORN. L.Q. 283 (1957). The United States Supreme Court in *Fisher v. United States*, 328 U.S. 463 (1946), refused to reject or adopt "diminished responsibility" and, thus, continued its policy of not interfering with the local law of the District of Columbia except in extreme cases.

24. For an excellent summary of arguments both pro and con, see F. LINDMAN & D. McINTYRE, JR., *THE MENTALLY DISABLED AND THE LAW* 355-57 (1961).

25. Proponents argue that if such evidence was not admitted, then "major crimes specifically requiring a certain bad state of mind would, in effect, be strict liability offenses as applied to abnormal defendants." W. LaFAVE & A. SCOTT, *CRIMINAL LAW* § 42 (1972). Furthermore, proponents argue that if voluntary intoxication can negate a required state of mind, as most states hold, then mental disease or defect should be allowed to negate a required state of mind and thus reduce the degree of the offense. *State v. Noel*, 102 N.J.L. 659, 133 A. 274 (1926); R. PERKINS, *CRIMINAL LAW* 882-83 (2d ed. 1969); Note, 18 WASH. & LEE L. REV. 118, 122-23 (1961). However, Missouri follows the minority rule that voluntary intoxication cannot be a factor reducing the grade of offense. See *State v. Shipman*, 354 Mo. 265, 189 S.W.2d 273, 274 (1945); Hunvald, *Criminal Law in Missouri - The Need for Revision*, 28 Mo. L. Rev. 521, 537-38 (1963).



but rather they question its practicality.<sup>26</sup> First, opponents claim that juries are incapable of recognizing that a mental defect may not be severe enough to justify a conviction of first degree murder, but would justify a conviction of second degree murder or manslaughter.<sup>27</sup> Proponents respond that juries make line-drawing decisions in the application of many legal doctrines,<sup>28</sup> and, if the decision is especially difficult in this case, it is the fault of legislatures who have failed to make a clear distinction between the degrees of homicide.<sup>29</sup>

Second, opponents claim that the doctrine would result in compromise verdicts. It is claimed that when a jury is divided on the issue of legal insanity, it will decide to reduce the degree of the crime rather than to convict or acquit the defendant.<sup>30</sup> Proponents respond that many opportunities exist already for compromise verdicts<sup>31</sup> and that they are not necessarily harmful.<sup>32</sup> Furthermore, it is argued that the doctrine would prevent the situation where a sympathetic jury, having only the option to acquit or convict, acquits the defendant rather than convict him for a crime for which the jury does not feel the defendant is *totally* responsible.<sup>33</sup>

Third, opponents claim that the doctrine would result in less protection to society because criminals with a mental disease or defect not amounting to legal insanity are released from prison sooner than a criminal who does not have a similar disease or defect.<sup>34</sup> Proponents argue that the solution is proper recognition of the mental condition of the accused, and treatment as well as punishment.<sup>35</sup> In addition, it is argued that if the jury cannot reduce the

26. See W. LAFAVE & A. SCOTT, *CRIMINAL LAW* § 42 (1972); F. LINDMAN & D. MCINTYRE, JR., *THE MENTALLY DISABLED AND THE LAW* 356 (1961).

27. *Id.* See *Commonwealth v. Hollinger*, 190 Pa. 155, 42 A. 548, 549 (1899); *State v. Van Vlack*, 57 Idaho 316, 65 P.2d 736 (1937); Note, 43 CORN. L.Q. 283, 284-85 (1957).

28. Note, 18 WASH. & LEE L. REV. 118, 123 n.41 (1961).

29. See note 26 *supra*; Weihofen & Overholzer, *Mental Disease Affecting the Degree of a Crime*, 56 YALE L.J. 959, 974 (1947).

30. See note 26 *supra*; Note, 43 CORN. L.Q. 283 (1957).

31. See note 26 *supra*; Player, *The Mentally Ill in Missouri Criminal Cases*, 30 MO. L. REV. 514, 524 (1965).

32. See W. LAFAVE & A. SCOTT, *supra* note 26.

33. See *Fisher v. United States*, 328 U.S. 463, 492 (1946) (dissent); F. LINDMAN & D. MCINTYRE, JR., *supra* note 26; Weihofen & Overholzer, *supra* note 29; Note, 20 S. CAL. L. REV. 95, 97 (1946); Note, 22 LA. L. REV. 664, 667 (1962).

34. *Fox v. State*, 73 Nev. 241, 316 P.2d 924 (1957); *Commonwealth v. Scott*, 14 Pa. D. & C. 191 (1930), *rev'd on other grounds*, 102 Pa. Super. 53, 156 A. 584 (1931). See I. GOLDSTEIN, *THE INSANITY DEFENSE* 195-96, 202 (1967); Note, 43 CORN. L.Q. 283 (1957); Comment, *Criminal Law—Partial Insanity—Evidentiary Relevance Defined*, 16 RUTGERS L. REV. 174, 178 (1961); Note, WASH. & LEE L. REV. 118, 123 (1961). See also note 26 *supra*.

35. See Weihofen & Overholzer, *supra* note 29; Comment, *Criminal Law—Partial In-*

degree of crime, it will tend to acquit rather than convict and, thus, turn criminals loose.<sup>36</sup>

The majority of jurisdictions which have adopted the doctrine of "diminished responsibility" have allowed evidence of mental disease or defect to reduce first degree murder to second degree murder.<sup>37</sup> Fewer courts have allowed such evidence to reduce murder to manslaughter.<sup>38</sup> In a very few instances, courts have indicated that the "diminished responsibility" doctrine might be extended to non-homicide cases.<sup>39</sup>

*Anderson* clearly indicates that evidence of mental disease or defect can reduce murder to manslaughter in Missouri. It would seem that if murder can be reduced to manslaughter in Missouri, then a fortiori first degree murder can be reduced to second degree. The Missouri position on whether "diminished responsibility" can be extended to nonhomicide cases is unclear.<sup>40</sup> In order to be logically consistent, the Missouri courts should extend the doctrine to non-homicide crimes which are divided into degrees and which require a particular mental state for each degree. Any evidence which is relevant, including evidence of mental disease or defect

*sanity—Evidentiary Relevance Defined*, 16 *RUTGERS L. REV.* 174, 180 (1961); Note, 22 *LA. L. REV.* 664 (1962); Note, 18 *WASH. & LEE L. REV.* 118 (1961). See also note 26 *supra*.

36. See Comment, *Insanity as a Defense in Criminal Law and Semi-Responsibility*, 25 *TEX. L. REV.* 295, 301 (1947). See note 33 *supra*.

37. See, e.g., *People v. Nicolaus*, 65 Cal. 2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967); *Becksted v. People*, 133 Colo. 72, 292 P.2d 189 (1956); *State v. Donahue*, 141 Conn. 656, 109 A.2d 364, cert. denied, 349 U.S. 926 (1954); *State v. Gramenz*, 256 Iowa 134, 126 N.W.2d 285 (1964); *Starkweather v. State*, 167 Neb. 477, 93 N.W.2d 619 (1958); *State v. Di Paolo*, 34 N.J. 279, 168 A.2d 401, cert. denied, 368 U.S. 880 (1961); *State v. Padilla*, 66 N.M. 289, 347 P.2d 312 (1959); *State v. Adin*, 7 Ohio Dec. Reprint 25, 1 SL Bull. 38 (1876); *State v. Schleigh*, 210 Ore. 155, 310 P.2d 341 (1957); *State v. Fenik*, 45 R.I. 309, 121 A. 218 (1923); *State v. Green*, 78 Utah 580, 6 P.2d 177 (1931); *Dejarnette v. Commonwealth*, 75 Va. 867 (1881); *State v. Pressler*, 16 Wyo. 214, 92 P. 806 (1907); W. LAFAYE & A. SCOTT, *CRIMINAL LAW* § 42 (1972); Annot., 22 A.L.R.3d 1228 (1968).

38. See, e.g., *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53, cert. denied, 338 U.S. 836 (1949); *State v. Anderson*, 515 S.W.2d 534 (Mo. En Banc 1974); *State v. Nichols*, 3 Ohio App. 2d 271, 209 N.E.2d 750 (1965); *State v. Schleigh*, 210 Ore. 155, 310 P.2d 341 (1957); *State v. Green*, 78 Utah 580, 6 P.2d 177 (1931); W. LAFAYE & A. SCOTT, *CRIMINAL LAW* § 42 (1972); Annot., 22 A.L.R.3d 1228 (1968).

39. See *People v. Wilson*, 261 Cal. App. 2d 12, 67 Cal. Rptr. 678 (1968); *People v. Chapman*, 261 Cal. App. 2d 149, 67 Cal. Rptr. 601 (1968); *People v. Taylor*, 220 Cal. App. 2d 212, 33 Cal. Rptr. 654 (1963); *Schwickrath v. People*, 159 Colo. 390, 411 P.2d 961 (1966); *People v. Colavecchio*, 11 App. Div. 2d 161, 202 N.Y.S.2d 119 (1960); W. LAFAYE & A. SCOTT, *CRIMINAL LAW* § 42 (1972); Annot., 22 A.L.R.3d 1228 (1968).

40. It could be argued that since the *Anderson* court did not distinguish *State v. Garrett*, 391 S.W.2d 235 (Mo. 1965), on the basis that it involved robbery and not homicide, then at least the *Anderson* court did not preclude the extending of "diminished responsibility" to nonhomicide cases. See note 22 *supra*.

not sufficient to constitute legal insanity, should be admitted to negate the existence of a particular mental state.

*Anderson* represents a rejection of the Missouri courts' strained "all or nothing" interpretation of section 552.030(3)(1). The Missouri Proposed Criminal Code, if adopted, would not change the rule in *Anderson* because the proposed code incorporates Chapter 552, RSMo 1969 by reference.<sup>41</sup> Modern psychiatry and psychology have long recognized that there is no clearcut distinction between the sane and the insane, but rather varying degrees of mental aberration.<sup>42</sup> *Anderson* is consonant with this modern view and adopts the better reasoned rule.

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41. Mo. PROP. CRIM. CODE § 7.160 (1973).

42. See, e.g., Taylor, *Partial Insanity as Affecting the Degree of Crime—A Commentary on Fisher v. United States*, 34 CAL. L. REV. 625, 629, 632 (1946); Note, 18 WASH. & LEE L. REV. 118, 123 (1961).

## INEFFECTIVENESS OF COUNSEL — THE DUTY TO MAKE A REASONABLE PRETRIAL INVESTIGATION

### *McQueen v. Swenson*<sup>1</sup>

On October 2, 1964, Roger Lee McQueen was found guilty of second-degree murder by a jury and sentenced to life imprisonment. After appealing unsuccessfully,<sup>2</sup> McQueen filed a motion under Missouri Supreme Court Rule 27.26 collaterally attacking his conviction on the ground that he had been denied effective assistance of counsel.<sup>3</sup> After an evidentiary hearing, the circuit court denied relief and this was affirmed by the Missouri Supreme Court.<sup>4</sup> McQueen then petitioned the United States District Court for the Eastern District of Missouri for a writ of habeas corpus under 28 U.S.C. section 2254.<sup>5</sup> On appeal from a denial of relief, the Eighth Circuit Court of Appeals reversed and held that where it appeared that defense counsel's sole preparation for trial was an interview with McQueen, and that the counsel did not investigate any witnesses endorsed by the state, McQueen had met the burden of proving a violation of his constitutional right to effective assistance of counsel. The court remanded the case to the district court to allow McQueen the opportunity to establish prejudice which would justify further relief.<sup>6</sup>

After the Supreme Court assured indigent defendants the right to "effective" or "adequate" representation of counsel in federal criminal prosecutions<sup>7</sup> and extended the sixth amendment right to

1. 498 F.2d 207 (8th Cir. 1974).

2. *State v. McQueen*, 399 S.W.2d 3 (Mo. 1966). Because McQueen was indigent and not furnished counsel on appeal, the decision was set aside and counsel was appointed. Upon resubmission to the Missouri Supreme Court, the judgment was again affirmed. *State v. McQueen*, 431 S.W.2d 445 (Mo. 1968).

3. The charge of ineffectiveness of counsel is usually raised collaterally in Missouri pursuant to Mo. SUP. CT. R. 27.26, but on occasion has been raised on direct appeal. See *State v. Cluck*, 451 S.W.2d 103 (Mo. 1970); *State v. Wilkenson*, 423 S.W.2d 693 (Mo. 1968). For a general discussion of theories and methods of obtaining post-conviction relief, see Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964).

4. *McQueen v. State*, 475 S.W.2d 111 (Mo. En Banc 1971). Justices Donnelly and Seiler dissented.

5. *McQueen v. Swenson*, 357 F. Supp. 557 (E.D. Mo. 1973).

6. *McQueen v. Swenson*, 498 F.2d 207, 220 (8th Cir. 1974).

7. *Powell v. Alabama*, 287 U.S. 45 (1932). It is generally accepted that the assistance of counsel referred to in *Powell* means "effective" or "adequate" assistance. See *Reece v. Georgia*, 350 U.S. 85 (1955); *White v. Ragen*, 324 U.S. 760 (1945); *Glasser v. United States*, 315 U.S. 60 (1942); *Avery v. Alabama*, 308 U.S. 444 (1940). In order to meet constitutional standards, the "counsel" must be a duly licensed attorney, and not an attorney-in-fact or a layman. *People v. Cox*, 12 Ill. 2d 265, 146 N.E.2d 19 (1957); *Higgins v. Parker*, 191 S.W.2d

counsel to state defendants through the due process clause of the fourteenth amendment,<sup>8</sup> courts sought an objective standard to determine when representation by counsel would satisfy the level of effectiveness required by the Constitution. Eventually, the "mockery of justice" standard became the acceptable criterion.

Under the mockery of justice standard a criminal defendant can obtain post-conviction relief on the ground that ineffective assistance of counsel "made the proceedings a farce and a mockery of justice, shocking to the conscience of the court."<sup>9</sup> Criticized for its stringent requirement,<sup>10</sup> the mockery of justice standard has been replaced in a minority of jurisdictions by a standard of "reasonableness."<sup>11</sup> Other courts and writers have realized that whatever objec-

668, *cert. denied*, 327 U.S. 801 (1945). *See also* *Derringer v. United States*, 441 F.2d 1140 (8th Cir. 1971) (refusal to admit defense counsel licensed in the state bar to the bar of the federal district court where the trial was held did not constitute ineffective assistance of counsel); *People v. Sardo*, 178 N.Y.S. 2d 691, 15 Misc. 2d 69, *cert. denied*, 363 U.S. 816 (1967) (ineffectiveness of counsel not established merely because defense counsel, although a licensed attorney, was not admitted to the state bar where the trial was held). Defense counsel must act in the role of an advocate, and not perform merely as *amicus curiae*. *See, e.g., Goodwin v. Swenson*, 287 F. Supp. 166 (W.D. Mo. 1968).

8. *Gideon v. Wainwright*, 372 U.S. 335 (1963). It is not clear whether the right to effective assistance of counsel is required by the sixth or fourteenth amendments in state proceedings. *See note 53 infra*.

9. *Cardarella v. United States*, 375 F.2d 222, 230 (8th Cir. 1967). More recently, the same court couched the principle in other terms:

. . . [Defendant] must show actions of his lawyer which would constitute such conscious conduct as to render pretextual the attorney's legal obligation to fairly represent the appellant and circumstances which demonstrate that which amounts to a lawyer's deliberate abdication of his ethical duty to his client.

*Brown v. Swenson*, 487 F.2d 1236, 1240 (8th Cir. 1973). *See also* *Scalf v. Bennet*, 408 F.2d 325, 327-28 (8th Cir. 1969) (when "the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation"); *United States ex rel. Feeley v. Ragen*, 166 F.2d 976 (7th Cir. 1948) (where the test is "virtually no representation"); *State v. Benson*, 247 Iowa 406, 72 N.W.2d 438 (1955) ("so ineffective as to amount to no counsel at all"); *State v. Caffey*, 457 S.W.2d 657, 662 (Mo. 1970) ("so woefully inadequate as to shock the conscience"); *Holbert v. State*, 439 S.W.2d 507, 509 (Mo. 1969) (must be a "breach of his legal duty faithfully to represent his client").

10. *See Bines, Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973). Another critic asserts that the vagueness of the standard makes its application difficult. *Finer, Ineffective Assistance of Counsel*, 58 CORN. L. REV. 1077 (1973). Still others argue that any attempt to formulate an absolute, objective rule that would be determinative of effectiveness of counsel for any given case is unrealistic. *See Foster v. State*, 502 S.W.2d 436 (Mo. App., D. St. L. 1973); *McQueen v. State*, 475 S.W.2d 111 (Mo. En Banc 1971) (Judge Donnelly dissenting); *Grano, The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970).

11. *Moore v. United States*, 432 F.2d 730, 736 (3d Cir. 1970) (defense counsel should exhibit the "customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law"); *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968) (mockery of justice standard replaced by specific requirements counsel obliged to follow); *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960) ("reasonably effective assistance"); *United States v. DeCoster*,

tive test is employed to measure counsel effectiveness, the ultimate question is whether the defendant received a "fair trial."<sup>12</sup>

The courts have long viewed motions for post-conviction relief on grounds of ineffective assistance of counsel with suspicion and distaste.<sup>13</sup> Judges are reluctant to disturb criminal convictions in collateral proceedings,<sup>14</sup> and find displeasure in the task of evaluating the performance of another member of the bar.<sup>15</sup> Many such motions are termed "frivolous" and summarily dismissed.<sup>16</sup> Even if the court permits a hearing on the motion, relief is seldom granted.<sup>17</sup>

487 F.2d 1197, 1202 (D.C. Cir. 1973) (adoption of guidelines to insure defendant of "reasonably competent assistance"). One critic suggests that to insure effectiveness the test should be the reasonable effectiveness and ordinary skill and care of a competent criminal lawyer. Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 939 (1973).

12. *Harried v. United States*, 389 F.2d 281 (D.C. Cir. 1967); *McCarthy v. State*, 502 S.W.2d 397 (Mo. 1973). See also Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1242 (1970); Anderson, *Post-Conviction Relief in Missouri—Five Years Under Amended Rule 27.26*, 38 Mo. L. Rev. 1 (1973). It is representation that affords the criminal defendant a fair trial that satisfies the constitutional requirements. See, e.g., *Betts v. Brady*, 316 U.S. 455, 473 (1942) ("the fourteenth amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental idea of fairness and right").

13. With the development of due process over the past 30 years, the number of post-conviction motions based on ineffectiveness of counsel has greatly increased. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 52 (1963). Courts are cognizant that prisoners have discovered the ease of drafting habeas corpus petitions, and thus view them with skepticism. See *Diggs v. Welch*, 148 F.2d 667, 669-70 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945); *United States v. Culbert*, 215 F.Supp. 333, 335 (W.D. Mo. 1963). See also Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. REV. 289 (1964).

14. See Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973):

The mockery of justice standard simply reflects the view that the policy of finality in criminal cases so outweighs the consequences of inferior defense work that only the most serious errors and omissions by counsel deprive the defendant of a fair trial.

*Id.* at 929.

15. See *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 601, 235 A.2d 349, 352 (1967). A hearing based on a post-conviction motion claiming ineffectiveness of counsel has been characterized as a "trial" of the defense counsel. *State v. Benson*, 247 Iowa 406, 410, 72 N.W.2d 438, 441 (1955).

16. Most of the 6000 habeas corpus petitions filed in federal district court in the decade of 1949-1959 were deemed to be "patently frivolous" and summarily dismissed. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 52 (1963). The Missouri Supreme Court granted no major relief on this ground in the 130 appeals from 1968-1973, and ordered evidentiary hearings in only two cases. Out of 20 cases filed in the federal courts in Missouri, 16 were summarily dismissed and one case was granted only minor relief. Anderson, *Post-Conviction Relief in Missouri—Five Years Under Amended Rule 27.26*, 38 Mo. L. Rev. 1 (1973).

17. Anderson, *Post-Conviction Relief in Missouri—Five Years Under Amended Rule 27.26*, 38 Mo. L. Rev. 1 (1973).

The court must evaluate a post-conviction claim of ineffective assistance of counsel with respect to the overall concept of fundamental fairness. If the petitioner did not receive a fair trial, a new trial must be granted.<sup>18</sup> Thus, the court must scrutinize the conduct of defense counsel to determine whether his performance was so deficient as to deny the petitioner his constitutional right to a fair trial.<sup>19</sup>

The petitioner has the burden of proving the inadequacy of counsel. The defense counsel is initially presumed adequate.<sup>20</sup> Effective assistance does not require successful,<sup>21</sup> errorless<sup>22</sup> assistance, or assistance that measures up to petitioner's notions of ability or competency.<sup>23</sup> Indigent defendants are not entitled to the appointment of the best counsel available<sup>24</sup> or to any particular attorney.<sup>25</sup> Criminal defendants are only entitled to assistance of counsel which is "adequate" to insure a fair trial. Whether this constitutional right of fairness is violated must be determined on a case by case basis.<sup>26</sup>

According to the court in *McQueen*, the conduct of counsel must be viewed at two separate stages in the trial process: first, pre-trial preparation; second, performance at the trial itself.

18. See, e.g., *Kramer v. Alvis*, 103 Ohio App. 324, 141 N.E.2d 489 (1956).

19. See *Mitchell v. United States*, 259 F.2d 787, 793 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958); *State v. Gleeman*, 170 Minn. 197, 205, 212 N.W. 203, 207 (1927).

20. See, e.g., *Farr v. United States*, 314 F.Supp. 1125, adopted, 436 F.2d 975 (8th Cir.), cert. denied, 402 U.S. 947 (1970).

21. See, e.g., *United States v. Hammonds*, 425 F.2d 597 (D.C. Cir. 1970). The mere fact that defendant received the maximum sentence does not demonstrate ineffectiveness of counsel. *State v. Caffey*, 365 S.W.2d 607 (Mo. 1963). Counsel has the duty to insure defendant a fair trial, and not necessarily to secure acquittal. *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir. 1958), cert. denied, 358 U.S. 850 (1958).

22. See, e.g., *State v. Caffey*, 457 S.W.2d 657 (Mo. 1970). Where it was charged that defense counsel was mistaken as to the maximum sentence defendant would receive by pleading guilty, the court held there was no ineffectiveness of counsel. *Pauley v. State*, 487 S.W.2d 565 (Mo. 1972).

23. *Conley v. Cox*, 138 F.2d 786 (8th Cir. 1943). The courts do not inquire whether the advice received was right or wrong, but seek to determine whether the advice was given "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

24. *State v. Caffey*, 457 S.W.2d 657 (Mo. 1970).

25. *State v. Williams*, 419 S.W.2d 49 (Mo. 1967).

26. See *Hodge v. State*, 477 S.W.2d 126 (Mo. 1972):

It is impossible to enumerate what counsel in any given case should do to furnish his client with effective assistance. In each case, the required activities will vary depending on the offense, the facts, the client, and the lawyer.

*Id.* at 128. It is generally accepted, however, that if defense counsel operated under a conflict of interest, ineffectiveness has been demonstrated and specific prejudice is not required to be shown. See *Lebron v. United States*, 229 F.2d 16 (D.C. Cir. 1955), cert. denied, 351 U.S. 974 (1956); *Craig v. United States*, 217 F.2d 355 (6th Cir. 1954); *Commonwealth v. Russell*, 406 Pa. 45, 176 A.2d 641 (1962).

The most crucial stage of the trial process begins after the indictment and ends prior to the trial; this is the period allotted defense counsel for the preparation of the defense.<sup>27</sup> It is during this stage that counsel must conduct thorough investigations into the factual and legal matters presented by the case in order to provide the accused all available defenses. Without adequate investigation, defense counsel cannot make the necessary informed judgments regarding defendant's initial plea and trial strategy<sup>28</sup> and thus the representation may be rendered meaningless.<sup>29</sup>

Courts require a "reasonable" standard of conduct by defense counsel during the pretrial stage of the proceedings.<sup>30</sup> The trial re-

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27. To be effective, defense counsel must not limit his representation to the appearance in the courtroom. *Goodwin v. Swenson*, 287 F. Supp. 166 (W.D. Mo. 1968). See also *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (finding ineffectiveness of counsel when defendants received virtually no legal assistance "during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough investigation and preparation were vitally important . . ."). Information counsel obtains during preparation for trial may influence counsel's decisions at the trial itself. See *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970). See also AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Comment to § 4.1, at 227-28 (Hereinafter, ABA STANDARDS).

28. Any judgment of trial strategy defense counsel makes must necessarily be based upon the facts of each case and the applicable law to be competent. See ABA STANDARDS, *supra* note 27, Comment to § 4.1. See also, *Smotherman v. Beto*, 276 F.Supp. 579 (N.D. Tex. 1967).

Defense counsel has a duty to make reasonable investigations into the facts and applicable law to determine when a plea of guilty is advisable and to insure that a guilty plea is voluntarily and intelligently made. See ABA STANDARDS, *supra* note 27, § 4.1: "The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty." See *Matthews v. State*, 501 S.W.2d 44 (Mo. 1973)(adequacy of legal representation immaterial where pleas of guilty entered unless counsel incompetent so as to affect issues of voluntariness and understanding); *Roberts v. State*, 476 S.W.2d 490 (Mo. 1972)(plea of guilty based on desire to avoid the death penalty held knowingly and intelligently made); *Hall v. State*, 496 S.W.2d 300 (Mo. App., D. St. L. 1973) (attorney merely performing as agent in plea bargaining process and not advising client regarding law and facts of case held ineffective assistance of counsel).

Absent a reason to believe otherwise, counsel has no duty to conduct independent investigation into the mental condition of defendant. *Chapman v. State*, 506 S.W.2d 393 (Mo. 1974). But when there is reason to suspect a possible mental defect in defendant, failure to adduce proof of mental condition has been held to deny effective assistance of counsel. *Owsley v. Peyton*, 368 F.2d 1002 (4th Cir. 1966).

29. See, e.g., *Jones v. Cunningham*, 297 F.2d 851 (4th Cir. 1962).

30. *Goodwin v. Swenson*, 287 F. Supp. 166 (W.D. Mo. 1968); *Jackson v. State*, 465 S.W.2d 642 (Mo. 1971). The court in *McQueen* clarified its holding in *Cross v. United States*, 392 F.2d 360 (8th Cir. 1968), by reiterating that "the failure to make a reasonable investigation may amount to ineffective assistance of counsel" under the mockery of justice standard. 498 F.2d at 217. The AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Approved Draft, 1971) cited with approval by the court, states the duty to investigate as follows:



cord will not always reflect whether the investigation was reasonable, so courts have found it necessary to look beyond the record in order to evaluate the performance of counsel.<sup>31</sup> The amount of time counsel spends in preparation is relevant, but not conclusive;<sup>32</sup> the circumstances of each case must still be evaluated in order to determine if counsel's investigation was reasonable.<sup>33</sup>

An individual is not denied effective assistance of counsel merely because of what, in retrospect, appear to be errors of judgment in the handling of the defense.<sup>34</sup> Nevertheless, there must be a true exercise of counsel judgment and not an "abdication" of it. It was an abdication of the duty to make a reasonable investigation

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.

*Id.* § 4.1. The fourth circuit specifically includes the duty to investigate in its list of requirements that overturned the mockery of justice standard:

Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

*Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968). Similarly, the District of Columbia circuit includes the duty to investigate in its third guideline for the defense counsel:

(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed . . . . This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible.

*United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973). *See also the Criminal Justice Act*, 18 U.S.C. § 3006A(a): "Representation under each plan shall include counsel and investigative expert and other services necessary to an adequate defense."

31. *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970); *United States v. Lett*, 143 F. Supp. 594 (S.D. Ohio 1955), *aff'd*, 236 F.2d 417 (6th Cir. 1956).

32. *See, e.g., United States v. Wight*, 176 F.2d 376 (2d Cir.), *cert. denied*, 338 U.S. 950 (1949):

Certainly the amount of time and effort of preparation required to provide effective representation will vary with the nature of the charge, counsel's familiarity with the law applicable, and the facts.

*Id.* at 379. It has been held that a total failure to consult with defendant did not amount to ineffectiveness of counsel. *Penn v. Smythe*, 188 Va. 367, 49 S.E.2d 600 (1948). *See also Fields v. Peyton*, 375 F.2d 624 (4th Cir. 1967) (ineffectiveness of counsel established when defendant entered plea of guilty after short consultation with attorney in rear of the courtroom); *Miller v. State*, 1 Md. App. 653, 232 A.2d 548 (1967) (single interview with defendant held adequate representation without a showing of prejudice).

33. One writer has suggested that defense counsel should prepare and submit to the trial judge a confidential worksheet showing the time spent in consultation and other investigation, the witnesses interviewed, and other pretrial preparation. While this may not totally eliminate later claims of ineffective representation, he suggests this might abrogate frivolous claims. *Grano, The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970).

34. *See, e.g., Cardarella v. United States*, 375 F.2d 222 (8th Cir. 1967); *State v. Wilkerson*, 423 S.W.2d 693 (Mo. 1968).

that denied petitioner his right to effective assistance of counsel in *McQueen*.<sup>35</sup> It is thus apparent that even under the mockery of justice standard, counsel must make an adequate pretrial investigation in order to achieve effective assistance.<sup>36</sup> Whether an investigation was "adequate" to guarantee defendant his constitutional right to a fair trial must be determined by what was reasonable under the circumstances.<sup>37</sup>

In conducting the defense at trial, counsel is allowed wide discretion.<sup>38</sup> Judgment of counsel regarding trial methods and strategy will not be considered in retrospect as grounds for a finding of ineffective assistance.<sup>39</sup> Similarly, it has been held that a mere showing

35. The Missouri Supreme Court has held that the failure of defense counsel to interview any of the prosecution's witnesses and investigate the scene of the crime did not prevent the defendant from obtaining a fair trial. Because the defense was self-defense, the defendant had been the only eyewitness and thus "consultation with the defendant . . . was basically what was required in order to make proper and adequate presentation of the defense." *McQueen v. State*, 475 S.W.2d 111, 114 (Mo. En Banc 1971). The federal court of appeals disagreed and held that it was in precisely circumstances as these, where the defendant was the only eyewitness, that outside investigation is "absolutely crucial" and supplies the only means to corroborate defendant's factual assertions. 498 F.2d at 217. The court labeled defense counsel's policy of never interviewing witnesses of the prosecution "absurd and dangerous," and not a mere exercise of counsel judgment, but an abdication of it. 498 F.2d at 216. *See also* *Cross v. United States*, 392 F.2d 360 (8th Cir. 1968) (ineffectiveness of counsel established when counsel did not develop defendant's case because of his practice in not representing a criminal defendant unless paid in advance).

36. The duty of defense counsel to make a reasonable investigation includes a good faith effort to contact potential witnesses for the defense. *Foster v. State*, 502 S.W.2d 436 (Mo. App., D. St. L. 1973). Failure to locate the witnesses after a good faith effort does not constitute ineffectiveness of counsel. *State v. Davis*, 505 S.W.2d 115 (Mo. 1973); *Colthorp v. State*, 466 S.W.2d 689 (Mo. 1971); *State v. Woolbright*, 449 S.W.2d 602 (Mo. 1970).

37. It has been held that the failure to make an investigation is not always a dereliction of duty. *State v. Turley*, 443 F.2d 1313, 1317 (8th Cir. 1971). Nevertheless, the growing number of cases that have resulted in a holding of ineffectiveness of counsel based on a lack of pretrial investigation suggests that when the omission results in prejudice in the presentation of the defense, the omission was not reasonable, and a new trial must be granted. *See* *Brizendine v. Swenson*, 302 F. Supp. 1011 (W.D. Mo. 1969) (counsel ignorant of law of defendant's right to independent psychological examination); *Goodwin v. Swenson*, 287 F. Supp. 166 (W.D. Mo. 1968) (lack of investigation resulted in nondisclosure of medical diagnosis of psychosis on the same day defendant gave oral statement to police); *Smotherman v. Beto*, 276 F. Supp. 579 (N.D. Tex. 1967) (with defense of insanity, counsel did not seek or obtain copy of a medical report); *People v. Ibarra*, 386 P.2d 487, 34 Cal. Rptr. 863 (1963) (lack of preparation resulted in the loss of a crucial defense); *People v. Morris*, 3 Ill. 2d 437, 121 N.E.2d 810 (1954) (public defender unaware of basic criminal procedure statute); *Hillman v. State*, 234 Ind. 27, 123 N.E.2d 180 (1954) (defense counsel failed to interview witnesses); *Abraham v. State*, 228 Ind. 179, 91 N.E.2d 358 (1950) (defense counsel failed to consult with defendant prior to trial and conducted no investigation).

38. *See, e.g.*, *Cardarella v. United States*, 375 F.2d 222 (8th Cir. 1967); *Huff v. State*, 267 Ala. 282, 100 So.2d 769 (1958); *Newton v. Commonwealth*, 333 Mass. 523, 131 N.E.2d 749 (1956).

39. *State v. Dean*, 400 S.W.2d 413 (Mo. 1966); *State v. Howard*, 383 S.W.2d 701 (Mo. 1964). Courts often describe alleged counsel omissions or errors as within the realm of judg-

of mistakes, omissions, lack of experience, or other subjective deficiencies does not establish inadequacy of counsel.<sup>40</sup> It is only when there has been an abdication of the defense function,<sup>41</sup> a breach of

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ment and thus not conduct reviewable as a basis for finding ineffectiveness of counsel. See *Tanner v. United States*, 401 F.2d 281, 284 (8th Cir.), *cert. denied*, 393 U.S. 1109 (1968) (counsel's failure to object resulted from his considered exercise of judgment); *Wilson v. State*, 268 Ala. 86, 105 So. 2d 66 (1958) (within counsel's discretion to have no witnesses testify for defendant and fail to cross-examine prosecutrix of rape case); *Coney v. State*, 491 S.W.2d 501, 510 (Mo. 1973) (it was "not outside the realm of reason" to conclude that avoidance of the death penalty was the best possible result and therefore failure to make motion for new trial was not ineffectiveness of counsel).

40. See, e.g., *Edwards v. United States*, 256 F.2d 707, (D.C. Cir.), *cert. denied*, 358 U.S. 857 (1958):

Mere improvident strategy, bad tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel, unless taken as a whole the trial was a 'mockery of justice.'

*Id.* at 708. Thus the following omissions have not been grounds for relief on a claim of ineffectiveness of counsel: (1) failure to make objections. *United States ex rel. Gist v. Rundle*, 371 F.2d 407 (3d Cir. 1967); *State v. Harris*, 425 S.W.2d 148 (Mo. 1968); (2) failure to make opening and closing statements. *Harroald v. State*, 438 S.W.2d 202 (Mo. 1969); (3) failure to attack the indictment. *Hall v. United States*, 410 F.2d 653 (4th Cir.), *cert. denied*, 396 U.S. 970 (1969); (4) failure to move for a new trial. *White v. State*, 430 S.W.2d 144 (Mo. 1968); (5) failure to move for a change of venue. *Brown v. State*, 465 S.W.2d 563 (Mo. 1971); (6) failure to request instructions. *Mason v. State*, 468 S.W.2d 617 (Mo. 1971); (7) failure to challenge the jury on voir dire. *State v. Franklin*, 379 S.W.2d 526 (Mo. 1964); (8) failure to discuss jury waiver with defendant. *Brown v. State*, 465 S.W.2d 563 (Mo. 1971); (9) failure to appeal. *Patrick v. United States*, 310 F. Supp. 1267 (E.D. Mo. 1970). If, however, the omission is a result of an abdication of the role of defense counsel, or a breach of a legal duty owing defendant, ineffectiveness has sometimes been demonstrated. See note 41 and accompanying text *infra*. Courts have demonstrated great reluctance to find ineffectiveness of counsel for failing to suppress evidence allegedly acquired in violation of constitutional rights. See, e.g., *Redus v. Swenson*, 339 F. Supp. 571 (E.D. Mo.), *aff'd*, 468 F.2d 606 (8th Cir.), *cert. denied*, 411 U.S. 933 (1972). See also *Edwards v. United States*, 256 F.2d 707 (D.C. Cir. 1958):

Appellant does not try to say he did not do the act charged. He pleads only that, unknown to him, he *might* have been able to suppress the truth as to certain evidence of his crime, and thus, perhaps defeat justice.

*Id.* at 710 (court's emphasis). The amount of counsel's legal experience is not in itself an indication of the effectiveness of counsel. The question is the performance of counsel in the particular case being challenged. *Cardarella v. United States*, 375 F.2d 222 (8th Cir. 1967); *State v. Schaffer*, 454 S.W. 2d 60 (Mo. 1970). Basing a claim of ineffectiveness on the physical condition of counsel has been successful. *Michel v. Louisiana*, 350 U.S. 91 (1953) (age); *Hanye v. State*, 99 Ga. 212, 25 S.E. 307 (1896) (illness); *O'Brien v. Commonwealth*, 115 Ky. 608, 74 S.W. 666 (1903) (intoxication). It seems clear, however, that if the physical condition of counsel results in a denial of a fair trial, ineffectiveness has been demonstrated. *Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289 (1964). See also *State v. Keller*, 223 N.W. 698 (1929) (ineffectiveness demonstrated when defense counsel was so drunk that he failed to introduce any evidence, submitted no instructions, and made no argument to the jury).

41. See *Johns v. Smyth*, 176 F. Supp. 949 (E.D. Va. 1959) (defense counsel's failure to give closing argument held ineffectiveness of counsel because such failure was based on counsel's conscience and belief that defendant was lying). *But see Wilson v. State*, 268 Ala. 86, 105 So. 2d 66 (1958) (ineffectiveness was not demonstrated although counsel called no witnesses and failed to cross-examine any witnesses presented by the prosecution).

a legal duty owing defendant,<sup>42</sup> or when defense counsel's performance at trial demonstrates "gross incompetence,"<sup>43</sup> that defendant has been denied a fair trial and post-conviction relief should be granted.

Careful scrutiny of the trial record is necessary to establish inadequacy of counsel at the trial stage.<sup>44</sup> Frequently the level of performance will be apparent on the face of the record. In some cases, however, omissions or mistakes that appear to be the result of faulty trial strategy may in fact be the consequence of inadequate preparation.<sup>45</sup> Thus, the evaluation of counsel's trial conduct may also require a search beyond the record to ascertain whether the performance at trial was ineffective or inadequate.<sup>46</sup>

According to the court in *McQueen*, when a conviction is attacked on the ground of ineffective assistance of counsel, the court should employ a two-step method of analysis to determine whether relief must be granted.<sup>47</sup> First, the court must consider the stage of

42. Failure to investigate specific witnesses when requested to do so by defendant is a breach of a legal duty owed defendant and thus constitutes ineffectiveness of counsel. *Jones v. State*, 491 S.W.2d 233 (Mo. 1973). Ineffectiveness of counsel is also demonstrated when counsel fails to advise defendant of his right to appeal or fails to file appeal when requested to do so. *Williams v. United States*, 402 F.2d 548 (8th Cir. 1968). See also *Roper v. Territory*, 7 N.M. 255, 33 P. 1014 (1893) (public intimidation caused counsel not to request a change in venue).

43. See *People v. Nitti*, 312 Ill. 73, 143 N.E. 448 (1924) (gross incompetence demonstrated after court reprimanded defense counsel several times and had to explain numerous points of law to him); *People v. Gardiner*, 303 Ill. 204, 135 N.E. 422 (1922) (where defense counsel let in large amounts of irrelevant evidence, made improper argument, and was patently unfamiliar with the rules of evidence it was held that defendant was denied a fair trial); *Wilson v. State*, 222 Ind. 63, 51 N.E.2d 848 (1943) (court found that the representation rendered was worse than no representation whatsoever when defense counsel acquiesced in a witness's refusal to comply with a subpoena, criticized the defendant before the jury, and failed to object when the judge cast doubt on the credibility of the defendant); *Sanchez v. State*, 199 Ind. 235, 157 N.E. 1 (1927) (in murder trial, attorney failed to subpoena material witnesses and failed to object to the use of an interpreter who was a friend of the deceased).

But when incompetence of defense counsel is patent at trial, the court and the prosecution have a duty to intervene and protect the rights of the defendant. *United States ex rel. Darcy v. Handy*, 203 F.2d 407 (3d Cir. 1953); *Brizendine v. Swenson*, 302 F. Supp. 1011 (W.D. Mo. 1969) (the trial judge should take judicial notice of the incompetence of defendant to stand trial); *United States ex rel. Hall v. Ragen*, 60 F. Supp. 820, 823-24 (N.D. Ill. 1945) (prosecution "should not have permitted the farce to go farther"); FED. R. CRIM. P. 52(b) *Plain Error*: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

44. See *Ex parte Kramer*, 61 Nev. 174, 122 P.2d 862, 877, *appeal dismissed*, 316 U.S. 646 (1947).

45. Not every mistake or omission is the result of intelligent, strategic weighing of alternatives. Some mistakes stem from deficiencies in the skill, experience, or in the amount of investigation and preparation. See Craig, *The Right to Adequate Representation in the Criminal Process: Some Observations*, 22 Sw. L.J. 260 (1968).

46. See note 31 *supra*.

47. 498 F.2d at 218.

the trial process at which the alleged error occurred. Measured against the appropriate level of performance required for that stage, the court must determine whether there has been a failure to perform some essential duty owed by the defense attorney to his client. Second, if such a failure has occurred, a hearing must be conducted to ascertain whether the failure resulted in prejudice to the criminal defendant.<sup>48</sup> The court in *McQueen* held that prejudice resulting from inadequate pretrial investigation is established by petitioner showing that a reasonable investigation could have uncovered admissible evidence which "would have proved helpful" to the defendant either on cross-examination or in his case-in-chief at the original trial.<sup>49</sup> If petitioner cannot so demonstrate, he must be permitted to show changed circumstances beyond his control which make it impossible to produce such evidence. Upon such a showing, the burden is shifted to the state to prove any error was harmless beyond a reasonable doubt.<sup>50</sup>

While holding that criminal defendants are entitled to reasonable pretrial investigations, the court in *McQueen* did not decide whether the right to effective assistance of counsel is derived from the due process clause of the fourteenth amendment or from the more demanding "right to counsel" provision of the sixth amendment.<sup>51</sup> Furthermore, the court did not decide whether different standards of performance need be applied when counsel is retained

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48. The finding of prejudice is essential before relief may be granted because of the "harmless error" rule enunciated in *Chapman v. California*, 386 U.S. 18 (1967). Judge Seiler, in his dissenting opinion in the Missouri Supreme Court decision, would not require a showing of prejudice in cases where defendant had no counsel at all. 475 S.W.2d at 123. According to the court in *McQueen*, however, there is an "important and obvious difference" between having ineffective counsel and having no counsel. 498 F.2d at 218.

49. 498 F.2d at 220. The court in *McQueen* appears to have lessened petitioner's burden of proof in showing the harm caused by the ineffectiveness of counsel. See *People v. Morris*, 3 Ill. 2d 437, 121 N.E.2d 810 (1954) (petitioner must show substantial prejudice, without which the outcome would probably have been different); *Barker v. State*, 505 S.W.2d 448 (Mo. App., D. Spr. 1974) (defendant deprived of substantial rights); *Monteer v. State*, 506 S.W.2d 25 (Mo. App., D.K.C. 1974) (failure to investigate deprived defendant of evidence of substance).

50. 498 F.2d at 220.

51. It appears that invoking the sixth amendment's more demanding standards often abrogates the mockery of justice standard. See, e.g., *United States v. Hammonds*, 425 F.2d 597 (D.C. Cir. 1970); *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970). See generally, Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964). There is an indication that Missouri courts favor the invocation of the stricter standards of the sixth amendment. See, e.g., *Goodwin v. State*, 502 S.W.2d 269 (Mo. 1973); *Knight v. State*, 491 S.W.2d 282 (Mo. 1973); *Anderson v. State*, 487 S.W.2d 455 (Mo. 1972); *Gaitan v. State*, 464 S.W.2d 33 (Mo. 1971).

rather than appointed,<sup>52</sup> or when the attack on the conviction is direct, rather than in a collateral proceeding.<sup>53</sup> Nevertheless, because the question is whether petitioner was denied his right to a fair trial, the standard of performance should be the same regardless of the procedural setting of the attack or how counsel became associated with the case.

Whether the standard for effectiveness of counsel is phrased in terms of "mockery of justice" or of "reasonableness," the ultimate determination should be whether a criminal defendant has received a fair trial. Although counsel is allowed much discretion and a wide margin of error in the conduct of the defense, it is apparent from *McQueen* that defense counsel must not abdicate his responsibilities and must conduct reasonable pretrial investigations. Without a reasonable pretrial investigation, the representation becomes perfunctory, and the criminal defendant may be denied his constitutional right to a fair trial.

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52. Under older case law, defendant was bound by the actions of his retained attorney on two possible theories. The first was an agency theory based on the defendant having selected the attorney. Under the second theory a privately retained attorney did not involve state action which was considered necessary to invoke the protection of the fourteenth amendment. The trend is clearly away from the older thinking. *Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. REV. 289 (1964). The fifth, sixth, and ninth circuits have found the same constitutional standard applies whether defense counsel has been retained or appointed. *See Porter v. United States*, 298 F.2d 461 (5th Cir. 1962), *rehearing en banc granted*, Sept. 5, 1973; *Goodwin v. Cardwell*, 432 F.2d 521 (6th Cir. 1970). The Missouri Supreme Court has indicated that the same standard is applicable whether defense counsel is appointed or retained. *See, e.g., State v. Woolbright*, 449 S.W.2d 602 (Mo. 1970); *Holbert v. State*, 439 S.W.2d 507 (Mo. 1969).

53. Following *McQueen*, the court had an opportunity to answer this question, but declined because the issue had not been briefed. *Garton v. Swenson*, \_\_\_ F.2d \_\_\_ (8th Cir. 1974). The court did indicate, however, that petitioner would bear a heavier burden of proving ineffectiveness of counsel in a collateral proceeding than he would on direct appeal because of the impact of time and its effect on the memories of witnesses. *See also United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973); *Bruce v. United States*, 379 F.2d 113 (D.C. Cir. 1967).

## PREADOPTIVE PARENTS—RIGHT TO DUE PROCESS HEARING PRIOR TO CUSTODY TERMINATION

*In re Beste*<sup>1</sup>

Tammy Louise Beste was an illegitimate child. The rights of her natural mother had been terminated and custody of the child transferred to Family Services, St. Louis County Welfare Office, for foster care and placement in an adoptive home. On September 2, 1971, at the request of Family Services, the juvenile court approved the transfer of custody of the child to Barry and Marjorie Shapiro as prospective adoptive parents. While Mr. and Mrs. Shapiro had preadoptive custody of the child, they experienced marital difficulties which eventually came to the attention of Family Services. As a result of these difficulties, on May 17, 1972, physical custody of the child was taken away from Mr. and Mrs. Shapiro. On May 30, 1972, upon its own motion and without a hearing, the court transferred legal custody of the child from Mr. and Mrs. Shapiro back to Family Services.<sup>2</sup>

Mr. Shapiro subsequently moved to have the transfer of custody order of May 30 set aside on the grounds that it was inserted in the record without a hearing or notice and in violation of the due process clause.<sup>3</sup> This motion was denied. However, after a conference between Mr. Shapiro's attorney and the court, the court advised him that in its opinion the Shapiros were entitled to a hearing on the right of the court to remove the child from their custody.<sup>4</sup> A full-blown hearing was held without further pleadings, after which the court affirmed its prior order transferring custody back to Family Services. Mr. Shapiro appealed the action of the trial court<sup>5</sup> on the grounds that the court order transferring legal custody was made without a hearing in violation of the due process clause and that the subsequent hearing improperly shifted the burden of proof to him.<sup>6</sup>

The Missouri Supreme Court refused to decide the merits of his contentions and dismissed the appeal on the grounds that his appeal was not properly taken. The court said that his appeal was not authorized by the Juvenile Code<sup>7</sup> because under its provisions,<sup>8</sup>

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1. 515 S.W.2d 530 (Mo. 1974).

2. *Id.* at 531-32.

3. *Id.* at 532.

4. *Id.*

5. The Missouri Supreme Court was unable to determine which order Shapiro was appealing from, but the disposition of the case makes that determination unnecessary. *Id.* at 533.

6. *Id.* at 533.

7. Ch. 211, RSMo 1969.

8. §§211.261, 211.021(5), RSMo 1969.

only a natural parent or an adoptive parent whose adoption has been finalized may appeal. The court also held that the appeal was not authorized under the Adoption Code<sup>9</sup> because it was "premature."<sup>10</sup> The court suggested that the proper procedural remedy would be for Shapiro to file a petition for adoption and then appeal after the petition is denied.<sup>11</sup>

*Beste* raises two basic questions. The first is whether prospective adoptive parents, who have had legal custody of a child transferred to them by court order, have a right to notice and a hearing before their legal custody of the child may be terminated. If this question is answered in the affirmative, then the second question is how such prospective parents can assert this right.

Whether prospective adoptive parents have a due process right to notice and a hearing before their legal custody of the child may be terminated has never been litigated in Missouri. Missouri cases, however, clearly support the proposition that a natural parent has these rights.<sup>12</sup>

The United States Supreme Court has also given the parental status procedural due process protection.<sup>13</sup> For example, in *Stanley v. Illinois*,<sup>14</sup> the Supreme Court held that, pursuant to due process, an unwed father was entitled to a hearing on his fitness as a parent before his child could be taken from him.<sup>15</sup> The Court reached its conclusion by balancing the father's interest in having a hearing against the state's interest in summary disposition. The unwed father's interests, those of a father in his child,<sup>16</sup> were found to warrant protection.<sup>17</sup> The state's interests were found to be the protection of the welfare of children primarily,<sup>18</sup> and also the avoidance of admin-

9. Ch. 453, RSMo 1969.

10. 515 S.W.2d at 533.

11. *Id.* at 533-34.

12. *See, e.g., In re Lipschitz*, 466 S.W.2d 183 (St. L. Mo. App. 1971); *Fernbaugh v. Clark*, 163 S.W.2d 999 (K.C. Mo. App. 1942).

13. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972); *Armstrong v. Manzo*, 380 U.S. 545 (1965).

14. 405 U.S. 645 (1972).

15. *Id.* at 649.

16. The Court describes the father's interest in retaining custody as being "cognizable and substantial." *Id.* at 652.

17. "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id.* at 651.

18. The Court said:

For its part, the State has made its interest quite plain: Illinois has declared that the aim of the Juvenile Court Act is to protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" and to "strengthen the minor's family ties whenever possible, removing him from the



istrative inconvenience.<sup>19</sup> However, the Court pointed out that the state's interest in promoting child welfare would actually be damaged if, due to the absence of a hearing, a fit parent were separated from his child.<sup>20</sup> Thus the state's primary interest in the promotion of child welfare was promoted by a hearing. In view of this conclusion, the Court, in effect, weighed the interests of the father and the interests of the child<sup>21</sup> against the state's remaining interest in administrative convenience, and found the state's interest to be insufficient to justify denying the father a hearing.<sup>22</sup>

The reasoning in *Stanley* should be equally applicable to the termination of the legal custody of prospective adoptive parents.<sup>23</sup> *Stanley* indicates that the question of the existence of due process hearing rights is to be decided by balancing the competing interests.

custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal. . . ." Ill. Rev. Stat., c. 37, §701-2.

*Id.* at 652.

19. "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication." *Id.* at 656.

20. The Court said:

We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed if *Stanley* is a fit father, the State spites its own articulated goals when it needlessly separates him from his family.

*Id.* at 652-53.

21. It is important to note that the Court does consider the interests of the child in its balancing of interests process, although it is the due process rights of the parent, apparently, that are being adjudicated. For example, at one point the Court makes the following statement:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of *both parent and child*. It therefore cannot stand.

*Id.* at 656-57 (emphasis added).

22. *Id.* at 658.

23. It is important to note that this discussion is limited to the procedural due process rights of prospective adoptive parents and does not attempt to deal with the rights of foster parents. The foster parent program in Missouri (sections 453.300 et seq., RSMo 1975 Supp.) is substantially different in terms of procedures and goals than adoption. The basic idea behind the foster parent program is to provide temporary, short-term care for children. In many cases, children who have been placed in foster homes are later returned to the care and custody of their natural parents. Before receiving a child, foster parents must sign a written agreement describing the temporary nature of their status with the child. Legal custody is almost never transferred to the foster parents, but remains with the natural parents or the placement agency. The agreement also provides that the foster parents cannot be considered for adoption of their foster child without the agency's consent. Section 453.070, RSMo 1969, does, however, grant foster parents who have had their foster child for 18 months or more a statutory preference for adoption placement if they so desire.

In the preadoptive custody situation, the interests to be balanced, those of the state and those of the parents, are quite similar to those involved in *Stanley*.

Missouri cases clearly state that the state's primary interest in adoption or custody proceedings is promoting the interests and welfare of the child.<sup>24</sup> Although psychological literature relevant to the kind of brief separation that would result from a child's unnecessary removal from the prospective parents' home is scarce, the literature that is available indicates that this type of separation is a traumatic experience for the child.<sup>25</sup> In view of these data, the *Stanley* rationale would indicate that Missouri's avowed primary interest in protecting the welfare of children is not advanced if the prospective adoptive parents are fit parents and yet are deprived of custody as a result of the absence of a hearing to determine fitness. Hence, Missouri's interest in promoting child welfare would favor the holding of a hearing.

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24. See, e.g., *In re Brooks v. Division of Children's Services*, 411 S.W.2d 276, 281 (St. L. Mo. App. 1967); *In re Adoption of McKinzie*, 275 S.W. 2d 365, 372 (Spr. Mo. App. 1955).

25. For example, in V. BERNARD, ADOPTION 75 (1964) the statement is made that even as early as the age of six months,

the infant has learned to recognize his mother as a unique individual. He therefore reacts with anxiety to separation from her, and to being with a stranger. If intense and prolonged, this separation anxiety may be psychologically injurious to the older infant.

Also, in C. HEINICKE & I. WESTHEIMER, BRIEF SEPARATIONS (1965), a study by the Child Development Research Unit of the Tavistock Institute of Human Relations and the Tavistock Clinic is published. The study documents typical responses of two-year-olds to separations of from two to twenty weeks from their parents, during which time the children were cared for in a nursery. The initial uneasiness which the children experienced upon arriving at the nursery became more pronounced as soon as their parents left them. Parental visits after two weeks of separation produced unhappiness and resignation, excessive cheerfulness, and self-injury in the children. While the children were less affectionate towards their parents, the memory of the separation from them apparently remained painful as many reenacted the initial separation. Attachment to parental substitutes was minimal even though the children increasingly developed favorites among the nurses who cared for them. The children initially suffered difficulty in sleeping and often refused to cooperate in the routine of the nursery. Also eight of the ten children studied became ill during separation, and all but one experienced a breakdown in their toilet training. The children used fewer words than when they had first entered the nursery.

Even after the children rejoined their parents, the difficulties continued. All of the children initially displayed a lack of affection for their mothers. Five of the children displayed ambivalence towards their mothers (being first hostile and defiant, then affectionate) for a subsequent period of twelve weeks or more. While most of the children appeared to have completely recovered from the separation after twenty weeks, a few continued to have difficulties. The study concluded that it was the loss of the specific relationship to the mother and father that constitutes the essential and most significant aspect of the traumatic event.

Thus, although the children in the study eventually recovered from their experience, the study strongly indicates that an unnecessary separation of a child from its prospective adoptive parents is not in the best interests of the child and should be avoided where possible.

The interests of the prospective adoptive parents also favor the holding of a hearing. Their interests are incomplete and imperfect and, therefore, are less compelling than the interests of natural parents in their natural children. Yet it should be noted that the Supreme Court has recognized that an individual interest of a nature that normally would be protected by procedural due process does not lose that protection simply because it is incomplete, imperfect, or lacks certain elements usually associated with it.<sup>26</sup> In effect, the Court has recognized a sliding scale of due process rights. Pursuant to this sliding scale approach, the nature and extent of the due process rights to which the individual is entitled varies depending upon the circumstances, the adverse interests, and the quality and importance of the right being protected.<sup>27</sup> Thus, the fact that the prospective parent's interest is admittedly not as strong as the natural parent's does not mean that the prospective parents are not entitled to any due process protection, but only that they may not be entitled to as great a degree of protection.<sup>28</sup>

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26. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 480-82 (1972). In *Morrissey*, parolees were held to be entitled to due process protections before their parole could be revoked. The Court said:

the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.

*Id.* at 482.

27. For example, in *Goss v. Lopez*, \_\_\_ U.S. \_\_\_, 95 S.Ct. 729 at 740 (1975), the Court held, in connection with a suspension of students for ten days or less, that due process requires that the student be given notice of the charges against him and an opportunity for an informal hearing to present his side of the story. However, the Court pointed out that longer suspensions or expulsions may require more formal procedures and that it is possible that in unusual situations, although involving only a short suspension, something more than rudimentary procedures will be required. *Id.* at 741.

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court held that, although a parolee in a parole revocation proceeding is not entitled to "the full panoply of [due process] rights" due a defendant in a criminal prosecution, 408 U.S. at 480, he is entitled to certain less formal due process protections including a hearing. 408 U.S. at 482-90. See note 25 *supra*.

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court held that the due process rights of a welfare recipient did not require such formalities as a "judicial or quasi-judicial trial" before his welfare payments could be terminated, but did require notice and an opportunity to defend by confronting adverse witnesses and presenting his own arguments and evidence orally. 397 U.S. at 266-68.

28. See, for example, the quote from *Morrissey v. Brewer* note 25 *supra*. As applied to the *Beste*-type child custody situation, the reasoning of *Morrissey* would indicate that since the interests of prospective parents include many of the "core values" of unqualified and complete parenthood, they should, therefore, receive due process protection. The parents' emotional and economic expenditures have already begun although the relationship is subject to closer control and observation than legal parenthood. The interests of prospective parents were described by one court as follows:

Competing against these two interests which favor a hearing is the state's interest in procedural convenience which favors summary termination of custody. This interest was similarly involved in *Stanley*. It would seem, after balancing the competing interests in the *Beste* situation, that the combined interests in favor of a hearing, the interests of the prospective parents<sup>29</sup> and of the state in child welfare,<sup>30</sup> will substantially outweigh the conflicting interest of the state in procedural convenience. Thus the *Stanley* analysis would dictate that notice and a hearing prior to termination of legal custody are necessary to satisfy due process.<sup>31</sup> California has applied this type of analysis and reached the same conclusion.<sup>32</sup>

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Gain of a child for adoption fulfills the prospective parents' most cherished hopes. The event marks the onset of a close and meaningful relationship. The emotional investment does not await the ultimate decree of adoption. Love and mutual dependence set in ahead of official cachets, administrative or judicial. The placement initiates the "closest conceivable counterpart of the relationship of parent and child."

*C.V.C. v. Superior Court*, 29 Cal. App. 3d 909, 916, 106 Cal. Rptr. 123, 128 (1973).

29. This is true even though the interests of prospective parents are less compelling than those of natural parents.

30. The interest of the state in child welfare, is the state's admitted primary interest in the matter.

31. There could, of course, be situations where, because of imminent danger to the child's health or safety, the state's interest would require summary termination of physical custody. But even in those situations where physical custody must be transferred summarily, it would seem that the prospective adoptive parents should be entitled to a hearing before a court order is issued terminating their legal (as distinguished from physical) custody. After all, the child would be out of danger as soon as he is taken from the prospective parents' physical custody. Hence, the state would then have no additional interest (other than procedural convenience) in the subsequent transfer of legal custody being entered without a hearing.

32. *C.V.C. v. Superior Court*, 29 Cal. App. 3d 909, 106 Cal. Rptr. 123 (1973). The facts of this case are very similar to those in *Beste* and the relevant aspects of California's adoption law are similar to Missouri's. The few differences between *C.V.C.* and *Beste* would seem to make *Beste* a stronger case for due process protection than *C.V.C.* For example, in *Beste*, legal custody of the child had been transferred by a court order to the prospective parents, while in *C.V.C.*, the legal custody had never been transferred away from the placement agency.

The court in *C.V.C.* held that prospective adoptive parents have a status entitling them to procedural due process protections. The court said:

The Fourteenth Amendment's guarantee of due process of law requires notice and an opportunity to be heard before an individual suffers governmental deprivation of a fundamental interest. Entitlement to procedural protections depends upon the extent to which "grievous loss" is threatened; it requires the court to weigh the individual's interest in avoiding the loss against the governmental interest in summary adjudication. . . . The formalities and procedural requisites for the hearing may vary according to the quality of the governmental function, the character of the private interest and the nature of the subsequent proceedings.

29 Cal. App. 3d at 915-16, 106 Cal. Rptr. at 127-28. After applying this analysis, the court held that the combined interests of the child and of the prospective parents in having a

Assuming that prospective adoptive parents are entitled to due process notice and hearing protections<sup>33</sup> before their legal custody can be terminated, the next problem is to determine how that right can be asserted in Missouri. The court in *Beste* states that the order terminating the prospective parents' custody and transferring custody back to the placement agency is not a final order and hence may not be appealed.<sup>34</sup> Although this proposition is supported by the precedent of the two cases cited in *Beste*,<sup>35</sup> neither *Beste* nor the two cited cases provide any analysis or reasoning in support of that holding. It would certainly seem to be an illogical and unproductive result.

To the extent relevant here, Missouri law provides that an aggrieved party may appeal from any "final judgment."<sup>36</sup> A "final judgment" has been held to be one that disposes of all parties and all issues and leaves nothing for further determination.<sup>37</sup> In view of that test, the denial of custody to prospective adoptive parents could arguably be considered a final order, and therefore appealable. Under section 453.080, RSMo 1969,<sup>38</sup> nine months legal custody is required before an adoption decree can be entered.<sup>39</sup> Thus, the transfer of custody back to the placement agency prior to the completion of the nine month custody period has the effect of making further adoption proceedings by these prospective parents

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hearing outweighed the state's interests in summary termination of custody and interpreted the due process requirements accordingly.

33. To say that prospective adoptive parents are entitled to a "hearing" raises other important questions. These include such questions as what the nature of the hearing should be, who should have the burden of proof, and what standard should be applied in making the determination. No reported case has as yet considered these problems. This writer would speculate that the hearing should be expedited since the welfare of a child is involved, and could be fairly informal. The parties should be allowed to retain counsel at their own expense to represent them if they wish. The burden of proof should be on the placement agency, the party trying to change the status quo. The standard to be applied by the court in determining whether custody is to be terminated probably should be the long-term best interests of the child since that is frequently the standard in child custody and adoption cases.

34. 515 S.W.2d at 533.

35. The two cases cited in *Beste* are *In re Adoption of L.L.V. and S.A.V.*, 457 S.W.2d 2 at 3 (Spr. Mo. App. 1970) and *In re Smith*, 331 S.W.2d 169 at 171 (St. L. Mo. App. 1960). Neither of these cases provide anything more than the bare assertion that such orders are not appealable because they are not final. There are no supportive reasoning or arguments at all.

36. See § 512.020, RSMo 1969.

37. *Elliott v. Harris*, 423 S.W.2d 831, 832 (Mo. En Banc 1968); *Scheid v. Pinkham*, 395 S.W.2d 166, 168 (Mo. 1965); *Bennett v. Wood*, 239 S.W.2d 325, 327-28 (Mo. 1951).

38. § 453.080, RSMo 1969.

39. See, e.g., *State ex rel. M.L.H. v. Carroll*, 343 S.W.2d 622, 627 (St. L. Mo. App. 1961); *State ex rel. Dorsey v. Kelly*, 327 S.W.2d 160, 161 (Mo. En Banc 1959).

a futile and unproductive waste of time in most cases.<sup>40</sup> Hence, an order terminating legal custody arguably disposes of all parties, all issues, and leaves nothing for further determination.

The court in *Beste* suggests that prospective parents can appeal under the Adoption Code after their petition for adoption has been denied.<sup>41</sup> This implies that once the adoption petition has been denied because of lack of the requisite nine month custody, the prospective parents would be able to challenge the validity of the summary custody termination in an appeal from the denial of their adoption petition. However, it is possible that the appellate court might decline to consider the due process issue and affirm merely on the grounds that appellants did not have the nine months of custody which section 453.080 establishes as a prerequisite for adoption.<sup>42</sup> Judicial reluctance to reach constitutional issues if there is any other ground for decision is well known.<sup>43</sup> Hence, the possibility of challenging the summary nature of the custody termination in an appeal of the denial of the adoption petition, which is the avenue of appeal which *Beste* suggests, is at best unsure and time-consuming.

It would appear necessary, therefore, to look for other remedies by which the right to a due process hearing could be asserted in Missouri courts at the appellate level. Although no case is directly in point, several cases indicate that a writ of habeas corpus might accomplish that result. In Missouri and many other states, habeas corpus has been used to adjudicate whether someone holds custody of a child wrongfully, and, if so, to obtain a transfer of custody to the rightful custodian. In *In re Lipschitz*,<sup>44</sup> habeas corpus was used by a natural parent to attack a court order changing a post-divorce child custody decree which had been obtained by the other natural parent without a court hearing. The court invalidated that order on

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40. In view of the nine month requirement, the only thing that the court in its subsequent consideration of the adoption petition could possibly do in favor of the prospective parents is to reinstate their custody of the child. This is not very likely since the court considering the adoption petition is the same court that a short time earlier terminated their custody. Even if the court did wish to reinstate the custody of these parents, the placement agency may have already placed the child with other prospective parents. In any case, the psychological harm to the child discussed in note 24 *supra* has already been done.

41. 515 S.W.2d at 533-34.

42. One Missouri case went so far as to describe the lack of nine month custody as a "jurisdictional" defect which would indicate that the appellate court should affirm without considering anything else if the nine months custody has not been satisfied. *State ex rel. Dorsey v. Kelly*, 327 S.W.2d 160, 161 (Mo. En Banc 1959). It seems likely, however, that the court would retreat from this position if it would otherwise be decisive in a case.

43. See, e.g., *City of St. Joseph v. Roller*, 363 S.W.2d 609, 612 (Mo. 1963).

44. 466 S.W.2d 183 (St. L. Mo. App. 1971).

the grounds that the absence of a hearing violated the complaining parent's due process rights.<sup>45</sup> Habeas corpus has also been used in several adoption cases by natural parents to attack adoption decrees entered without the required consent<sup>46</sup> or notice.<sup>47</sup> In another case,<sup>48</sup> habeas corpus was used by the legal custodian, a child care agency, to attack an adoption decree entered without allowing the agency to exercise certain preliminary rights granted it by statute. This case is significant in that it indicates that habeas corpus in child custody cases is not an exclusive remedy of natural parents, but may also be used by other custodians to attack orders affecting child custody on the grounds that the orders were entered without complying with the custodian's legal rights.

Another possible remedy is the writ of prohibition. Prohibition is used to prevent, in advance, a judicial officer from acting in excess of his jurisdiction. It has been held<sup>49</sup> that prohibition may be used by a natural parent to prohibit a transfer of custody to the other natural parent without a hearing in a post-divorce custody modification situation. The court said that in transferring custody without a hearing, the lower court exceeded its jurisdiction,<sup>50</sup> and prohibition was therefore appropriate.<sup>51</sup> Prohibition would have the added advantage that it could be used to block the termination of custody before it occurs rather than after the fact.<sup>52</sup>

In conclusion, *Beste* raises questions to which Missouri law gives no definitive answers. However, it seems likely from the foregoing cases and analysis that prospective adoptive parents should be entitled, pursuant to procedural due process, to notice and a hearing before their legal custody of a child can be terminated by a judicial transfer of custody. The assertion of these rights was made more difficult by the holding in *Beste* that the termination of custody is not a final, appealable order. This holding seems illogical and unproductive and probably should be reconsidered. In the interim, habeas corpus and prohibition are possible remedies for the assertion of those rights by prospective adoptive parents.

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45. See also *Fernbaugh v. Clark*, 236 Mo. App. 1200, 163 S.W.2d 999 (K.C. Mo. App. 1942).

46. See, e.g., *State ex rel. Renner v. Alford*, 343 Mo. 576, 122 S.W.2d 905 (1938); *Rochford v. Bailey*, 322 Mo. 1155, 17 S.W.2d 941 (En Banc 1929).

47. See, e.g., *In re Adams v. Brown*, 237 S.W.2d 232 (St. L. Mo. App. 1951).

48. *Child Saving Institute v. Knobel*, 327 Mo. 609, 37 S.W.2d 920 (En Banc 1931).

49. *State ex rel. Tatum v. Ramey*, 134 Mo. App. 722, 115 S.W. 458 (K.C. Ct. App. 1909).

50. See also *Foster v. Foster*, 300 S.W.2d 857, 868 (St. L. Mo. App. 1957).

51. 134 Mo. App. at 725-26, 115 S.W. at 459. See also *In re Lipschitz*, 466 S.W.2d 183, 185 (St. L. Mo. App. 1971).

52. Thus preventing the psychological damage to the child discussed in note 24 *supra*.

**REAL PROPERTY—PRE-EMPTIVE RIGHT OR RIGHT  
OF FIRST REFUSAL—VIOLATIVE OF THE RULE  
AGAINST PERPETUITIES?**

*Gilmore v. Letcher*<sup>1</sup>

Plaintiffs, owners of a lot in Lake Tapawingo subdivision, Jackson County, Missouri, sought specific performance of a pre-emptive right to purchase three and a half lots owned by defendant Letcher. Letcher owned Lot 62, which was adjacent to plaintiffs' Lot 61, and two and a half other lots which adjoined Lot 62 but were not adjacent to plaintiffs' lot. Letcher's house was located partly on Lot 62 and partly on her other lots.<sup>2</sup> All lots in the subdivision were subject to the following restrictive covenant of record:

No sale of said lot shall be consummated without giving at least 15 days written notice to Grantor, and the owners of the two lots adjoining said lot on the sides, of the terms thereof; and any of them shall have the right to buy said land on such terms. . . .<sup>3</sup>

On May 29, 1970, Letcher contracted to sell all of her lots to the Spaldings for \$13,000, and on July 10, 1970, notified plaintiffs of the proposed sale and asked for a waiver of their right to purchase the land. Plaintiffs notified Letcher on July 14, 1970, that they wished to exercise their pre-emptive right, and enclosed a deposit of \$300. On July 20, 1970, Letcher returned the \$300 check to plaintiffs, rejecting their offer to purchase because the sale to the Spaldings had been abandoned. The following day, Letcher entered into a new agreement with the Spaldings omitting Lot 62, but at the same price and on the same terms as the original sale.<sup>4</sup>

The trial court denied relief to plaintiffs, finding that Letcher had the right to withdraw from the original sale, and that plaintiffs' right of pre-emption was limited to Lot 62. Plaintiffs appealed asserting that their pre-emptive right extended to the entire three and a half lots. Defendant Letcher asserted, *inter alia*, that the covenant was an unreasonable restraint on alienation. The Kansas City District of the Missouri Court of Appeals reversed the judgment on the grounds that the covenant was not an unreasonable restraint on alienation. The court held that the plaintiffs' pre-emptive right was operative when they were notified of the pending sale,<sup>5</sup> and that this

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1. 508 S.W.2d 257 (Mo. App., D.K.C. 1974).

2. *Id.* at 258.

3. *Id.*

4. *Id.* at 261.

5. *Id.* at 257. The court cites *Kershner v. Hurlburt*, 277 S.W.2d 619, 623 (Mo. 1955),



pre-emptive right extended to all three and a half lots.

The covenant involved in *Gilmore v. Letcher* was part of the contract between the subdivider and the defendant. Plaintiffs and defendant had each contracted with the subdivider, but not with each other. If the plaintiffs possessed a pre-emptive right, it was because they were beneficiaries of a third party beneficiary contract, or because the covenant between Letcher and the subdivider was of a type that runs with the land, and was therefore enforceable by prior or subsequent grantees of the subdivider.

The English courts do not allow a plaintiff to enforce a contract to which he is not a party,<sup>6</sup> and the English courts also refuse to enforce at law or in equity an affirmative covenant running with the land against an assignee of the covenantor.<sup>7</sup> The majority of American jurisdictions permit third party beneficiaries to enforce a contract.<sup>8</sup> Furthermore, the majority of American courts enforce affirmative covenants running with the land<sup>9</sup> if: (1) there is privity of estate; (2) the promise touches and concerns the land; and (3) the parties intend that the covenant run with the land.<sup>10</sup> Since *Shelley*

when the owner reached a decision to sell, the offeree "had a short-lived option to purchase in accordance with the terms of his agreement." When the holder of the pre-emption exercises his option, the contract becomes complete and enforceable. *Barling v. Horn*, 296 S.W.2d 94, 98 (Mo. 1956); 5A CORBIN, CONTRACTS § 1197, at 377 (1964).

6. 4 CORBIN, CONTRACTS § 836 (1951).

7. *Tulk v. Moxhay*, [1848] 2 Phill. Ch. 774, 41 Eng. Rep. 1143; *Haywood v. Brunswick Permanent Ben. Bldg. Soc.*, [1881] L.R., 8 Q.B. 403. In *Tulk*, an affirmative covenant running with the land was enforced in equity against an assignee of the covenantor. The *Haywood* case subsequently limited *Tulk* by holding that an assignee of the covenantor could not enforce an affirmative covenant against the assignee of the covenantor.

8. RESTATEMENT (SECOND) OF CONTRACTS, Ch. 6, Intr. Note at 284 (1973); RESTATEMENT OF PROPERTY, Ch. 46, Intr. Note at 3244 (1944) which states:

By virtue of the third party beneficiary doctrine, the law of covenants running with the land has now so expanded as to include among the successors who may enforce the promise . . . the successors of third parties who were beneficiaries of the promise. . . .

9. The weight of authority favors enforcement in equity against purchasers with notice. See 2 AMERICAN LAW OF PROPERTY § 9.36 (Casner ed. 1952); Annot., 68 A.L.R.2d 1022 (1959); 20 AM. JUR. 2d *Covenants* § 37 (1965). New Jersey had refused to enforce such covenants but has recently adopted the majority position. *Petersen v. Beekmere, Inc.*, 117 N.J. Super. 155, 283 A.2d 911 (Ch. Div. 1971).

10. For equitable relief, privity of estate is generally not required. Privity of estate in Missouri is defined as a mutual or successive relationship to the same rights of property. *Cook v. Tide Water Assoc. Oil Co.*, 281 S.W.2d 415 (Spr. Mo. App. 1955). See 2 AMERICAN LAW OF PROPERTY § 9.27 (Casner ed. 1952).

For a discussion of intent, and whether the covenant "touches and concerns the land," see *Neponsit Property Owners' Ass'n, Inc. v. Emigrant Industrial Savings Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938); C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH THE LAND (1929). It apparently makes no difference whether the person seeking to enforce the covenant is a prior or subsequent grantee of the subdivision developer. *Berger, A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 196 (1970).

*v. Kraemer*,<sup>11</sup> however, American courts have lacked the power to enforce covenants, conditions or equitable use restrictions designed to prevent purchase or occupancy of land by members of minority races. A pre-emptive scheme of the type involved in *Gilmore v. Letcher*, imposed as part of a general plan of subdivision development, is likely to be so designed. The opinion does not discuss this point.

*Gilmore v. Letcher* is consistent with the view of the *Restatement of Property* that a pre-emption provision is not an invalid restraint on alienation if conditioned on paying the price at which the obligor is willing to sell to another.<sup>12</sup> The *Restatement* deems such a provision to be a restraint on alienation, void if applicable to an estate in fee simple, if sale at a fixed or lower price is required.<sup>13</sup> *Beets v. Tyler*,<sup>14</sup> upon which the court relied, held valid a pre-emptive provision limited in duration to twenty years and to a price at which the obligor would sell to another. The Missouri courts apparently will enforce even a fixed price provision if it is reasonable and will not operate beyond the period of the Rule Against Perpetuities.<sup>15</sup>

The pre-emptive provision involved in *Gilmore* was unlimited in duration. A pre-emptive provision is an option exercisable on the condition precedent of the owner's willingness to sell.<sup>16</sup> Options to

11. 334 U.S. 1 (1948). See also *Barrows v. Jackson*, 346 U.S. 249 (1953); Annot., 3 A.L.R.2d 441 (1948).

Where the provision was in the forfeiture form and the time period limited, the Missouri Supreme Court held them valid and enforced the forfeiture. *Koehler v. Rowland*, 275 Mo. 573, 205 S.W. 217 (1918).

12. RESTATEMENT OF PROPERTY § 413(1) (1944) which states:

(1) A promissory restraint or forfeiture restraint on the alienation of a legal estate in land which is in the form of a provision that the owner of the estate shall not sell the same without first offering to a designated person the opportunity to meet, with reasonable expedition, any offer received, is valid, unless it violates the rule against perpetuities.

13. RESTATEMENT OF PROPERTY § 413(2). However, a majority of the courts have upheld such provisions, *Mercer v. Lemmens*, 230 Cal. App. 2d 167, 40 Cal. Rptr. 803 (1964); *Blair v. Kingsley*, 128 So. 2d 889 (Fla. App. 1961); *Dodd v. Rotterman*, 330 Ill. 362, 161 N.E. 756 (1928); *Lantis v. Cook*, 342 Mich. 347, 69 N.W.2d 849 (1955) (the court refused to accept the *Restatement* position on fixed price, and followed *Windiate v. Leland*, 246 Mich. 659, 225 N.W. 620 (1929)); *Hall v. Crocker*, 192 Tenn. 506, 241 S.W.2d 548 (1951); *Kamas State Bank v. Bourgeois*, 14 Utah 2d 188, 380 P.2d 931 (1963) (the court cites *Restatement* § 406 as allowing fixed price, but *Restatement* § 413(2) seems to control as § 406 applies to conditions). See also *Schnebly, Restraint Upon the Alienation of Property*, 6 AMERICAN LAW OF PROPERTY § 24.56 (Casner ed. 1952).

14. 365 Mo. 895, 290 S.W.2d 76 (1956).

15. *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. 1955). The court in *Kershner* refused to accept the *Restatement* position that a fixed price should always invalidate the agreement, choosing instead to consider whether the price is reasonable under the circumstances.

16. L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1154 (1956); Boyer & Spiegall,

sell land, being specifically enforceable, give the optionee an equitable interest in the nature of a springing executory interest. The Rule Against Perpetuities was developed to invalidate executory interests which may spring up or shift at a time beyond lives in being plus twenty-one years.<sup>17</sup> It is clear that an ordinary option is void if it is exercisable beyond the period of the Rule Against Perpetuities.<sup>18</sup> An ordinary option is conditioned only on the optionee's decision to buy; a pre-emptive option is conditioned on both the optionee's decision to buy and the optionor's willingness to sell. There is no reason why a pre-emptive option should be exempt from the Rule Against Perpetuities unless it falls within one of the recognized exceptions to that Rule. Conditions subsequent are excepted from the Rule in this country,<sup>19</sup> but, as such conditions may enure only to the benefit of the grantor, the plaintiff Gilmore would not have been aided by this exception to the Rule. It is arguable that the pre-emptive provision involved in *Gilmore* was exempt from the Rule Against Perpetuities as a covenant running with the land.<sup>20</sup> This exception, however, is probably limited to negative covenants and covenants to pay money. Numerous decisions have held that pre-emptive provisions which may operate beyond the period of the Rule Against Perpetuities violate that Rule.<sup>21</sup> The opinion in the princi-

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*Land Use Control: Pre-emptions, Perpetuities, and Similar Restraints*, 20 U. MIAMI L. REV. 148, 155 (1965).

17. The Rule Against Perpetuities is in force in Missouri, *Lockridge v. Mace*, 109 Mo. 162, 18 S.W. 1145 (1891), and is clearly stated in *St. Louis Union Trust Co. v. Kelly*, 355 Mo. 924, 935, 199 S.W.2d 344, 350 (1947):

The rule against perpetuities is that no interest within its scope is good unless it must vest, if at all, not later than twenty-one years after some life or lives in being at the creation of the interest, to which period is added the period of gestation, if gestation exists.

See Eckhardt, *Rule Against Perpetuities In Missouri*, 30 Mo. L. REV. 27 (1965). The Rule has been modified by statute. See statute quoted note 23 *infra*; Eckhardt, *Perpetuities Reform By Legislation*, 31 Mo. L. REV. 56 (1966).

18. Schnebly, *Restraint Upon the Alienation of Property*, 6 AMERICAN LAW OF PROPERTY § 24.56 (Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 16, § 1244.

19. L. SIMES & A. SMITH, *supra* note 16, § 1238.

20. A covenant running with the land may be enforced in equity absent a showing of privity of estate as long as the requirements of intent and that the covenant touch and concern the land are met. See note 10 *supra*. It is questionable whether an affirmative covenant of a personal nature touches and concerns the land. *Neponsit Property Owners' Ass'n, Inc. v. Emigrant Industrial Savings Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938); C. CLARK, *supra* note 10; L. SIMES & A. SMITH, *supra* note 16, § 1244.

21. *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 107 A. 138 (1919) (repurchase agreement for a fixed price plus value of any improvements was void as against the Rule Against Perpetuities); *Missouri State Highway Comm'n v. Stone*, 311 S.W.2d 588 (Spr. Mo. App. 1958) (the court looked at the duration and purpose for which it was imposed, and indicated the Rule Against Perpetuities would apply, but chose to invalidate it as a restraint on aliena-

pal case does not mention the perpetuities problem, which should have been the main basis of the decision.

If, as seems probable, the pre-emptive provision involved in *Gilmore* violated the Rule Against Perpetuities, it would be wholly void under that Rule in absence of statutory change.<sup>22</sup> A 1965 Missouri statute, however, empowers the court to reform a limitation which violates the Rule Against Perpetuities to the extent necessary to avoid violation of the Rule and, as so reformed, to enforce the limitation.<sup>23</sup> The opinion in *Gilmore* does not reveal whether the pre-emptive provision was entered into before or after the effective date of this statute. If it was after the effective date, the court should have reformed the pre-emptive provision to limit its duration to the life of one of the original parties plus twenty-one years.

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tion); *Ross v. Ponemon*, 109 N.J. Super. 363, 263 A.2d 195 (1970) (repurchase agreement was held void under both rules); *McGaffey v. Walker*, 379 S.W.2d 390 (Tex. Civ. App. 1964) (repurchase agreement void as a restraint on alienation). *Contra*, *Rountree v. Richardson*, 268 Ala. 448, 108 So. 2d 152 (1959) (repurchase agreement was treated as a condition subsequent, and not within the Rule Against Perpetuities). See Annot., 40 A.L.R.3d 920 (1971).

22. *Atchison v. City of Englewood*, 170 Colo. 295, 493 P.2d 297 (1970); *Neustadt v. Pearce*, 145 Conn. 403, 143 A.2d 437 (1958); *Saulsberry v. Saulsberry*, 290 Ky. 132, 160 S.W.2d 654 (1942); *Melcher v. Camp*, 435 P.2d 107 (Okla. 1967).

However, some courts have construed the agreement so as to avoid the Rule Against Perpetuities altogether. *Campbell v. Campbell*, 313 Ky. 249, 230 S.W.2d 918 (1950) (the court preferred to interpret the agreement so as to avoid the Rule Against Perpetuities); *Peters v. Hoover*, 31 Pa. D. & C.2d 641 (1963) (no mention of heirs and assigns in agreement, so court considered it personal).

23. Section 442.555, RSMo 1969 reads in part:

2. When any limitation or provision violates the rule against perpetuities or a rule or policy corollary thereto and reformation would more closely approximate the primary purpose or scheme of the grantor, settlor or testator than total invalidity of the limitation or provision . . . the limitation or provisions shall be reformed, if possible, to the extent necessary to avoid violation of the rule or policy and, as so reformed, shall be valid and effective. . . .

See Eckhardt, *Perpetuities Reform By Legislation*, 31 Mo. L. Rev. 56 (1966).

## SCHOOL DESEGREGATION—THE INTERDISTRICT REMEDY FOR METROPOLITAN SEGREGATION GREATLY LIMITED

### *Milliken v. Bradley*<sup>1</sup>

The Detroit branch of the NAACP and certain individual parents and students brought a class action in federal district court against the Governor and Attorney General of Michigan, the State and the Detroit Boards of Education, and others. It was alleged that these public officials and their predecessors in office had caused the Detroit public school system to be segregated on the basis of race. It was also alleged that a state statute<sup>2</sup> unconstitutionally interfered with a voluntary Detroit School Board plan<sup>3</sup> for high school desegregation. After a lengthy trial,<sup>4</sup> the district court found that the Detroit School District's conduct had contributed to establishing and maintaining racial segregation within the Detroit school system.<sup>5</sup> The court also found that the state of Michigan had committed several constitutional violations in its responsibility for general supervision of public education.<sup>6</sup> In addition the court imposed vicarious liability upon the state for the acts of the Detroit Board of Education based upon the Michigan Constitution,<sup>7</sup> Michigan Su-

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1. \_\_\_\_ U.S. \_\_\_\_, 94 S. Ct. 3112 (1974).

2. Act No. 48, § 12, PUBLIC ACTS OF MICHIGAN, 1970; MICHIGAN COMPILED LAWS § 388.182. This statute was designed to delay the Detroit School Board's desegregation plan until elections could be held to oust the Board members who voted in favor of the plan. *See, Bradley v. Milliken*, 433 F.2d 897, 900-01 (6th Cir. 1970).

3. This was called the April 7, 1970 plan and had been adopted by the Detroit Board of Education. For details of this plan, see *Bradley v. Milliken*, 433 F.2d 897, 898 (6th Cir. 1970).

4. Plaintiffs initially asked for a preliminary injunction to restrain the enforcement of Act No. 48, *supra* note 2. The district court denied the injunction on the grounds that there was no proof that Detroit had a dual segregation school system. 94 S. Ct. at 3116-17. The court of appeals reversed and remanded to the district court for trial on the merits.

5. *Bradley v. Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971). Among specific acts of de jure segregation found to have been engaged in by the Detroit Board of Education were the following: (1) creation and maintenance of optional attendance zones which allowed white pupils to escape identifiably Negro schools; (2) failure to draw attendance zones which would enhance desegregation; (3) busing of Negro pupils to predominantly Negro schools instead of the closer white schools to relieve overcrowded classroom situations; and (4) construction of new schools in either all-Negro or all-white neighborhoods so that the new schools opened as one-race schools. *Id.* at 587-89.

6. *Id.* at 589.

7. MICH. CONST., art. VIII, § 2 provides in relevant part: "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."

preme Court decisions holding that a school district is a state agency<sup>8</sup> not inherently a part of local government,<sup>9</sup> and Michigan statutes regulating school construction.<sup>10</sup> The district court ordered the Detroit Board of Education to submit desegregation plans limited to the city of Detroit. The state defendants were ordered to submit desegregation plans encompassing the three-county Detroit metropolitan area. The 85 school districts in these outlying counties were not parties to the lawsuit.<sup>11</sup> There was no allegation that these districts had committed any constitutional violations.

After considering the plans submitted, the district court found that the Detroit-only desegregation plans "would not accomplish desegregation within the corporate geographical limits of the city"<sup>12</sup> and that "it must look beyond the limits of the Detroit school district for a solution to the problem."<sup>13</sup> Consequently the court combined 53 suburban school districts and Detroit into a single "desegregation area" and appointed a panel to submit a desegregation plan encompassing the entire desegregation area. The court held that it was not necessary to find that the outlying districts have committed acts of de jure segregation.<sup>14</sup> "School district lines are simply matters of political convenience and may not be used to deny constitutional rights."<sup>15</sup>

The Sixth Circuit Court of Appeals affirmed the finding of de jure segregation on the part of the Detroit Board of Education<sup>16</sup> and the state defendants.<sup>17</sup> It also agreed that a comprehensive metropolitan area plan was required.<sup>18</sup> The court noted that a plan limited to the city of Detroit "would result in an all black school system immediately surrounded by practically all white suburban school systems . . . ."<sup>19</sup> Furthermore, a metropolitan remedy was held to

8. *Attorney General v. Lowrey*, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902).

9. *Attorney General v. Detroit Board of Educ.*, 154 Mich. 584, 590, 118 N.W. 606, 609 (1908).

10. MICH. STAT. ANN. § 15 (1961) requires the State Board of Education to approve all school building construction plans.

11. The outlying school districts were permitted to intervene after the court began considering a metropolitan area desegregation plan.

12. 94 S.Ct. at 3121. The district court was concerned with the problem of "white flight" from the Detroit school system.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Bradley v. Milliken*, 484 F.2d 215, 221-38 (6th Cir. 1973). See also Note, *Segregative Intent and the Single Governmental Entity in School Desegregation*, 1973 DUKE L.J. 1111.

17. *Bradley v. Milliken*, 484 F.2d 215, 239-41 (6th Cir. 1973).

18. *Id.* at 249.

19. *Id.* at 245.

be within the equity powers of the district court because "the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts."<sup>20</sup> The United States Supreme Court reversed and remanded for the prompt formulation of a Detroit-only desegregation plan.<sup>21</sup> The Court held that "before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district."<sup>22</sup>

In the landmark case of *Brown v. Board of Education [Brown I]*,<sup>23</sup> the United States Supreme Court stated that "in the field of public education, the doctrine of 'separate but equal' has no place."<sup>24</sup> State-imposed segregation of public schools was held to deny fourteenth amendment equal protection,<sup>25</sup> as well as violate fifth amendment due process.<sup>26</sup> A subsequent related case, *Brown II*,<sup>27</sup> made it clear that dual systems<sup>28</sup> were to be ended with all deliberate speed.<sup>29</sup> The Court also imposed on the district courts the duty of assuring good faith compliance with *Brown I* by state and school officials.<sup>30</sup> The lower federal courts were allowed flexibility in shaping their remedies, including the power to revise school districts.<sup>31</sup>

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20. *Id.* at 249. In reaching this result, the court sought to distinguish *Bradley v. School Bd.*, 382 U.S. 103 (1965), on the grounds that in Virginia local boards have exclusive power to operate public schools. 484 F.2d at 251. See text accompanying note 52 *infra*.

21. 94 S.Ct. at 3131.

22. *Id.* at 3127.

23. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

24. 347 U.S. at 495. The Court in *Brown I* overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Plessy* had upheld racial segregation on railroad cars where the facilities involved were "equal but separate." This doctrine was subsequently applied in many other contexts. Annot., 94 L.Ed. 1121, 1123 (1950).

25. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

26. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Here, the Court extended *Brown I* to the District of Columbia through the due process clause of the fifth amendment.

27. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

28. The term "dual system" refers to a system providing separate educational facilities for black and white students.

29. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955). For other cases where the Court has rejected efforts to halt prompt desegregation, see *Northcross v. Board of Educ.*, 397 U.S. 232 (1970); *Alexander v. Holmes Bd. of Educ.*, 396 U.S. 19 (1969); *Carter v. West Feliciana Parish School Bd.*, 396 U.S. 226 (1969); *Bradley v. School Bd.*, 382 U.S. 103, 105 (1965); *Griffin v. County School Bd.*, 377 U.S. 218, 229 (1964).

30. *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955).

31. . . . courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a

The Court later unanimously reaffirmed *Brown I* but left unanswered the question of how far the state had to go to meet its *Brown I* obligation.<sup>32</sup> This question was partially answered by the Court in *Green v. County School Board*<sup>33</sup> and *Monroe v. Board of Commissioners*.<sup>34</sup> *Green* struck down a "freedom of choice" plan<sup>35</sup> and held that the state must not only eliminate race as a criteria for school attendance but must also take affirmative action to eliminate pure de jure<sup>36</sup> segregation "root and branch."<sup>37</sup> *Monroe* reiterated the Court's position in *Green* and invalidated a "free transfer" provision.<sup>38</sup> The net result of these two cases was to place upon pure de jure states an affirmative duty to establish unitary school systems.<sup>39</sup> *Swann v. Charlotte-Mecklenburg Board of Education*<sup>40</sup> gave a district court a large amount of discretion in remedying pure de jure segregation. While the Court in *Swann* did not prohibit predominantly one-race schools, it cautioned the district judge to scrutinize such schools closely to insure that they were not the product of state-imposed segregation.<sup>41</sup> The Court vested district judges

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system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.

*Brown v. Board of Educ.*, 349 U.S. 294, 300-01 (1955).

32. *Cooper v. Aaron*, 358 U.S. 1, 17-18 (1958). The Court denied a request to stay a plan of integration in Little Rock, Arkansas, despite violence generated to a large extent by the Governor's unsolicited dispatching of National Guard units to keep Negro students from entering a high school and by the legislature's opposition to desegregation. "[T]he Constitutional rights of [the Negro children] are not to be . . . yielded to the violence . . . which[has] followed upon the actions of the Governor and Legislature." *Id.* at 17-18.

33. 391 U.S. 430 (1968).

34. 391 U.S. 450 (1968).

35. This plan gave the student the choice of attending his neighborhood school or being bused to another school to achieve desegregation.

36. De jure segregation can be divided into two categories, pure de jure and indirect de jure. Pure de jure segregation results from statutory or constitutional provisions which either require or permit racial segregation of public schools. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). Indirect de jure segregation refers to segregative actions taken by the school board (and arguably other agencies of the state) with the intent to segregate. Examples of indirect de jure segregation include gerrymandering of school attendance zones and construction of new schools in predominantly one-race neighborhoods. See *Keyes v. School District No. 1*, 413 U.S. 189 (1973). See also Shannon, *Present Direction of Court Decisions Regarding Metropolitan Area Desegregation*, 1 J.L.E. 587, 588 (1972).

37. *Green v. County School Bd.*, 391 U.S. 430, 438 (1968).

38. *Monroe v. Board of Comm'rs*, 391 U.S. 450, 459 (1968). The invalidated provision permitted any pupil to transfer to a school outside his attendance zone if space was available. *Id.* at 453-54. For a discussion of other types of desegregation plans held invalid by the Court, see Note, *Fifth Circuit Relies on Administrative Standards in School Desegregation Cases*, 64 MICH. L. REV. 340, 341 (1965).

39. This is the opposite of a dual system. See note 28 *supra*.

40. 402 U.S. 1 (1971).

41. *Id.* at 26.



with power to alter attendance zones as one remedy for pure de jure segregation<sup>42</sup> and implied that in some circumstances busing of students may be required.<sup>43</sup> *Keyes v. School District No. 1*<sup>44</sup> involved no constitutional or statutory provisions which required or permitted segregation.<sup>45</sup> However, the school board had taken certain actions which had the effect of segregating part of the school district.<sup>46</sup> The Court found that these actions were taken with the intent to segregate suburban schools. The Court held that proof of indirect de jure segregation<sup>47</sup> in one part of a school system makes a prima facie case that the state intended to segregate elsewhere in the system.<sup>48</sup> Unless the state can prove that its conduct with respect to other parts of the segregated district was not racially motivated, a finding of indirect de jure segregation in one part of a district means that the whole district must be desegregated in compliance with *Swann*.

Since 1972 the Court has been faced with segregation cases involving more than one school district. In that year, the Court upheld district court injunctions preventing the subdivision of existing school districts,<sup>49</sup> but denied a request to redraw district lines to alleviate alleged de facto metropolitan segregation.<sup>50</sup> One year later, the Court denied certiorari of a district court order requiring the State of Indiana to either reorganize Indianapolis school districts or implement an interdistrict transfer program to correct indirect de jure segregation.<sup>51</sup> In *Bradley v. School Board*,<sup>52</sup> an evenly divided Court<sup>53</sup> upheld an appeals court decision that a met-

42. *Id.* at 28.

43. *Id.* at 30. "Desegregation cannot be limited to the walk-in school."

44. 413 U.S. 189 (1973).

45. *Id.* at 191.

46. The board's actions involved construction policies and the drawing of attendance zones. *Id.*

47. This form of segregation—intent to segregate plus segregative effect—will be referred to as indirect de jure segregation. A third type of segregation is de facto segregation. In a de facto situation, pupils attend schools of predominantly racial sameness simply because they live in neighborhoods characterized by the racial sameness reflected in student enrollment of the local public schools. See Shannon, *Present Direction of Court Decisions Regarding Metropolitan Area Desegregation*, 1 J.L.E. 587, 588 (1972).

48. *Keyes v. School District No. 1*, 413 U.S. 189, 213 (1973).

49. *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972); *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972).

50. *Spencer v. Kugler*, 454 F.2d 839 (3d Cir. 1972), *aff'd*, 404 U.S. 1027 (1972). For a definition of de facto segregation, see note 47 *supra*.

51. *United States v. Board of School Comm'rs*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

52. 412 U.S. 92 (1973).

53. Mr. Justice Powell took no part in the decision. Justice Powell disqualified himself

ropolitan desegregation plan involving three school districts was improper because the state-imposed segregation had been eliminated within the individual school districts.<sup>54</sup>

The addition of Justice Powell to the majority in *Milliken* gives it the precedential value lacking in *Bradley v. School Board*.<sup>55</sup> The Court's decision in *Milliken* may have been dictated as much by policy considerations as by constitutional principles. The constitutional reason for reversal was the complete absence of proof that the outlying school districts had violated any fourteenth amendment equal protection guarantees. There was no showing that the outlying districts had, in any way, contributed to the segregation existing within the Detroit School District.<sup>56</sup> Thus, the Court stated that the "constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district."<sup>57</sup> The major policy consideration underlying the Court's decision was the impracticability of a multi-district consolidation.<sup>58</sup> Other policy considerations were the desirability of local control over education,<sup>59</sup> equitable principles of fault,<sup>60</sup> a reluctance to have courts engage in legislative functions,<sup>61</sup> and the Court's awareness of public dis-

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because of his prior membership on the Richmond School Board, one of the petitioners, and on the Virginia State Board of Education, one of the defendants. Note, *Consolidation For Desegregation: The Unsolved Issue of the Inevitable Sequel*, 82 YALE L.J. 1681 (1973).

54. 412 U.S. 92 (1973).

55. See Note, *Consolidation For Desegregation: The Unsolved Issue of the Inevitable Sequel*, 82 YALE L.J. 1681, 1684 (1973). This authority deals with *Bradley v. School Bd.*, *supra* note 52, taking the position that it and the appellate court holding in *Milliken v. Bradley* are directly contradictory.

56. 94 S. Ct. at 3128.

57. *Id.*

58. *Id.* at 3126. The Court raised seven practical problems associated with the metropolitan plan: (1) What happens to popularly elected school boards? (2) What board or boards would levy taxes for school operations? (3) How would equality in tax levies be assured? (4) What provisions would be made for financing? (5) Would the validity of long term bonds be jeopardized? (6) Who would determine the curricula? and (7) Who would set up attendance zones, purchase equipment, locate and construct new schools, etc.?

59. No single tradition in public education is more deeply rooted than local control over the operation of schools . . . . [It] affords citizens an opportunity to participate in decision-making, [and] permits the structuring of school programs to fit local needs . . . .

*Id.* at 3125-26.

60. *Id.* at 3128. "Disparate treatment of White and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system."

61. *Id.* at 3126-27.

. . . absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first, a de facto "legislative authority" to resolve these complex questions, and then the "school superintendent" for the entire area. This is a task which few, if any, judges are qualified to perform . . . .

satisfaction with current desegregation policies.<sup>62</sup>

Although the Court did not categorically reject multi-district remedies as a cure for metropolitan segregation, the likelihood of such solutions being upheld has been greatly diminished. According to the Court, before separate school districts may be consolidated or a cross-district remedy imposed, it must first be shown that "there has been a constitutional violation within one district that produces a significant segregative effect in another district."<sup>63</sup> What constitutes "a significant segregative effect in another district" is unclear because the Court in *Milliken* chose not to decide that issue. What is clear, however, is that the state must act in a highly segregative manner before an inter-district remedy is permissible. One example the Court offered is the intentional drawing of school district lines on the basis of race.<sup>64</sup> Actions with lesser segregative impact (e.g. state construction policies and the legislative rescinding of Detroit's voluntary desegregation plan) are not sufficient to give rise to a multi-district remedy.<sup>65</sup> Despite the fact that the concentration of Negro school-aged children is very high in the large metropolitan cities<sup>66</sup> and is projected to go even higher,<sup>67</sup> desegregation remedies must be confined to the particular school district absent proof of the limited criteria set out above. Furthermore, it might be argued that based on *Keyes*, not only must a certain quantum of "segregative effect" be found, but an intent to segregate must also be shown. The Court expressly reaffirmed its position in *Swann* that desegregation in the sense of dismantling a dual school system does not require any particular racial balance in each school, grade, or classroom.

The four dissenting justices noted the practical effect of the Court's decision and argued that: (1) the State of Michigan through its constitution and laws has great control over local school districts and should be made to answer for de jure segregation policies; (2) it would be impossible for the Detroit School District to achieve an

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62. Though the Court does not denominate this as a factor in its decision, its presence is certainly apparent. See Annot., 16 A.L.R. FED. 950 (1973).

63. 94 S.Ct. at 3127.

64. 94 S.Ct. at 3128.

65. The Court reasoned that because the only impact of the state's segregative acts was on the Detroit School District, no cause for a multi-district remedy was shown. This rationale may cast doubt on the holding of *Keyes v. School District*, *supra* note 44, that proof of de jure segregation is one part of a school system raises prima facie the intent to segregate elsewhere in the system.

66. See Hauser, *Demographic Factors in the Integration of the Negro*, DAEDALUS, Fall 1965 at 847-77.

67. See James S. Coleman, *et al.*, EQUALITY OF EDUCATIONAL OPPORTUNITY 39-40 (1966).

equitable racial balance;<sup>68</sup> (3) the transportation costs would be greatly increased by a Detroit-only remedy; (4) a multi-district plan would more effectively prevent resegregation; (5) the reasoning used by the Court with respect to legislative reapportionment should apply with equal force to school desegregation<sup>69</sup> and should not be confined by political or administrative boundaries; and (6) the social, economic and political advantages of a desegregated school system will be denied to children within the Detroit School District because of the Court's decision.

The Court's decision turned upon a single vote. A new face on the Court could theoretically alter *Milliken's* result. Given the current judicial, social and political sentiment, however, a reversal of *Milliken* seems unlikely in the near future. Based in large part upon policy considerations, the net result of *Milliken v. Bradley* will be to shelter further suburbs from the inner cities' minority group population. Absent the intentional segregative redrawing of school district lines or the commission of unconstitutional acts having a significant segregative effect in another district, the Supreme Court has for all practical purposes laid to rest the remedy of interschool district consolidation for the achievement of metropolitan desegregation.<sup>70</sup> The Court's holding in *Swann* that the scope of the remedy is to be determined by the nature of the constitutional violation has been given a more restrictive interpretation.<sup>71</sup>

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68. 94 S.Ct. at 3137. Although the overall Detroit School District ratio was 63.6% Negro and 34.8% white, many schools under the Detroit-only desegregation plans would be 75% to 90% Negro.

69. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

70. See, e.g., *United States v. Board of School Comm'rs*, 474 F.2d 81 (7th Cir.), cert. denied, 413 U.S. 920 (1973); *Calhoun v. Cook*, 469 F.2d 1067 (5th Cir. 1972).

71. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).