Recent Cases

THE EIGHTEEN YEAR OLD VOTE CASE: THE POWER OF CONGRESS TO LEGISLATE UNDER THE FOURTEENTH AMENDMENT

Oregon v. Mitchell

I. Introduction

In a decision delivered December 21, 1970, the United States Supreme Court passed on the key provisions of the Voting Rights Act Amendments of 1970. The ruling consists of five separate opinions, none of which represents a majority of the Court. The report of the case runs to 185 pages in the United States Reports. This proliferation of opinions was probably due in part to the fact that a rapid judgment was required to avoid uncertainty in the results of various local elections scheduled for January, 1971.

A. The Holding

The Court passed on three separate provisions of the Act:

(1) Section 1973aa, which suspended the use of literacy tests to qualify voters for any state or national election until August 6, 1975, was upheld by a unanimous Court. Five Justices found congressional power to legislate in this area granted by section two of the fifteenth amendment. The remaining Justices relied on either the fourteenth amendment or the fourteenth and fifteenth amendments.

(2) Section 1973aa-1 of the Act "forbids States from disqualifying voters in national elections for presidential and vice-presidential electors because they have not met state residency requirements." This provision was approved by an 8-1 margin. Six members of the Court seemed to agree that this provision was within congressional power because it insured a citizen's "fundamental right" to unencumbered interstate travel.

(3) Sections 1973bb et seq. of the Act sought to reduce the voting age to eighteen in all federal, state and local elections. It was the judgment of the Court that this provision was valid as applied to federal elections but was outside the constitutional power of Congress as applied to state and local elections. Only Justice Black would have reached this judgment independently. Four members of the Court thought Congress was wholly

3. Opinions were written by Justices Black, Douglas, Harlan, Stewart (joined by Chief Justice Burger and Justice Blackmun), and Brennan (joined by Justices Marshall and White).
4. The opinions of Justices Stewart, Black and Harlan embrace this position.
6. The opinions of Justices Stewart and Brennan discuss the issue in these terms.

(514)
without power to alter the minimum voting age by simple legislation; four would have allowed Congress to legislatively determine the voting age for both local and federal elections.8

B. Was the Holding Significant?

The judgment of the Court regarding the eighteen-year-old voting provision of the Act is, of course, no longer the law. On June 30, 1971, the twenty-sixth amendment to the United States Constitution became law, and citizens between the ages of eighteen and twenty-one now will have the right to vote in all elections. Yet, despite this fact, and despite the confusing array of opinions delivered, Oregon v. Mitchell will continue to be a significant decision because of what it has to say about Congress' power to legislate under the fourteenth amendment.

Section five of the fourteenth amendment grants Congress the "power to enforce" its broad substantive provisions "by appropriate legislation." Section two of the thirteenth amendment, as well as section two of fifteenth amendment, uses similar language. Not until the last several decades, however, has Congress or the courts seriously treated these provisions as sources of substantial legislative power. In recent times, the Court has appeared more and more willing to find congressional legislative power in these "Civil War Amendments." Katzenbach v. Morgan,9 decided in 1966, was thought by many to give Congress new, even broader powers in this regard. In fact, it was the language in Morgan which lead Congress to believe that the voting age could be lowered to eighteen in all elections by simple legislation.10 As has already been seen, the Court in Oregon v. Mitchell found that Congress lacked the power to change the minimum voting age in state and local elections.11 The following discussion will attempt to assess the impact of this decision upon the controversial and widely discussed doctrines announced by the Court in Morgan. It is therefore necessary to examine the Morgan decision in some detail.

II. Katzenbach v. Morgan

The statute under examination in Katzenbach v. Morgan was a portion of the Voting Rights Act of 196512 aimed primarily at certain New York statutes. The Act provides "that no person who has successfully com-

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7. Chief Justice Burger and Justices Harlan, Stewart, and Blackmun.
11. This was arguably the first time since the commerce clause cases of the 1930's that the Court had found Congress lacking in power to legislate. It should be noted that there has been a line of recent cases dealing with the constitutionality of legislation establishing court-martial jurisdiction in which it is unclear whether the controlling decisional basis is a lack of congressional power or the application of a specific constitutional limitation. See O'Callahan v. Parker, 395 U.S. 258 (1969); McElroy v. United States ex rel. Guagliardi, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States ex rel. Singleton, 361 U.S. 284 (1960); Reid v. Covert, 354 U.S. 1 (1957); United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).
pleted the six primary grades in [an accredited Puerto Rican school] in
which the language of instruction was other than English shall be denied
the right to vote in any election because of his inability to read or write
English. 13 A seven-man majority 14 held that this statute was "a proper
exercise of the powers granted to Congress by [section five] of the Four-
teenth Amendment" 15 and, therefore, overrode the New York statute. The
Court's reasoning was not altogether clear. Most writers identify two
analytically distinct rationales, and it is difficult to determine whether the
opinion stands on one or the other or both of these. 16 However, it is very
important that these rationales be carefully identified and distinguished.

A. The First Morgan Rationale

Under the first Morgan rationale the Court viewed the legislation as
essentially remedial in nature. The statute in question was viewed by the
Court "as a measure to secure for the Puerto Rican community residing
in New York non-discriminatory treatment by government—both in the
imposition of voting qualifications and the provision or administration of
governmental services." 17 Discriminatory treatment by governmental agen-
cies has always been judicially construed to be prohibited by the equal
protection clause. Therefore, Congress was said to have the power to remedy
this discriminatory situation by legislation. By using this rationale the
Court could neatly uphold the legislation without being forced to recon-
sider prior cases which held that literacy tests, in and of themselves, do
not violate fourteenth amendment protections. 18 In fact, in Cardona v.
Power, 19 a companion case to Morgan, the same New York literacy statute
was challenged directly on the grounds that it violated the equal protec-
tion clause. Only two Justices were willing to so find.

To restate the first Morgan rationale: Congress may legislate to bar
state activity A, if the Court finds that barring activity A is an appropriate
means to stop or prevent activity B (activity B having been judicially con-
strued to be a violation of the equal protection clause). This is true not-
withstanding the fact that the Court might not be willing to hold that
activity A, in and of itself, violates equal protection.

What standard does the Court use to determine if a particular con-
gressional act is an appropriate means for reaching activity prohibited by
the equal protection clause? The standard seems highly permissive. Pro-
fessor Cox points out that [c]onclusory but qualifying phrases like 'rea-

14. Justice Brennan delivered the opinion of the Court, joined by Chief
Justice Warren and Justices Black, Douglas, Clark, White, and Fortas.
Miranda and Title II: A Morganatic Marriage, 1969 Sup. Ct. Rev. 81, 101-118;
Cox, Constitutional Adjudication and the Promotion of Human Rights, 80 Harv.
L. Rev. 91, 103-08 (1966); Engdahl, supra note 10, at 8-15; Comment, Power to
Abolish the States, 55 Calif. L. Rev. 293, 308-09 (1967).
United States, 238 U.S. 347 (1915).
sonable relation’ and ‘rational’ are notably absent from the opinion.”

In Morgan the Court stated quite simply:

It is not for us to review the congressional resolution of [the] factors [to be weighed in determining if this is a proper means for insuring fourteenth amendment protections.] It is enough that we be able to perceive a basis upon which Congress might resolve the conflict as it did.

Even this language is misleading. It purports to refer and defer to a determination of fact and a balancing of conflicting interests by Congress, resulting in a finding that the provisions of this statute would reach some specified invidious discrimination. In fact, it is highly conjectural that Congress ever made such a finding. Rather it seems to be “read-in” by the Court. While the propriety of such a permissive test has been questioned, the approach is not unique. The same approach, perhaps with a few more qualifying words, has been applied to support congressional legislation under sections two of the thirteenth and fifteenth amendments. Also, a strong parallel is apparent in the operation of the commerce clause in conjunction with the necessary and proper clause to reach local activity which in some manner influences interstate commerce.

B. The Second Morgan Rationale

It would appear that the first Morgan rationale is sufficient to answer any challenge of Congress’ power to legislatively abolish New York’s English literacy requirement. The Morgan Court, however, appeared to announce a second, seemingly alternative rationale, when it stated:

[W]e perceive a basis upon which Congress might predicate a judgment that the application of New York’s English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools . . . constituted an invidious discrimination in violation of the Equal Protection Clause.

In short, the Court appeared to say that to deny the vote to New York’s non-English speaking Puerto Rican community is itself a violation of the equal protection clause. Being so characterized, there is no question that it was a proper subject for attack by congressional legislation.

However, the crucial question is: Who determined that this particular activity was in violation of the fourteenth amendment? The opinion is not

22. Id. at 669 (dissent of Harlan, J.).
23. See Bickel, supra note 16, at 98-100. “[S]uppose Congress decided that aliens or eighteen-year-olds . . . are being discriminated against in New York.” Id. at 100. But see Burt, supra note 16, at 102; Cox, supra note 16, at 104-05; Engdahl, supra note 10, at 12 n.58.
altogether clear, but the majority language strongly suggests that Congress initially made this determination.29 Furthermore, the opinion suggests that the Court is bound to accept this determination as long as it can perceive a basis upon which such a determination could be made. As Professor Burt has put it:

The central premise . . . is that Congress had authority to define the substance of equal protection and that the courts will defer to a congressional judgment even if it is not persuaded that, acting independently, the court should have come to the same result.30

As is no doubt apparent, when taken at face value the second Morgan rationale is almost revolutionary. Not surprisingly, it has been subject to much questioning and criticism.31 It is said that this logic undercuts the principle, first announced in Marbury v. Madison32 of judicial supremacy in the interpretation of the Constitution.33 It has even been suggested that, taken to its logical extreme, this rationale would permit Congress to "interpret with finality (so long as it has "some basis") the meaning of every constitutional power conferred upon itself or any branch of the federal government."34 It should immediately be noted, however, that as broad as the congressional power to legislate under the fourteenth amendment seemed to be after Morgan, it was not without limits. Both rationales required that the Court be able to "perceive a basis" for the congressional action. This, however, is not much of a standard, and it is difficult to see what it might preclude. Another limitation of a more substantial nature is set out in footnote 10 of Mr. Justice Brennan's opinion. The footnote answers a charge

29. It should be remembered that in a companion case to Morgan, Cardona v. Power, 384 U.S. 672 (1966), the Court specifically declined to make such a finding.
31. See Bickel, supra note 16, at 97-98; Engdahl, supra note 10, at 15-25.
32. 5 U.S. (1 Cranch) 137 (1809).
33. The Morgan Court gave several reasons for abdicating to Congress the power to determine the scope of the fourteenth amendment:
   (1) Historically the drafters of the amendment intended to augment the power of Congress. Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966). See Brennan, Landmarks of Legal Liberty, in The Fourteenth Amendment 1 (B. Schwartz ed. 1970). However, this argument has been criticized. See Bickel, supra note 16, at 97; Burt, supra note 16, at 84-100; Engdahl, supra note 10, at 15-25.
   (2) The Court is willing to defer to Congress' judgment since Congress has a greater ability to resolve the essentially factual issue of whether a specific activity is injurious to fourteenth amendment rights. Katzenbach v. Morgan, supra at 652. See Cox, supra note 16, at 107. This rationale has also been criticized. See Burt, supra note 16, at 105-10.
   (3) Professor Burt suggests a third rationale is implicit in the decision. He argues that:
   Congress can make distinctions among classes that the Court itself would be hard put to explain on principled grounds both because Congress is more sensitively tuned to the competing social interests that demand accommodation and because the institutional legitimacy of a legislative act depends not so much on the rational persuasiveness of its decisions as on the simple fact that a majority of "responsible" elected officials were willing to vote for the proposition. Burt, supra note 16, at 113-14.
34. Engdahl, supra note 10, at 21.
by the dissent that the majority holding would allow Congress to enact
"statutes so as in effect to dilute equal protection and due process decisions of this Court:"

We emphasize that Congress' power under [section five] is limited
to adopting measures to enforce the guarantees of the Amendment;
[section five] grants . . . no power to restrict, abrogate, or dilute
these guarantees as judicially construed.

Yet even with these limitations and with the added qualification that in
the above exposition of the case overanalysis may have led to overstatement,
the Morgan opinion must be read as a recognition of an extremely broad
congressional power to legislate under the fourteenth amendment.

III. THE IMPACT OF THE EIGHTEEN YEAR OLD VOTE
CASE ON THE MORGAN RATIONALE

A. Placing the Eighteen Year Old Vote in Perspective

At this point the reader may well be wondering: (1) Is there really
a significant logical difference between the first and second Morgan
rationale, and, (2) if so, does this distinction have any practical im-
portance?

Congress' attempt to lower the minimum voting age to eighteen pro-
vides an excellent vehicle to demonstrate the logical difference between the
first and second Morgan rationale. First, it seems fairly safe to assume the
courts would be disinclined to find that denying citizens between eighteen and
and twenty-one the right to vote in and of itself constitutes a violation of the
fourteenth amendment. Therefore, the question becomes whether either
one of the Morgan rationales will provide a basis for legislative power.

It is difficult to imagine that there is any activity that violates the equal
protection rights of the class of citizens between eighteen and twenty-one—at
least any activity which would be remedied by giving these citizens the
right to vote. Hence, the first Morgan rationale is probably inapplicable.
The second Morgan rationale may well apply, however, as long as Congress
is willing to make a fact finding that denying the right to vote to citizens

86. Id. at 651 n.10. See also Brennan, supra note 35, at 3. Professor Engdahl
argues that the "footnote 10 limitation" indicates that the Court really never
understood its own rationale. Engdahl, supra note 10, at 22. Professor Burt notes
that this limitation undercuts the reasoning he perceives for the decision. See
note 35 supra, ¶13; Burt, supra note 16, at 119-22.
87. Professor Burt identifies a third limitation. He argues that in the area of
"fundamental rights—which are not as such constitutional rights"—the Court
reserves the right to overturn legislation which it considers a "restriction of existing
concludes that:
[The Morgan opinion appears a tour de force. To regulate activities the
Court wishes to reach . . ., but cannot itself justify regulating, the Court
has enlisted congressional assistance. But the Court will set the basic
terms. Congress can only fill in the blanks. Id. at 118.
38. Professor Engdahl has argued, however, that such legislation is sus-
tainable under the first Morgan rationale. Engdahl, supra note 10, at 25-41.
between eighteen and twenty-one constitutes a violation of their right to equal protection of the law.

As a matter of fact those sections of the Voting Rights Act Amendment of 1970 which attempted to lower the voting age to eighteen in all elections demonstrated a conscious, calculated attempt to invoke congressional power under the second Morgan rationale.\(^{39}\) The Act made a specific finding that denial of the vote to citizens between eighteen and twenty-one years of age was a violation of due process and equal protection provided by the fourteenth amendment.\(^{40}\) This attempt to legislate under the fourteenth amendment failed. Five members of the Court found that, in this area, the fourteenth amendment was no source of congressional power.\(^{41}\) One of the five, Justice Black, found congressional power to set the voting age for federal elections elsewhere in the constitution,\(^ {42}\) but no other member of the Court agreed. With Justice Black acting as the "swing man," the Court announced the unusual ruling that the statute was valid for federal elections but \textit{ultra vires} for state elections.

\section*{B. The Second Morgan Rationale Revisited}

Clearly then, Congress’ attempt to use the second Morgan rationale to establish its power to set a minimum voting age failed, having been rejected by a majority of the Court. What is the status of the second Morgan rationale today? To declare it overruled would be premature; however, it is clear there has been a decided shift in the weight of opinion on the Court as to congressional power to legislate under the fourteenth amendment. Three of the seven Justices who signed the Morgan majority had retired

\begin{itemize}
\item \textit{See} Engdahl, \textit{supra} note 10, at 1-4 \textit{(for a history of the Act).}
\begin{itemize}
\item (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—
\begin{itemize}
\item (1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed on such citizens;
\item (2) has the effect of denying to [these] citizens \ldots the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment \ldots; and
\item (3) does not bear a reasonable relationship to any compelling State interest.
\end{itemize}
\item (b) In order to secure the constitutional rights set forth in subsection (a) \ldots, the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.
\end{itemize}
\item 41. Chief Justice Burger and Justices Black, Harlan, Stewart, and Blackmun.
\item 42. The power found by Justice Black was in U.S. Const. art. I, § 4, which reads:
\begin{quote}
\textit{The Time, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.} \ldots
\end{quote}
\end{itemize}

by the time *Oregon v. Mitchell* was decided. And another, Justice Black, apparently no longer subscribed to the *Morgan* majority's opinion. At any rate he too has now retired.

As a starting point in analyzing the Court's decision on the eighteen year old vote issue, it must be remembered that Congress was clearly attempting to invoke the second *Morgan* rationale. It was thought that after *Morgan*, Congress had the power to make an independent determination, binding on the judiciary, that a certain state activity violated fourteenth amendment equal protection. In *Oregon v. Mitchell*, a majority of the Court was unwilling to abdicate its traditional judicial function of determining the ambit of equal protection. Unwilling to be bound by the congressional finding, five members of the Court independently examined the question of whether a state-established minimum voting age is a proper area for equal protection scrutiny, and decided it was not. An analysis of why the ambit of the equal protection clause does not extend to this type of voter qualifications is beyond the scope of this note. The point is that a majority of the Court, by making the determination that this particular type of state activity is not a proper subject of equal protection scrutiny, served notice that they rejected the second *Morgan* rationale. Even those four Justices who would have upheld the legislation in its entirety discourse at length about the ambit of equal protection rights before, presumably, deferring to the congressional determination.

How was a majority of the Court able to avoid the apparent holding in *Morgan*? Justice Harlan simply believes *Morgan* a bad precedent which should be overruled. Justice Stewart's opinion states that *Morgan* never established such unusual congressional power. He states that, "assuming" *Morgan* was "rightly decided," it only says:

> [T]hat Congress could conclude that enhancing the political power of the Puerto Rican community by conferring the right to vote was an appropriate means of remedying discriminatory treatment in public services; and that Congress could conclude that the New York statute was tainted by the impermissible purpose of denying the right to vote to Puerto Ricans, an undoubted invidious discrimination. . . . The Court's opinion made clear that Congress could impose on the states a remedy . . . which elaborated on the direct command of the Constitution, and that it could override state laws on the ground they were in fact used as instruments of invidious discrimination, even though a court in an individual lawsuit might not have reached that factual conclusion.

Justice Black characterizes *Morgan* as a case essentially concerned with congressional remedy of racial discrimination, an area where Congress' "au-

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43. Chief Justice Warren, and Justices Clark and Fortas.
45. *Id.* at 293 (opinion of Stewart, J.).
46. *Id.* at 295-96 (emphasis added).
thority is enhanced.”48 He expresses concern that if Congress is allowed free reign to legislate under the equal protection clause, the states will cease to have any independent power at all.49

It is fairly clear that Justices Brennan and Douglas would follow the second Morgan rationale. But Justice Brennan is careful to point out that under the eighteen year old vote statute

[w]e are not faced with an assertion of congressional power to regulate any and all aspects of state and federal elections. . . [n]or . . . the assertion that Congress has plenary power to set minimum ages for voting throughout the States.50

Justice Brennan also makes clear that he might well find a state statute setting the voting age at twenty-one an equal protection violation on a purely judicial challenge.51 He and Justice Douglas proclaim the fourteenth amendment “applies on its face to all assertion of state power, however made.”52 They find the congressional conclusion that the present state laws serve no substantial state interest as a reasonable finding of fact.

IV. CONCLUSION

Where does the Supreme Court’s decision in Oregon v. Mitchell leave us? First, it must be concluded that the validity of the second Morgan rationale, which would have permitted Congress to define the ambit of equal protection, is too uncertain to rely on—at least for the time being. Four Justices clearly rejected it. Of those four, Justice Harlan has recently retired. Four fairly clearly accepted it. Justice Black, if not wholly rejecting it, severely limited its effectiveness.53 Since Justices Black and Harlan left the bench it is impossible to predict what the future vitality of the second Morgan rationale will be. At the present we know with some certainty that four Justices are favorably disposed towards the second Morgan rationale and three do not accept it. The ultimate fate of the second Morgan rationale will probably be very uncertain for some time. On the other hand,
the first Morgan rationale is clearly acceptable to a majority of the Court. (Both Justices Black and Stewart distinguished Morgan from the instant case on grounds that Morgan only stood for the first rationale.54) Congress will continue to have the power to legislate to remedy situations which violate the fourteenth amendment as judicially construed. As has been seen, this first Morgan rationale was conceptually the sturdier of the two and was supported by substantial precedent. In the future, when Congress attempts to legislate under the fourteenth amendment and the other Civil War amendments, it would be prudent to attempt to remain within the ambit of the first Morgan rationale.

PETER C. BAGGERMAN

PRETRIAL CONFRONTATIONS BETWEEN WITNESS
AND ACCUSED

State v. Walters1

In 1967 the Supreme Court, in United States v. Wade2 and Gilbert v. California,3 held that an individual is constitutionally entitled to be represented by counsel4 at all "critical stages" of a criminal proceeding against him. A post-indictment lineup was held to be such a "critical stage."5 In establishing this new right-to-counsel ruling, however, the court left several questions unanswered. For example, it is not clear whether the ruling was limited only to lineups occurring after indictment, or applied to any lineup whether before or after indictment. Similarly, it is not clear whether it covered all pretrial confrontations between the witness and the accused or was limited only to confrontations occurring after indictment.

In State v. Walters6 the Missouri Supreme Court interpreted Wade and Gilbert as applying only to post-indictment lineup situations.7 Defendant Walters had been convicted of assault with intent to rape. Walters asserted on appeal that a lineup which was conducted 20 days after the crime, but before information or indictment, at which the victim identified him as her

54. See text accompanying notes 45 and 46 supra.
1. 457 S.W.2d 817 (Mo. 1970).
4. As used in this note, right to counsel includes providing a criminal suspect with the opportunity to have counsel of his choice present or, if the suspect is unable to afford counsel, having counsel appointed to represent him. But see State v. Lacoste, 256 La. 697, 237 So. 2d 871 (1970), which held that the presence of an assistant district attorney for the purpose of advising persons in a lineup of their rights served as substitute counsel and prevented the defendant from being deprived of his constitutional rights.
6. 457 S.W.2d 817 (Mo. 1970).
7. Id. at 819.
assailant, violated his constitutional right to have counsel present at a pretrial lineup. The court held that *Wade* and *Gilbert* apply only to post-indictment lineups and that Walter's right to counsel was not violated because the allegedly illegal lineup occurred before information or indictment. The court also held that the lineup was not conducted in a manner that was likely to result in a mistaken identification and that Walters, therefore, had not been denied due process of law.

One of the questions left unanswered in *Wade* and *Gilbert* was the extent to which the holdings in those cases, both of which involved post-indictment lineups, apply to other pretrial confrontations between witness and accused. For example, one type of case in which *Wade* and *Gilbert* are frequently discussed involves confrontations between witness and accused which take place before indictment and within minutes after the crime. In this factual situation some courts have found these confrontations to be a critical stage of the prosecution and have held that the suspects were entitled to representation by counsel. Other cases have found that the need for immediate identification is necessary for effective law enforcement and have held that *Wade* and *Gilbert* do not apply to the factual situation involved. A second type of case in which *Wade* and *Gilbert* are frequently discussed involves factual situations similar to Walters where the confrontation takes place before indictment but not until a period of hours or days has lapsed since the crime was committed. Most

8. Id.
9. Id. Defendant Walters assigned two points as error. The first was that he was denied due process of law because the lineup had been conducted in a manner that was likely to result in mistaken identification. Here, the court held that the police had not been unduly suggestive and that the witness had sufficient independent basis for her identification of defendant Walters. The second point was that he was denied the right to counsel at a pretrial lineup in violation of the sixth amendment. This note is concerned only with this alleged violation of the sixth amendment.


courts, in this factual situation, have found these confrontations to be a critical stage of the prosecution and have held that the suspects were entitled to representation by counsel; however, a few courts, as the court did in Walters, have held that Wade and Gilbert apply only to post-indictment situations and that there is no right to counsel at any pre-indictment confrontation between witness and accused.

Courts which have applied Wade and Gilbert to pre-indictment confrontations have followed a number of distinct paths of reasoning. First, the language of Wade and Gilbert has been said to imply an intention to require counsel at other than post-indictment confrontations. Second, there is nothing in the language of Wade or Gilbert which requires limiting the right to counsel to post-indictment lineups, and pre-indictment lineups are as fraught with danger of misidentification as post-indictment lineups. Third, the Supreme Court has attached the right to counsel to other pre-indictment situations, thereby indicating an intent to apply the rule to any pretrial confrontations between witness and accused. Fourth, in his dissent in Wade, Justice White, with Justices Harlan and Stewart concurring, stated that the Wade rule should apply to any lineup regardless of whether it occurs before or after indictment or information. Fifth, Justice Douglas, dissenting in Biggers v. Tennessee, stated that Wade and Gilbert would clearly apply to that pre-indictment confrontation were it not for the prospective ruling of those cases. Sixth, Stovall v. Denno, a case


19. See Escobedo v. Illinois, 378 U.S. 478 (1964), holding that a suspect is entitled to presence of counsel at a police interrogation once police investigation has begun to focus on a particular suspect; and Miranda v. Arizona, 384 U.S. 436 (1966), involving the right to counsel at a custodial police interrogation.


21. United States v. Wade, 388 U.S. 218, 250 (1967) (dissenting opinion). The following courts have used as a reason for adopting a post-indictment rule, the fact that Justices White, Harlan and Stewart stated that the Wade rule should apply to any lineup regardless of whether it occurs before or after indictment or information: Rivers v. United States, 400 F.2d 935, 939 (5th Cir. 1968); United States v. Wilson, 283 F. Supp. 914, 915 (D.D.C. 1968); People v. Fowler, 1 Cal. 3d 335, 343, 461 P.2d 643, 649, 82 Cal. Rptr. 363, 369 (1969).


23. Id. at 406 (dissenting opinion). Justice Douglas's views in Biggers were given as one reason for adopting a post-indictment rule in Rivers v. United States, 400 F.2d 935, 940 (5th Cir. 1968).

decided the same day as *Wade* and *Gilbert* which limited those cases to prospective application, implies that *Wade* and *Gilbert* would apply to the facts in *Stovall* (pre-indictment confrontation), were it not for the fact that the confrontation occurred before the effective date of *Wade* and *Gilbert*.25 Seventh, the police can easily circumvent a post-indictment rule by conducting all lineups before indictment.26 Finally, a suspect is less likely to be alert to the need for safeguards when he has not been formally charged.27

The courts which have chosen to limit *Wade* and *Gilbert* to post-indictment lineups have not been able to formulate as many reasons for their rulings as have the courts which have chosen to apply *Wade* and *Gilbert* to pre-indictment confrontations. The *Walters* court relied in part on the fact that a number of other states have expressly limited *Wade* and *Gilbert* to post-indictment lineup situations,28 and in part on the concurring opinion in *Hays v. State*,29 a Wisconsin case, which stated that the requirement of counsel at early stages in the prosecution would create formidable problems of appointing and arranging for the presence of that counsel.30 Other courts have chosen to limit *Wade* and *Gilbert* to their facts by adopting a narrow interpretation of the Court's language.31 As stated earlier, many of the cases where courts have chosen not to apply *Wade* and *Gilbert* involve confrontations within minutes after the crime; in those cases the courts, instead of adopting a post-indictment ruling, have merely held *Wade* and *Gilbert* do not apply to the factual situations involved.32

One point of controversy among the courts limiting *Wade* and *Gilbert* to post-indictment confrontations and the courts which have chosen not to limit *Wade* and *Gilbert* to post-indictment confrontations centers on the interpretation of the language in the majority opinion in *Wade*. One passage of the *Wade* opinion reads as follows:

25. *Id.* at 298-99. The following cases have used the implication of *Stovall* as a reason for adopting a post-indictment rule: *Rivers v. United States*, 400 F.2d 935, 940 (5th Cir. 1968); *People v. Fowler*, 1 Cal. 3d 335, 343-44, 461 P.2d 643, 650, 82 Cal. Rptr. 363, 370 (1969); *In re Holley*, 268 A.2d 723, 726 (R.I. 1970).


28. 457 S.W.2d at 819.

29. 46 Wis. 2d 93, 175 N.W.2d 625 (1970).

30. *Id.* at 109, 175 N.W.2d at 633 (concurring opinion).

31. *People v. Palmer*, 41 Ill. 2d 571, 244 N.E.2d 173 (1969). Apparently the courts which have chosen to limit *Wade* and *Gilbert* to post-indictment lineups are not alone in their belief that those cases should be so limited. See *S. REP. No. 1097, 90th Cong., 2d Sess.* 63 (1968), where the Committee on the Omnibus Crime Control and Safe Streets Act of 1968 stated:

The use of eyewitness testimony in the trial of criminal cases is an essential prosecutorial tool. The recent case of *United States v. Wade* . . . struck a harmful blow at the nationwide effort to control crime. . . . To counter this harmful effect, the committee adopted that portion of title II providing that eyewitness testimony is admissible in criminal prosecutions brought in the Federal courts and that portion of title II that denies the Federal courts the power to review the final State court and Federal trial court decisions declaring eyewitness testimony to be admissible.

32. See cases cited note 13 *supra*.
Here can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid [of counsel] . . . as at the trial itself." 33

This passage has been interpreted to imply an intention by the Supreme Court to limit Wade to post-indictment lineups. However, this intention is not as clear when the Wade opinion is taken as a whole, and jurisdictions adopting a pre-indictment rule have found an implication in Wade and Gilbert indicating that the right to counsel exists at pre-indictment confrontations. 34 Justice Brennan, in the majority opinion in Wade, stated:

When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well determine the accused's fate and reduce the trial to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. 36

The opinion then provided a brief summary of how the right to counsel has been expanded to various stages of the proceedings and then concluded:

In sum, the principle of Powell v. Alabama and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice. 38

At least four Justices on the Court felt that the language of the majority opinion was intended to apply to pre-indictment confrontations. 39 A reasonable interpretation of the above quoted passages would support the con-

36. Id. at 227.
37. See text accompanying notes 21-23 supra.
clusion that the Court intended to apply the "critical stage" test to all pretrial confrontations. Many courts have adopted this interpretation. 38

Although it is possible to draw an inference from Wade and Gilbert indicating that the holdings in those cases should be limited to post-indictment lineups, it is also possible to draw a much stronger inference that the Court intended its right to counsel ruling to apply to all pretrial confrontations that meet the "critical stage" test. Notwithstanding the sound reasons for not applying Wade and Gilbert to on-the-scene identifications, the reasons favoring adoption of a post-indictment rule in all situations appear outweighed by the arguments in favor of adopting a pre-indictment rule. Put another way, perhaps Wade and Gilbert should not be applied to all pretrial confrontations; however, they should not be arbitrarily limited to post-indictment confrontations. Furthermore, most of the cases which do not apply Wade and Gilbert to confrontations between witness and accused involve on-the-scene identifications within a relatively short time after the crime. Walters, with its time lapse of 20 days, is the exception rather than the rule, and the case loses the benefit of the argument made in the on-the-scene identification cases that effective police work requires immediate action. Finally, the post-indictment rule of Walters is a poor result in that (1) it places administrative problems over the need to provide a criminal suspect with the formal safeguard of representation by counsel at a pre-indictment confrontation, and (2) a post-indictment ruling is contrary to the better interpretation of Wade and Gilbert and contrary to the view taken by the only four Supreme Court Justices who have spoken on the subject. Since there is a split of authority both in state and federal courts as to the scope and application of Wade and Gilbert, Missouri law enforcement officials should be warned that Walters may not be the final word on the constitutional right to be represented by counsel at pre-indictment confrontations in Missouri.

DONALD G. CHEEVER

STUDENTS’ RIGHT TO CHOICE OF PERSONAL APPEARANCE IN THE PUBLIC SCHOOLS

_Bishop v. Colaw_1

This case, like many in recent years, involved the suspension of a student from a public high school because of the length of his hair. The student and his parents sought an injunction against application of the high school dress code and damages for his suspension. The dress code involved was revised as of December 23, 1969, upon recommendation of the student council; it had been approved by a parents’ committee and faculty supervisory committee, and adopted by a majority vote of the faculty.2 On February 27, 1970, the Principal informed the 15 year-old plaintiff, Stephen Bishop, that he would be suspended if he failed to comply with the code. When he did not comply, he was suspended and his parents were notified of the necessity for compliance. On March 12th the Superintendent of Schools extended the suspension to the end of the semester.

On March 10, 1970, suit was filed in the United States District Court for the Eastern District of Missouri against the Superintendent, the Principal, the Board of Education, and the School District of St. Charles, Missouri, seeking injunctive relief and damages under 42 U.S.C. section 1983.3 Jurisdiction was claimed under 28 U.S.C. section 1343 (3).4 The petition alleged that the suspension had violated the rights of the plaintiff under the first, fourth, ninth, and fourteenth amendments to the United States Constitution. Relief was denied on a finding that the regulation was reasonable and not “such an invasion of privacy that requires protection by the United States courts.”5

There was no claim that the regulation or suspension was unauthorized by state law.6 The court found no evidence to support a claim

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2. The applicable provision in the dress code reads as follows:
   All hair is to be worn clean, neatly trimmed around the ears and back of the neck, and no longer than the top of the collar on a regular dress or sport shirt when standing erect. The eyebrows must be visible, and no part of the ear can be covered. The hair can be in a block cut. _Id._ at 447.
   Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.
   The district courts shall have original jurisdiction of any civil action . . .
5. 5 to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . .
6. Section 171.011, RSMo 1969, authorizes school boards to “make all needful rules and regulations for the organization, grading and government in the school
that this case fell within the first amendment symbolic-speech doctrine enunciated in Tinker v. Des Moines School District.\textsuperscript{7} Likewise, no religious belief was involved. Since no violation of procedural due process nor any evidence of unfair enforcement of the regulations was found, the court considered the two basic issues: (1) whether or not an individual has a right to wear his hair in the manner he prefers (apart from any right arising out of the first amendment); and (2) if such a right exists, what sort of justification is required before a limitation of that right is proper.

The court found that a constitutional right to privacy was involved but that it was permissible for school officials to adopt reasonable regulations in this area with which, in the absence of a compelling reason, a court will not interfere.\textsuperscript{8} From the testimony the court found problems of discipline (long-haired students tended to congregate and stay to themselves, were rowdy and belligerent, failed to observe lunchroom rules, were inattentive in class, and made poorer grades), safety (in shop and wrestling classes), and cleanliness (in the swimming pool and with driver’s training helmets) which provided a reasonable basis for the regulations to which plaintiff objected.\textsuperscript{9}

In cases brought under section 1983, plaintiffs must show they have been subjected to “the deprivation of . . . rights, privileges or immunities secured by the Constitution . . . .”\textsuperscript{10} Where the issue is violation of procedural due process, discriminatory application of the law, or deprivation of the right to free speech the case will proceed in accordance with established precedents for those respective areas of law. However, the issue is much more difficult to resolve when the long-haired plaintiff’s claim relies solely on the theory that a student has a constitutionally protected right of personal appearance with which a school may not interfere.

No one would question that the adoption of regulations by a school board or a principal constitutes “state action” for section 1983 purposes.\textsuperscript{11} A school system, however, functions in loco parentis in regulating its students,\textsuperscript{12} and courts are reluctant to interfere with the relationship between students and school administrators unless conflicts arise which “directly and sharply implicate basic constitutional values.”\textsuperscript{13} Courts will not review the wisdom of a regulation,\textsuperscript{14} and school officials are given wide discretion

\textsuperscript{7} 393 U.S. 505 (1969).
\textsuperscript{8} 316 F. Supp. at 448-49.
\textsuperscript{9} Id.
\textsuperscript{12} Id. at 710.
in drawing them, bound only by the requirement that the regulation be reasonable.\textsuperscript{15}

On the other hand, students do not leave fundamental rights at the schoolhouse gate,\textsuperscript{16} and a state does not have the right to refuse educational opportunities on an arbitrary basis or by the imposition of unreasonable conditions.\textsuperscript{17} The power of the school and the right of the student represent two basic interests that come into conflict when the parents disagree with the school officials as to what is best for the child. In such situations the school must, according to the seventh circuit case of \textit{Breen v. Kahl},\textsuperscript{18} share its power \textit{in loco parentis} with the actual parents, "especially over intimately personal matters such as dress and grooming."\textsuperscript{19}

The question thus becomes: How is the conflict between the two interests, the power of the schools and the rights of students, to be weighed—and hopefully resolved? The courts have tended to use one of three basic approaches: (1) the traditional or economic equal protection analysis, (2) a "fundamental right or interest" equal protection analysis, or (3) a substantive due process analysis. (These approaches frequently involve in addition a determination of the source and nature of the student's right.)

Those courts which have applied the traditional equal protection analysis uphold the regulation unless the opponent of the regulation can carry the burden of showing that it is purely arbitrary, \textit{i.e.}, without any reasonable basis. Any set of facts, reasonably conceivable, that will sustain the rule will be assumed; the lack of mathematical precision in its effect will not defeat the regulation.\textsuperscript{20} The court in \textit{Bishop} was apparently adopting this approach when it said the school has a right to "adopt reasonable regulations [without court] interference in the absence of a compelling reason . . . ."\textsuperscript{21} When a court uses the traditional equal protection approach the cases indicate that the school district will usually prevail;\textsuperscript{22} in some cases, however, the courts have found hair regulations to be unreasonable and arbitrary.\textsuperscript{23} Other courts have placed the burden of showing a rational


\textsuperscript{18} 419 F.2d 1084 (7th Cir. 1969), \textit{cert. denied}, 398 U.S. 937 (1970).

\textsuperscript{19} \textit{Id.} at 1037.


\textsuperscript{21} 316 F. Supp. at 449.


basis upon the school before they will sustain regulation of personal appearance, but these courts have not required a demonstration of a compelling state interest.\(^{24}\)

Some courts presented with a case of this type have found or assumed that a fundamental right is involved, and thus have applied a "fundamental right or interest" equal protection analysis. These courts require a showing of a "compelling state interest," or at least the meeting of a "substantial burden of justification" by the school authorities before they will sustain the contested regulation.\(^{25}\)

Other courts choose to follow a substantive due process analysis.\(^{26}\) They approach the issue by inquiring whether there is a constitutional right of free choice of appearance immune from state governmental infringement under the fourteenth amendment.\(^{27}\) Courts which utilize either the "fundamental right or interest" equal protection analysis or the substantive due process approach must first decide if there is a constitutionally protected right of personal appearance. When courts find such a right, they have not always been clear as to the basis of their finding.

Long-haired plaintiffs have frequently relied upon Justice Douglas' majority opinion in \textit{Griswold v. Connecticut,}\(^{28}\) and the concurring opinion in that case by Justice Goldberg.\(^{29}\) Justice Douglas, in examining the question of marital privacy, found a zone of privacy created in the penumbra of the specific provisions of the Bill of Rights.\(^{30}\) Justice Goldberg relied upon the ninth amendment to find that fundamental rights, other than


\(^{28}\) 381 U.S. 479 (1965).

\(^{29}\) \textit{Id.} at 486-99.

\(^{30}\) \textit{Id.} at 484. See also Ferrell v. Dallas Ind. School Dist., 393 U.S. 856 (1968) (Douglas, J., dissenting to denial of certiorari).
those enumerated in the first eight amendments, were protected from infringement.\textsuperscript{31} Some courts have seemed to follow the \textit{Griswold} approach in the area of personal appearance, but their language is not too clear. In \textit{Breen v. Kahl}, the seventh circuit declined to choose between the Douglas or Goldberg approaches, but said the right clearly existed and required a substantial burden of justification.\textsuperscript{32} A federal district court in \textit{Reichenberg v. Nelson},\textsuperscript{33} citing \textit{Breen}, found the "right to wear one's hair at any length or in any desired manner [to be] an ingredient of personal freedom protected by the United States Constitution. . . ." One federal district court merely cited \textit{Griswold},\textsuperscript{34} while another, in \textit{Crossen v. Fatsi},\textsuperscript{35} found that the right involved was the individual's right of privacy as protected by the ninth and fourteenth amendments.

On the other hand, some courts have felt no comparison can be made between the right of marital privacy found in \textit{Griswold} and the free choice of appearance asserted by long-haired plaintiffs.\textsuperscript{36} The first circuit preferred to find the right within the sphere of personal liberty established by the due process clause,\textsuperscript{37} paralleling the rights of foreign travel,\textsuperscript{38} interstate travel,\textsuperscript{39} teaching a foreign language,\textsuperscript{40} and educating children in secular schools.\textsuperscript{41} Similarly, other courts refer only to the general concept of "personal liberty."\textsuperscript{42} Still others merely refer to a right of privacy,\textsuperscript{43} or a free choice of appearance under the fourteenth amendment.\textsuperscript{44}

Under the "fundamental right or interest" equal protection analysis or the substantive due process analysis, after determining whether or not a fundamental right exists, courts will consider the interest of the state. If no fundamental right is involved, the regulations need merely bear a rational relationship to the interest of the state. If a fundamental right is

\textsuperscript{31} 381 U.S. at 491 (concurring opinion).
\textsuperscript{33} 310 F. Supp. 248, 252 (D. Neb. 1970). See also Crews v. Cloncs, 482 F.2d 1259 (7th Cir. 1970), in which the seventh circuit strongly reaffirms \textit{Breen}.
\textsuperscript{37} Richards v. Thurston, 424 F.2d 1281, 1284 (1st Cir. 1970).
\textsuperscript{40} Meyer v. Nebraska, 262 U.S. 390 (1923).
\textsuperscript{41} Pierce v. Society of Sisters, 268 U.S. 510 (1925).
involved, however, a "compelling interest" must be displayed if the regulation is to be upheld. Courts disagree whether the standard required to justify restriction of a student's rights is the same as would be required for regulation of the rights of adults.45

What sort of state interest is involved in the regulation of hair length by a school? School boards have asserted a wide range of justifications. Most frequently they offer evidence of actual or anticipated disruptions. Testimony on this question follows two basic patterns: (1) that disruptive incidents will occur between students with long hair and other students; and (2) that there is a correlation between long hair and disruptive behavior.

In Bishop the court, in sustaining the regulation, relied on testimony of teachers that long-haired boys tended to stay to themselves and were rowdy and belligerent. There was also evidence of a minor disturbance involving the plaintiff (a student refused to wear a driver's training helmet after him) and of several squabbles away from school between students with long hair and those with short hair.46 In other cases similar evidence of disruption has been found sufficient to sustain regulation of grooming.47 The dissent in Breen v. Kahl said no proof was necessary for something so "obvious" as the disruptive influence of long-hair.48 However, some courts require the school to present evidence of actual disruptions;49 and other courts have found that the regulation involved was not reasonably designed to prevent disruption.50 Still other courts have stated that an individual can not be denied his constitutional rights because of the disorderly reaction of others.51

There was testimony in Bishop and "expert" testimony in Livingston v. Swanquist52 to the effect that there is a direct correlation between good grooming and good behavior. This was apparently used by the courts to justify grooming regulation. School officials in Bishop similarly tried to

46. 316 F. Supp. at 448.
show a correlation between long hair and academic performance. However, it does not necessarily follow that long hair causes disruptive behavior or poor grades. It is difficult to accept the proposition that merely allowing one's hair to grow will alter one's behavior or academic performance; rather, it seems more likely that students who have poor attitudes toward school in general, resulting from independent causes, are also those students most likely to be unwilling to style their hair so as to meet the approval of their teachers. In short, poor grooming, poor grades and poor behavior may all be symptoms of the same basic problem, and it is not clear how forcibly preventing students from wearing long hair can reasonably be expected to solve this problem.

The other state interests, relied upon in Bishop to justify grooming regulation, were safety (shop and wrestling classes) and cleanliness (swimming and use of driver's training helmets). These interests have been found by different courts to be sufficient, insufficient, or better met by alternate means or more narrowly drawn rules. Other courts have considered arguments that long hair distracts other students in the classroom, interferes with teaching or school efficiency, adversely affects the economic welfare of students in job placement, or affects the image of the school and offends a sense of propriety. Some courts found sufficient justification in the argument that grooming rules are a part of citizenship training or help to teach self-discipline. Even grooming requirements for athletes

54. 316 F. Supp. at 448.
57. See Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir.), cert. denied, 393 U.S. 856 (1968); Crews v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969), rev'd on other grounds, 432 F.2d 1259 (7th Cir. 1970) (both finding for the school); Sims v. Colfax Community School Dist., 307 F. Supp. 485 (S.D. Iowa 1970) (the school argued it was necessary to see students' eyes to teach typing in a suit by a female student against a grooming rule; held insufficient justification).
have been upheld because the court found a rational basis in the purported adverse effect of long hair on performance in track, swimming, gymnastics, wrestling, and baseball and on team spirit and morale.\textsuperscript{61}

As has been demonstrated, courts have treated the question of the right of a school to regulate personal appearance in such diverse ways and have reached such different results that the entire area of student-administration relations in public high schools is extremely confused.\textsuperscript{62} Though many would disparage the importance of the Supreme Court considering such cases in view of crowded court dockets,\textsuperscript{63} these cases do not merely involve the question of whether a few students may wear nonconforming hair styles. There is a much more basic question here which involves the very essence of the relationship between school authorities and pupils. It arises at a time when student awareness of constitutional rights and unwillingness to submit to improper regulation are at high levels. It is time for the Supreme Court to provide the proper guidelines to lower courts so that they may determine the nature of the right of personal appearance and the quality of state interest required to justify regulation by school authorities.

With a clear guide from the courts school authorities hopefully would frame rules to meet the constitutional requirements. The standards established should be definite enough to prevent any judge from basing a decision on his personal belief that cutting an individual's hair makes him better behaved and more studious (as the court may well have in Bishop). As the situation stands now, a court can find authority somewhere to support any approach it might wish to take. Continued denial of certiorari by the Supreme Court may discourage judges even from seriously considering complaints by students against such rules. This is apparently the attitude in the western district of Missouri.\textsuperscript{64}

\textbf{DAVID C. CHRISTIAN}

\textbf{Editor's Note:} After this casenote went to press, the United States Court of Appeals for the Eighth Circuit reversed the district court's decision in Bishop v. Colaw on the grounds that the regulation in question violated plaintiff's rights under the ninth and fourteenth amendments. Bishop v. Colaw, No. 20,588 (8th Cir., filed Oct. 27, 1971).


DISCOVERY IN PROCEEDINGS BEFORE THE NLRB

NLRB v. Interboro Contractors, Inc.¹

In proceedings before the National Labor Relations Board,² Interboro was adjudged to have improperly discharged certain of its employees for engaging in protected labor activities.³ Subsequently, the Board instituted this proceeding to determine the amount of back-pay due the aggrieved employees. Prior to the back-pay hearing, Interboro made application with the Board's regional director to take depositions of the back-pay claimants. It was admitted the application "amounted to a request for pre-hearing discovery."⁴ This initial application was denied on the ground that Interboro had failed to show "good cause" for its request within the meaning of NLRB rule 102.30.⁵ On the day of the hearing Interboro renewed its request for leave to take depositions, but the trial examiner also denied this request, stating that "section 102.30 does not provide for the taking of discovery depositions . . ."⁶ The hearing closed without the submission of Interboro's case, and Interboro was held liable for the amount of back-pay specified in the complaint.

The Board affirmed the trial examiner's ruling. On appeal to the United States Court of Appeals for the Second Circuit, Interboro's primary assignment of error⁷ was that the denial of its applications for leave to take depositions had prevented it from receiving a fair hearing and therefore constituted an abuse of discretion. The Board asserted that it had exercised no discretionary authority in its denial, inasmuch as rule 102.30 "was never intended to provide for the taking of depositions for discovery purposes when witnesses will be available for trial."⁸ The court of appeals agreed with the Board's interpretation of rule 102.30 and affirmed the decision denying Interboro's request for discovery.

1. 432 F.2d 854 (2d Cir. 1970).
2. Hereinafter referred to as the "Board."
4. 432 F.2d at 857.
5. 29 C.F.R. § 102.30 (1970). The rule provides (in pertinent part): Examination of witnesses; depositions—Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.
(a) Applications to take depositions . . . shall be made to the regional director prior to the hearing, and to the trial examiner during and subsequent to the hearing but before transfer of the case to the Board. . . . The regional director or trial examiner, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, make and serve upon the parties an order which will specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify. . . .
6. 432 F.2d at 857.
7. On appeal, Interboro also argued that the Board's ruling was (1) not supported by substantial evidence, and (2) that its motion for adjournment at the close of the General Counsel's case had been improperly denied. Id. at 856. The court found no merit in either of these arguments.
8. Id. at 857.

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In reaching its decision, the court first examined the origin of rule 102.30. Finding it rooted in former Equity Rule 47,9 the court concluded that rule 102.30 "did not then authorize, and has not since authorized the taking of depositions for discovery purposes."10 In support of this conclusion, the court found that the 1947 amendment of section 10 (b) of the Labor Management Relations Act11 (pursuant to which rule 102.30 is promulgated) had imposed no affirmative statutory obligation upon the Board to adopt pre-trial discovery procedures.12 It was also found that no change in rule 102.30 was made in response to the Jenkins Memorandum,13 which

9. The forerunner of present rule 102.30 was promulgated in 1985. 1 Fed. Reg. 278 (1936). It provided that testimony should be taken by deposition only "for good and exceptional cause." In so providing the rule was directly patterned after Equity Rule 47, which permitted the deposing of witnesses for the purpose of preserving evidence for use at trial but not for the purpose of discovery of evidence in preparation for trial. In 1943 the rule was amended and the standard for permitting the deposing of witnesses was changed to "for good cause shown." The present rule remains in substantially the same form. This change in language from the original has not been considered by the courts as an attempt by the drafters of the 1943 amendment to bring the rule in line with Fed. R. Civ. P. 26, which was adopted in 1938. Cf. cases cited note 19 infra.
10. 432 F.2d at 858.
11. Labor Management Relations Act § 10 (b), 29 U.S.C. § 160 (b) (1947), formerly ch. 372, § 10 (b), 49 Stat. 454 (1935) [hereinafter cited as 10 (b)]. Section 10 (b) of the 1935 Act provided (in pertinent part): "In any such proceeding before the Board the rules of evidence prevailing in courts of law or equity shall not be controlling." As amended, 10 (b) reads as follows:
Any such proceedings shall, as far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States. . . .
12. The legislative history of the 1947 amendment to 10 (b) clearly indicates that the thrust of the amendment was directed toward changing the "procedure as to the introduction of evidence before the Board." 93 Cong. Rec. 3529 (1947) (remarks of Rep. Owens). There is no mention of making pre-trial discovery devices available in labor proceedings and no indication that Congress intended to make the full panoply of discovery contemplated by the Federal Rules of Civil Procedure applicable to proceedings before the Board. See NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 13, 67-68, 125, 194, 253, 296, 331, 332, 381, 543, 557, 697, 883, 893, 910, 1542, 1560, 1568, 1594, 1592, 1625 (1948). This publication gives the complete and unabridged history of the amendment.
13. JENKINS PROPOSALS FOR CHANGES IN NLRB PROCEDURES, 45 L.R.R.M. 94, 101 (1960). This working paper was prepared by the NLRB's Committee on Rules Revision headed by member Joseph A. Jenkins. The text of the Jenkins Memorandum dealing with the feasibility of pre-hearing discovery in Board proceedings is as follows:
Should the Board adopt some form of pre-trial discovery?
BACKGROUND
In the Federal court the pre-trial discovery technique is one of the most effective methods for enabling Counsel to ascertain the truth. The Federal rule is that in pre-trial depositions you may not only ask for relevant evidence but you may ask for evidence which would be reasonably calculated to disclose relevant evidence. This particular rule appears at the moment to be impracticable insofar as the National Labor Relations Board is concerned because of the physical location of Trial Examiners in Washington and San Francisco and the necessity, if it be a necessity, of having
suggested the adoption of pre trial discovery by deposition in proceedings before the Board. From these findings the court concluded that "rule 102.30 does not on its face, or as interpreted by the Board, provide for the taking of depositions for the purpose of pretrial discovery."

*Interboro* constitutes an adoption by the second circuit of the Board's position that under no circumstances can the denial of a request for discovery by deposition pursuant to rule 102.30 constitute an abuse of discretion, since 10 (b) does not require the Board to provide for discovery procedures in any form. The practical consequence of this interpretation of 10 (b) is to foreclose judicial review of the propriety of the Board's denial of a request for discovery, i.e., there can be no abuse of discretion where there is no statutory duty to act. In this regard, *Interboro* is in direct opposition to the fifth circuit's decisions in *NLRB v. Miami Coca-Cola Bottling Co.* and *NLRB v. Safeway Steel Scaffolds Co.* Although upholding the Board's

such depositions taken before them. I can see no reason why such depositions could not be taken by either party as a matter of right before any one authorized by the state or Federal Government to take oaths, if some means could be devised for enforcing this right without having to resort to the tedious and time-consuming process of obtaining a court order to enforce the right of deposition. At the moment, I must confess, I have no suggestions which would resolve this problem.

**QUESTION**

How can the Board effectively utilize something similar to the pre-trial discovery procedure, bearing in mind that the Board has no power to enforce its own orders without court action. In other words, is there some legal means whereby we could be assured that the pre-trial discovery procedures would be observed by both sides as a matter of command without having to resort to protracted litigation before the U.S. District Courts?

The final draft of the NLRB's Committee on Rules Revision proposals made no mention of discovery procedures. Proposed NLRB Rules Changes Submitted by the Jenkins Group, 46 L.R.R.M. 93 (1960).

14. 432 F.2d at 858.

15. A request for discovery prior to a hearing may take various forms depending upon the type of information the party is seeking to obtain. For cases involving a request to take discovery depositions, see Winn-Dixie Stores Inc. v. NLRB, 413 F.2d 1008 (5th Cir. 1969); NLRB v. Miami Coca-Cola Bottling Co., 403 F.2d 994 (5th Cir. 1968); NLRB v. Safeway Steel Scaffolds Co., 383 F.2d 273 (5th Cir. 1967), cert. denied, 390 U.S. 955 (1968); NLRB v. Gala-Mo. Arts, 232 F.2d 102 (8th Cir. 1956); NLRB v. Globe Wireless, Ltd., 193 F.2d 748 (9th Cir. 1951). For cases involving a request for interrogatories, see North American Rockwell Corp. v. NLRB, 389 F.2d 866 (10th Cir. 1968); Chambers Mfg. Corp., 124 N.L.R.B. 721 (1959). For cases involving a request for discovery of Board investigatory files, see NLRB v. Schill Steel Products, Inc., 408 F.2d 803 (5th Cir. 1969); NLRB v. Vapor Blast Mfg. Co., 287 F.2d 402 (7th Cir.), cert. denied, 368 U.S. 823 (1961); Biazevich v. Becker, 161 F. Supp. 261 (S.D. Cal. 1958).

16. 405 F.2d 994 (5th Cir. 1968).


In reaching its decision the court relied upon three premises: (1) That the 1947 amendment of 10 (b) required the Board to provide for pre-hearing discovery; (2) that the Committee on Rules Revision recommended that Board rules be revised to adopt pre-hearing discovery procedures; and (3) that rule 102.30 was thereafter amended to reflect this recommendation. The court in *Interboro* addressed itself directly to these "three untenable premises" and found them without merit in light of the legislative history of the 1947 amendment and the development of rule 102.30. See notes 9 and 12 supra.

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denial of the employer's request for discovery pursuant to rule 102.30 on the grounds that "good cause" had not been shown, the fifth circuit in both decisions expressly refused to accept the Board's restrictive interpretation. The court stated:

In light of section 10 (b) and of these new rules . . . , we must conclude that the examiner was wrong in holding that there is absolutely no provision for pre-trial discovery . . . It is within the trial examiner's discretion to grant or deny a motion for leave to take depositions . . . .

This interpretation views 10 (b) as imposing an affirmative duty upon the Board to provide for pre-trial discovery and considers that the purpose of the Board in promulgating rule 102.30 was to act upon this duty. This interpretation would subject the denial of a discovery request to judicial scrutiny and possible reversal when prejudicial abuse of discretion can be shown.

Other decisions dealing with the availability of pre-hearing discovery in proceedings before the Board fall between the broad confines laid down in Interboro and Safeway. The ninth circuit's decision in Electromec Design & Development Co. v. NLRB is illustrative of the willingness of other circuits to subject Board rulings to judicial review without adopting the fifth circuit's interpretation of 10 (b):

Since there is no specific provision in the National Labor Relations Act for discovery procedure . . . , it is within the sound discretion of the Trial Examiner to grant or deny a request for the taking of depositions, [but] a reviewing court still determines whether that discretion has been abused in its exercise.

Parties to judicial and quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional law. And, as a practical matter, the willingness of a reviewing court to scrutinize Board rulings has not secured the availability of pre-hearing discovery in labor proceedings. This result stems from the courts' refusal to find an abuse of discretion without a showing that the denial of discovery "clearly prejudiced" the appeal-

19. See Winn-Dixie Stores, Inc. v. NLRB, 413 F.2d 1008 (5th Cir. 1969); Electromec Design & Dev. Co. v. NLRB, 409 F.2d 631 (9th Cir. 1969); NLRB v. Southern Materials Co., 345 F.2d 240 (4th Cir. 1965); NLRB v. Vapor Blast Mfg. Co., 287 F.2d 402 (7th Cir. 1961); NLRB v. Chambers Mfg. Corp., 278 F.2d 715 (5th Cir. 1960); NLRB v. Gala-Mo Arts, 232 F.2d 102 (8th Cir. 1956); and NLRB v. Globe Wireless, Ltd., 193 F.2d 748 (9th Cir. 1951).
20. 409 F.2d 631 (9th Cir. 1969).
21. Id. at 635.
23. See cases cited note 19 supra. In none of the cited cases did the court find a sufficient abuse of discretion to warrant reversal of the Board's denial of a request for discovery. See also Blazevitch v. Becker, 161 F. Supp. 261 (S.D. Cal. 1958), where an NLRB trial examiner issued a subpoena duces tecum to the regional director, the Board attorney and the Board field examiner for production of documents. The examiner was reversed by the Board; the district court held that it was without jurisdiction to review.
ing party.\textsuperscript{24} In short, Board denials of discovery requests carry with them a heavy presumption of validity.

\textit{Interboro} has demonstrated that 10(b) and rule 102.30 do not provide an affirmative statutory basis for requiring the Board to entertain requests for discovery by deposition in its proceedings. This seriously undermines the basic premise of the fifth circuit's decision in \textit{Safeway Steel} that both 10(b) and rule 102.30 contemplate discovery. The impact of this well-reasoned decision can serve only to further insulate Board rulings from attack by increasing the already substantial reluctance of the courts to find a prejudicial abuse of discretion. But perhaps the more significant effect of \textit{Interboro} will be to convince other circuits of the error in interpreting 10(b) as providing a basis for requiring discovery in proceedings before the Board. Indeed, after \textit{Interboro} the question of discovery in labor proceedings has resolved itself into one of policy considerations, \textit{i.e.}, the practical and equitable benefits to be reaped from the application of modern discovery procedures to Board proceedings.

In examining the practical difficulties involved in adoption of discovery in Board proceedings,\textsuperscript{25} it should be noted that \textit{Interboro} did not interpret 10(b) as prohibiting the adoption of discovery procedures. Rather, the court sought only to illustrate that 10(b) placed no affirmative duty upon the Board in this respect. Discussing the Board’s rule-making power,\textsuperscript{26} the court stated:

\begin{quote}
Although section 6 of the Act does give the Board the necessary rule-making power to carry out the Act..., the circumstances under which discovery will be permitted is a matter committed to the Board’s discretion.\textsuperscript{27}
\end{quote}

\textsuperscript{24} The court in Electromec Design and Dev. Co. v. NLRB, 409 F.2d 631 (9th Cir. 1969), found that the denial of the request to take depositions by the trial examiner had not been demonstrated to be “clearly [prejudicial to] the appealing party.” \textit{Id.} at 635. In so holding, the court found that “the appellant had a full and fair hearing with ample opportunity to cross examine; no showing is made of denial of subpoena power to compel attendance of witness or lack of opportunity to present rebuttal evidence.” \textit{Id.} It is significant to note here that the factors used by the court in determining that there was no abuse of discretion have little relationship to the ability of the appellant to adequately prepare for the hearing. This de-emphasizes the importance of the prehearing discovery phase and stresses the conduct of the hearing once it is in progress.


\textsuperscript{26} The Board’s rule-making power is embodied in § 6, which provides: The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter. Labor Management Relations Act § 6, 29 U.S.C. § 156 (1947).

\textsuperscript{27} 432 F.2d at 858.
At present the Board’s rules of procedure make no provision for discovery, and the arguments in defense of this refusal to adopt even limited forms of discovery can be persuasive. The Jenkins Memorandum viewed the Board’s inability to compel compliance with its orders without resort to court action as the greatest procedural difficulty involved in adopting discovery by deposition. At least one authority has not seen this as a major obstacle because of the subpoena powers embodied in the Labor Management Relations Act and the Administrative Procedure Act. But perhaps the most persuasive fact in rebuttal is that the success of discovery by deposition under Federal Rule 26 (which allows the taking of depositions “without leave of court”) has in large part resulted from its good utilization by adversaries.

Secondly, there is concern that full discovery of the Board’s investigatory files could lead to undue intimidation of employees to remain silent. This would seriously impede the effectiveness of investigations which center around the statements of employees. This argument against “full disclosure” is not without merit in light of the “particularly delicate situation” of an employee giving a statement to a Board investigator. Should the Board adopt rules permitting full discovery of its investigatory files, it would not be without recourse in situations where the scope or purpose of discovery might become improper. It may assert any common law or statutory privilege to which other parties would be entitled, and remedy for an em-

28. NLRB R. 102.118, 29 C.F.R. § 102.118 (1970), was amended in 1964 in response to the decision in Jencks v. United States, 353 U.S. 567 (1957). It provides (in part): [After a witness called by the general counsel or by the charging parties has testified . . . the trial examiner shall, upon motion of the respondent, order the production of any statement . . . of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified. Such statements are not, however, made available until after the witness has testified, and the value of this “Jencks-type discovery” is limited to impeachment purposes.

29. For a complete discussion of the Board’s position see Manoli & Joseph, The National Labor Relations Board and Discovery Procedures, 18 Am. L. Rev. 9 (Winter/Spring 1966).


36. See Texas Indus., Inc. v. NLRB, 336 F.2d 128 (5th Cir. 1964). The court took note of this rationale and stated: It would seem axiomatic that if an employee knows his statements to Board agents will be freely discoverable by his employer, he will be less candid in his disclosures . . . [I]t is essential that the Board be able to conduct effective investigations and secure supporting statements from employees. We feel that preserving the confidentiality of employee statements is conducive to this end. Id. at 134.

37. For a discussion of the privileges asserted by the Board, see Manoli & Joseph, supra note 29, at 17.
ployer's misconduct during the course of an investigation is provided for in the Labor Management Relations Act. 38

In the recent case of NLRB v. Schill Steel Products, Inc., 39 the fifth circuit rejected the Board's argument against full discovery of its files as applied to statements of employees called to testify. Since such statements under rule 102.118 must be turned over in any event after the employee has testified, the court was not persuaded that the moment of disclosure would add significantly to the possibility of their misuse. 40 The court's reasoning in this regard is persuasive, and while the remedies available to the Board may not be sufficient to negate the dangers of full discovery of its investigatory files, limited discovery of the type permitted in Schill Steel Products cannot be reasonably excluded under the Board's present rationale.

The dramatic increase in the number of NLRB cases filed 41 lends support to the Board's continued refusal to adopt the full panoply of discovery devices embodied in the Federal Rules of Civil Procedure. If one can assume that even good faith utilization of such comprehensive discovery procedures would add measurably to the time required to bring a dispute to final decision, the argument against the adoption of full discovery is strengthened. 42 However, discovery in labor proceedings need not be an all or nothing proposition. Limited forms of discovery, such as the pre-hearing disclos-

38. Labor Management Relations Act § 8(a)(4), 29 U.S.C. § 158(a)(4) (1964), makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Subchapter." Labor Management Relations Act § 10 (l), 29 U.S.C. § 160(j) (1964), provides for "appropriate injunctive relief" to enjoin any unfair labor practice. Taken together, these sections would seem to provide an adequate means for remediying any misuse of information discovered prior to the Board hearing.

39. 408 F.2d 803 (5th Cir. 1969). This case arose on petition of the Board to adjudge Schill Steel in civil contempt for failure to comply with a cease and desist order. When the NLRB is a party to a proceeding in a federal court, it is clear that discovery procedures are controlled by the Federal Rules. See Olson Rug. Co. v. NLRB, 291 F.2d 655 (7th Cir. 1961). The Board can become a party to a suit in federal court by (1) seeking enforcement of its order, or (2) petitioning to adjudge a party in contempt for failure to comply with a court order enforcing a Board decision.


41. The following table gives an indication of the continuing increase in the number of NLRB cases filed during the years 1950-1966:

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Total Cases</th>
</tr>
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<tbody>
<tr>
<td>1936</td>
<td>1068</td>
</tr>
<tr>
<td>1940</td>
<td>6177</td>
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<tr>
<td>1945</td>
<td>9738</td>
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<tr>
<td>1948</td>
<td>10636</td>
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<tr>
<td>1950</td>
<td>15088</td>
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<tr>
<td>1955</td>
<td>13336</td>
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<tr>
<td>1960</td>
<td>21527</td>
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<tr>
<td>1965</td>
<td>28025</td>
</tr>
<tr>
<td>1966</td>
<td>28993</td>
</tr>
</tbody>
</table>


42. But see authorities cited note 25 supra. Generally, these authorities have taken the position that pre-trial discovery in administrative proceedings would serve as a means of overcoming unnecessary delay.
ure of employee's statements now covered by rule 102.118 or the permitting of discovery by deposition (pursuant to rule 102.30) upon showing of good cause, have a proper role in the administration of the Labor Management Relations Act.43

In light of the persuasiveness of the opinion in Interboro, it is not likely that the courts will play a significant role in the future in securing even limited forms of discovery in proceedings before the NLRB. The Board itself is the only body that can extend the right of discovery in its proceedings to all parties equally. Although the policy considerations surrounding this issue point in conflicting directions, the problem is important enough to warrant a thorough review of the Board's present position.

DENNIS L. DAVIS

PERJURY AND THE QUANTITATIVE EVIDENCE RULE

State v. Burgess1

Defendant was convicted of perjury under section 557.010, RSMo 1959,2 and contended on appeal that the trial court erred in failing to instruct the jury as to the requirements of the so-called "quantitative evidence rule." In order to be able to convict of perjury, this rule requires that "the falsity of the alleged testimony must be established by either two witnesses or one witness corroborated by other independent circumstances or evidence."3 The Missouri Supreme Court, in a unanimous decision, reversed the conviction and remanded for a new trial. Without questioning the "quantitative evidence rule," the court held that the requirements of the rule constitute an essential consideration under section 546.070 (4), RSMo 1959,4 in making the determination of "whether the evidence is sufficient

43. For a recent discussion of the proper role of discovery in Board proceedings, see Note, Labor Law—Pre-Hearing Discovery of Employees' Statements, 48 N.C.L. Rev. 368 (1970).

1. 457 S.W.2d 680 (Mo. En Banc 1970).
2. This section, now § 557.010, RSMo 1969, provides:
   Every person who shall willfully and corruptly swear, testify or affirm falsely to any material matter, upon any oath or affirmation, or declara-
   tion, legally administered, in any cause, matter or proceeding, before any
   court, tribunal or public body or officer, and whoever shall falsely, by
   swearing or affirming, take any oath prescribed by the constitution of this
   state, or any law or ordinance thereof, when such oath shall be legally
   administered, shall be deemed guilty of perjury.
3. 457 S.W.2d at 681.
4. This section, now § 546.070 (4), RSMo 1969, provides:
   Whether requested or not, the court must instruct the jury in writing
   upon all questions of law arising in the case which are necessary for their
   information in giving their verdict; which instructions shall include, when-
   ever necessary, the subjects of good character and reasonable doubt; and
   a failure to so instruct in cases of felony shall be good cause, when the
   defendant is found guilty, for setting aside the verdict of the jury and
   granting a new trial . . . .
in a perjury case to submit it to the jury." Thus, in every perjury case, the defendant, even though he does not request it, is entitled to have the jury instructed that "impeachment of the alleged false testimony . . . must be made by at least two witnesses or one witness and strongly corroborating circumstances." 

In a separate concurring opinion in *Burgess* Judge Finch noted that the "quantitative evidence rule" has been criticized by Professor Wigmore and that the rule, since it had its origin in English common law, presumably was being followed in Missouri on the basis of section 1.010, RSMo 1969. He further stated that until the rule was changed by the General Assembly of Missouri he would be compelled to adhere to it. It appears the remainder of the court, however, reaffirmed the rule because it was considered sound and, without discussion, declined to abandon it. It is submitted that the time was appropriate in *Burgess* for the court to have reexamined this "quantitative evidence rule" in order to determine its present validity in our system of justice. This note will briefly discuss this unique rule as well as note various treatments given to it in other jurisdictions, thereby illustrating the desirability of modification or abolition of the rule as it now stands in Missouri.

It was formerly held that in order to sustain a conviction of perjury it was necessary to have the sworn testimony of two or more witnesses. This rule was followed in England in the Court of the Star Chamber which, adopting the ecclesiastical rule, considered all oaths of equal value. Thus, according to the rule, to convict a defendant of perjury the court required two oaths against the defendant’s one. When the Star Chamber

5. 457 S.W.2d at 682.
6. Id. at 681, citing State v. Brinkley, 354 Mo. 337, 359, 189 S.W.2d 314, 325 (1945). In *Brinkley*, the court upheld jury instructions which omitted the word "strongly" in defining the "quantitative evidence rule." The court there found it unnecessary to include this word so long as the jury was told that the state must impeach defendant's testimony by two credible witnesses or one witness and corroborating circumstances and to require a finding on the issue beyond a reasonable doubt. The court in *Burgess* did not indicate that its inclusion of the word "strongly" in the definition of the rule was a requirement for a higher degree of proof of the corroborating circumstances.
7. 457 S.W.2d at 683 (concurring opinion).
8. 7 J. Wigmore, Evidence § 2041 (3rd ed. 1940). The author states: The rule is in its nature now incongruous in our system. The quantitative theory of testimony, if consistently applied, should enforce a similar rule for every criminal charge, now that the accused is competent to testify. "Oath against oath," as a reason for the rule, is indefensible.
9. This section provides (in part):
The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being, are the rule of action and decision in this state . . . .
10. United States v. Palese, 133 F.2d 600, 602 (3d Cir. 1943).
12. See Comment, Proof of Perjury: The Two Witness Requirement, 35 S. Cal. L. Rev. 86, 88 (1961). The oath of one opposing witness was sufficient to
Court was abolished in 1640 and the jurisdiction over the crime of perjury transferred to the common law court, this two-witness rule was also transferred.\textsuperscript{10} It was not until the early seventeenth century that the rule was relaxed so as to permit conviction by one witness if sufficiently corroborated.\textsuperscript{14} This modified version of the rule still involved a quantitative concept of counting and weighing oaths, a principle which was stated by the Missouri Supreme Court in \textit{State v. Heed.}\textsuperscript{16}

[T]he evidence must be something more than sufficient to counterbalance the oath of the prisoner and the legal presumption of his innocence. The oath of the opposing witness therefore, will not avail, unless it be corroborated by other independent circumstances.\textsuperscript{16}

As a general rule most American jurisdictions follow this "quantitative evidence rule" and require that proof of the allegedly false testimony of the defendant be established either by two witnesses or one witness supported by corroborating circumstances.\textsuperscript{17} In the jurisdictions which follow the rule, such as Missouri,\textsuperscript{18} a conviction cannot be sustained on the uncorroborated testimony of a single witness.\textsuperscript{19} As a carry-over from the historical fiction that all oaths are of equal value and thus carry the same weight, "the rule has descended the long, narrow path of stare decisis and today still stands, antiquated but resplendent, as the law."\textsuperscript{20}

It is important to note that this rule creates an exception to the general proposition that evidence which is sufficient to convince a jury of the accused's guilt beyond a reasonable doubt is sufficient.\textsuperscript{21} In addition, such convict in other criminal prosecutions because the accused could not testify. In the case of perjury, however, the defendant's oath was always in evidence; therefore, more than one oath was necessary to counterbalance it. \textit{Id.} at 89.

15. 57 Mo. 252 (1874).
16. \textit{Id.} at 254.
18. See State v. Burgess, 457 S.W.2d 680 (Mo. En Banc 1970); State v. Brinkley, 354 Mo. 337, 189 S.W.2d 314 (1945); State v. Kaempfer, 342 Mo. 1007, 119 S.W.2d 294 (1938); State v. Hardiman, 277 Mo. 229, 209 S.W. 879 (1919); State v. Hunter, 181 Mo. 316, 80 S.W. 955 (1904); State v. Blize, 111 Mo. 464, 20 S.W. 210 (1892); State v. Heed, 57 Mo. 252 (1874).
19. In State v. Hardiman, 277 Mo. 229, 233, 209 S.W. 879, 880 (1919), the court stated:

It is fundamental that to sustain a charge of perjury, it is necessary that there should be some substantial evidence, in addition to the testimony of a single witness. This for the very apparent reason that if the defendant swears to one thing and the witness to the opposite, there is simply one oath against the other, and the jury would, in consequence, not be warranted in saying that the testimony of the one is false rather than that of the other, without some proof tending to show which is true and which is false.

a rule runs contrary to the principle followed in our system of justice that
the "ultimate measure of testimonial worth is quality and not quantity."22 One reason which helps to account for the continued vitality of the rule is
the fear that innocent witnesses might be subjected to undue harrassment
and even conviction if a less strict rule were adopted.23 It thus appears that
the policy question to be decided is determining whether protection of wit-
tnesses counterbalances the occasional inability to convict an apparent per-
3. Some states have rejected the "quantitative evidence rule" either by statute25 or judicial decree.26 As a result, these states treat perjury the
same as other crimes in that any type of evidence, no matter what the
source, is sufficient to convict as long as such evidence establishes guilt
beyond a reasonable doubt.

Some courts which allegedly adhere to the "quantitative evidence rule"
relax the strictness of its requirements in certain cases by allowing circum-
stantial evidence alone to be sufficient as long as it proves guilt beyond a

23. In W. Best, EVIDENCE §§ 606-07 (12th ed. 1922) the author advanced the argument in this manner:
   But when we consider the very peculiar nature of this offense [perjury],
   and that every person who appears as a witness in a court of justice, is
   liable to be accused of it by those against whom his evidence tells, who
   are frequently the basest and most unprincipled of mankind; and when we
   remember how powerless are the best rules of municipal law without the
   co-operation of society to enforce them; we shall see that the obligation of
   protecting witnesses from oppression, or annoyance, by charges, or
   threats of having borne false testimony, is far paramount to that of giving
   even perjury its desserts.
24. See ABA-ALI MODEL ACT ON PERJURY, Commissioners' Prefatory Note (1952). In State v. Clinkingbeard, 296 Mo. 25, 36, 247 S.W. 199, 202 (1922), the
court stated that the evident purpose of the lawmaking power in providing
punishment of witnesses who commit perjury was "to keep the fountain of justice
pure." It would appear that if the courts today continue to adhere to the strict
requirements of the "quantitative evidence rule" and make it too difficult to
convict those guilty of perjury, there is danger of causing the "fountain of justice"
to become excessively polluted.
   Proof of guilt of perjury beyond a reasonable doubt is sufficient for
   conviction for perjury or subordination of perjury and it shall not be neces-
   sary also that proof be by a particular number of witnesses or by docu-
   nary or other type of evidence.
26. In State v. Storey, 148 Minn. 898, 182 N.W. 613 (1921), the defendant
   was convicted solely on the basis of circumstantial evidence. The court held that
   the "quantitative evidence rule" was not to be followed, and in rejecting the rule,
   stated:
   [W]e are of the opinion that the rule laid down is out of harmony with
   our system of jurisprudence. . . . [W]ith what consistency can it be said
   that a quality of testimony which will justify a court in condemning a
   defendant to life imprisonment, or, in some jurisdictions, to be hanged,
   is insufficient to sustain a conviction of the crime of perjury for which he
   may suffer a penalty of a short term of imprisonment? Id. at 402-03, 182
   N.W. at 615.
   Following this same reasoning, the Supreme Court of Vermont also found it more
   consonant with our system of justice to allow proof of perjury to be made by
reasonable doubt. Thus the rule sometimes has been held not to apply in situations where it would be difficult or impossible to prove the falsity of defendant's testimony by the direct testimony of two witnesses, or by the testimony of only one witness supported by corroborating circumstances. In conjunction with this, it is interesting to note the recent change regarding the use of circumstantial evidence that has been made in the area of military law. Formerly, there was no provision existing in military law which would allow conviction of perjury by circumstantial evidence alone. However, as a result of the recent revision of military law by the Military Justice Act of 1968, there is now a recognized exception which allows proof of the allegedly perjured statement by circumstantial evidence alone in those cases where such falsity is not capable of direct proof. Such a change in the rule has been characterized as being in accord with the modern trend.

In Missouri, it is doubtful whether under the "quantitative evidence rule" proof of perjury can ever be established by circumstantial evidence alone. Although this precise issue has apparently not been presented for determination in any court of this state, it appears that the rule by implication precludes the possibility of proving the falsity of defendant's allegedly perjured statement solely on the basis of circumstantial evidence. It is clear, however, that the rule does allow use of circumstantial evidence as a sole means of providing the corroborating circumstances. Thus it would appear that if circumstantial evidence were the only possible way to prove the falsity of defendant's statement, no conviction could be obtained in Missouri even if such evidence were sufficient to prove defendant's guilt beyond a reasonable doubt. The difference between the treatment of perjury and other crimes becomes readily apparent.

27. See, e.g., Marvel v. State, 33 Del. 110, 131 A. 317 (1925); State v. Cerfoglio, 46 Nev. 332, 205 P. 791 (1922); People v. Doody, 172 N.Y. 165, 64 N.E. 807 (1902).
29. Manual for Courts-Martial, United States ¶ 210, at 376 (1951) had the following provision regarding perjury:
The falsity of the allegedly perjured statement cannot, without corroboration by other testimony or by circumstances tending to prove such falsity, be proved by the testimony of a single witness.
The falsity of the allegedly perjured statement cannot, except with respect to matters which by their nature are not susceptible of direct proof, be proved by circumstantial evidence alone, nor can the falsity of the statement be proved by the testimony of a single witness unless that testimony directly contradicts the statement and is corroborated by other evidence, either direct or circumstantial.
33. Annot., 88 A.L.R.2d 852, 864 (1963). Conviction based on circumstantial evidence alone has apparently never been allowed in Missouri. In State v. Brinkley, 354 Mo. 337, 189 S.W.2d 314 (1945), the court noted that many states have receded from the "quantitative evidence rule" by holding that a conviction may rest solely on circumstantial evidence. The court made no indication that Missouri was among these states.
34. State v. McGee, 341 Mo. 151, 155, 106 S.W.2d 480, 482 (1937).
Some authors have recommended that the distinction between perjury and other crimes be eliminated by requiring that conviction be based on proof beyond a reasonable doubt without regard to what form the evidence takes. The Model Act on Perjury provides for this result as follows:

Proof of guilt beyond a reasonable doubt is sufficient for conviction under this Act, and it shall not be necessary also that proof be by a particular number of witnesses or by documentary or other type of evidence.

Under this approach the “quantitative evidence rule” is abolished by a rule that is more in accord with the treatment given other crimes.

It appears to be at least questionable that the Missouri Supreme Court is, as suggested in the concurring opinion of Burgess, bound to follow the “quantitative evidence rule” on the basis of the Missouri statute which adopted the common law of England. In State ex rel. Schlueeter Manufacturing Co. v. Beck, the Missouri Supreme Court stated:

We are not tied inextricably to the English common law which our ancestors adopted . . . . [O]ur courts are at liberty to declare that any portion of it inapplicable to our conditions and circumstances does not obtain here.

The Supreme Court of Minnesota, in State v. Storey, followed this reasoning when it rejected the rule as inapplicable. The court stated that “[i]n our opinion it is one of the rules of the common law inapplicable to our situation and ‘inconsistent with our circumstances,’ and hence not to be followed.”

Today it seems to be agreed that the quality of a witness’ testimony rather than the quantity of witnesses is most important. It is clear that the testimony of each witness is no longer accorded the same weight. Because of this, it would appear that the “quantitative evidence rule” is inapplicable to our “conditions and circumstances.” Therefore, the court should consider itself at liberty to either change or abolish this unique rule.

It would seem to follow by necessity that when a court accepts the “quantitative evidence rule,” as the Missouri court did in Burgess, instructing the jury as to its requirements is essential and that the holding in Burgess which makes such instruction mandatory would have to follow. Without such an instruction, the jury could possibly convict on the uncorroborated testimony of a single witness—a result the rule itself prohibits.

35. See Whitman, supra note 20, and Comment, supra note 12. See also [1985]
37. Id. § 4(1) (emphasis added).
38. See § 1.010, RSMo 1969, quoted note 9 supra.
39. 337 Mo. 839, 85 S.W.2d 1026 (En Banc 1935).
40. Id. at 847, 85 S.W.2d at 1029.
41. 148 Minn. 398, 182 N.W. 613 (1921).
42. Id. at 403, 182 N.W. at 615.
43. Whitman, supra note 20, at 142.
For example, a judge could find the evidence sufficient to go to the jury and the latter, not being instructed as to the requirements of the rule, might be convinced of guilt beyond a reasonable doubt and convict even though it found the corroborating evidence untrustworthy. It is submitted that the more important issue to which the court in Burgess should have addressed itself was that of considering the present-day validity of this "quantitative evidence rule" with a view towards its abolition or modification. In the absence of legislative adoption of the Model Act on Perjury, the court appears to be justified in holding that this rule is no longer applicable to our "conditions and circumstances" and not to be followed. Another alternative available to the court would be to modify the present rule so as to allow conviction based solely on circumstantial evidence. Not only would these alternatives provide adequate safeguards to protect the innocent, but they would also provide a stronger deterrent against the commission of perjury in our courts. When next confronted with this unique rule, the court hopefully will give due consideration to these possibilities.

Wendell R. Gideon

PROSECUTION COMMENT IN MISSOURI ON THE FAILURE OF THE DEFENDANT TO TESTIFY

State v. Hutchinson

Appellant was convicted in the Circuit Court of the City of St. Louis of stealing an automobile and was sentenced under the provisions of the Habitual Criminal Act to a term of two years imprisonment. He appealed to the Missouri Supreme Court, challenging certain alleged irregularities at the trial. His major allegation of error concerned remarks made by the prosecution in its closing argument to the jury. Appellant contended that these remarks were comments upon his failure to testify and thus violated his fifth amendment right against self-incrimination. The Missouri Supreme Court rejected this contention and affirmed his conviction. The statements objected to were as follows:

45. Id.

1. 458 S.W.2d 553 (Mo. En Banc 1970).
2. § 556.280, RSMo 1959.
3. Appellant also alleged that because the record did not clearly show that he had been advised of his right to testify in his own behalf, he should be given a new trial. The court said: "We hold that the record in criminal case need not affirmatively show that the trial court or counsel advised accused of his right to testify in his own behalf." State v. Hutchinson, 458 S.W.2d 553, 554 (Mo. En Banc 1970).
4. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend V.
"Mr. Kitchin: What he is saying to you is about the only thing he can say because he has no evidence on his side. . . . He can call any witnesses he wants.

Mr. Sigoloff: . . . I don't think that is proper argument.

The Court: Objection Sustained.

Mr. Kitchin: I closed the case just before lunch. . . . He was free to offer any evidence he had at that time and he offered nothing. (Defendant's objection at this point was interrupted by a bench conference and was not ruled.)

Mr. Kitchin: In other words, the only thing the defense brought you is a complete lack of evidence, nothing, nil. What he is trying to say is because there is no witness [who] actually saw the man remove [the car] that I haven't proved [sic] him guilty. . . . There's been no evidence at all to rebut any the State put on, no evidence at all. He had his chance.

Mr. Sigoloff: . . . That is not proper argument.

The Court: Overruled. . . ."8

The problem presented was: When does comment by counsel on the failure of the defendant to present evidence reach the level of a comment on his failure to testify? As Dean Wigmore said, "The question whether an inference may be drawn from a person's exercise of his privilege [not to testify] is one which may well puzzle by its anomalies."

At common law, the accused, as an interested party in the litigation, was not allowed to testify at all.7 This was changed by statute in Missouri in 1877 and the defendant was allowed to testify in his own behalf if he so chose.8 The statute prohibited any comment by the prosecution on the accused's failure to take the stand and provided that this was not to be considered in determining guilt.9 In 1913, a law review comment on the then current version of the statute noted that "[s]ince the passage of these statutes it has been uniformly held reversible error for counsel for the state to comment on the neglect, failure, or refusal of the defendant to take the stand. Such was the clear intent of the statute."10 Between 1913 and today, Missouri gradually turned to a more complex (and puzzling) analysis.

It is settled that when the defendant is the only one who could testify and the failure of the defense to present evidence is commented upon, or when there is clear reference to the failure of the defendant to testify, there is reversible error.11 Although Missouri courts earlier held the statute also

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5. 458 S.W.2d at 554-55.
6. 8 J. Wigmore, Evidence § 2272 (3d ed. 1940) (emphasis added).
9. The modern statute reads: "If the accused shall not avail himself or herself of his or her right to testify . . . it shall not . . . be referred to by any attorney in the case. . . ." § 546.270, RSMo 1969.
10. Willson, supra note 7, at 36. This comment was on § 5243, RSMo 1909 [now § 546.270, RSMo 1969], which read substantially the same as the part of the act of April 18, 1877 relating to comment by the prosecution on the failure of the defendant to testify.
11. "The appellant did not testify and the fact of his failure to do so was not and could not be referred to by counsel or considered by the Court and jury."

https://scholarship.law.missouri.edu/mlr/vol36/iss4/5
applied to comments which "alluded" to the defendant's failure to testify, the recent tendency has been to interpret the statute literally and require an almost direct mention of the defendant's failure to testify before a violation of the statute occurs. Thus, if other witnesses available to defendant are not called, the courts construe comment by the prosecution as merely referring to the general lack of evidence presented by the defense, and not as a specific allusion to the failure of the defendant himself to testify. Comment that the evidence was not disputed (usually because no evidence was presented by the defense) has also been held not to refer to the defendant's failure to testify. In other words, "where it appears that the prosecution testimony described as uncontradicted could be denied by a person or persons other than the defendant himself, no improper allusion to the accused's

State v. Phillips, 324 S.W. 2d 693, 697 (Mo. 1959). See also State v. Hampton, 430 S.W.2d 160 (Mo. 1968), and State v. Snyder, 182 Mo. 462, 82 S.W. 12 (1904).

12. The supreme court, construing § 4219, RSMo 1889 [now § 546.270, RSMo 1969], has said:

The words "referred to" evidently mean "alluded to." "Refer" is a synonym of "allude," and these words are used interchangeably. If the object of the statute was to prevent the jury from considering the fact that the defendant has failed to testify, it is easy to see that as much could be accomplished to defeat that object by an allusion to such fact, as by reference thereto. State v. Moxley, 102 Mo. 374, 393, 14 S.W. 969, 974 (1890).

13. [T]here is a long line of cases in this state which hold that a reference to the failure of the defense to offer any evidence is not a violation of the statute. By its express terms, the statute prohibits a reference to the failure of the accused to testify.

State v. Hampton, 430 S.W.2d 160, 162 (Mo. 1968). See, e.g., State v. Hayzlett, 265 S.W.2d 321 (Mo. 1954); State v. Conway, 348 Mo. 580, 154 S.W.2d 128 (1941); and State v. McKeever, 339 Mo. 1066, 101 S.W.2d 22 (1936).

14. In State v. Powell, 357 S.W.2d 914 (Mo. 1962), the defendant argued that the prosecutor's statement that the state's evidence was "unrefuted," "undisputed," and "undenied" referred to his failure to testify. The court said: the argument in this case . . . falls within the purview of those cases which permit the prosecuting attorney to discuss the evidence in general and refer to the failure of the defense as a whole to combat the facts adduced by the State tending to prove the guilt of the defendant. Id. at 918.

In State v. Garcia, 357 S.W.2d 931 (Mo. 1962), the prosecutor, while pointing a finger at the defendant, stated that the evidence was uncontradicted and undisputed. The court held that "[a] comment by a state's attorney that the state's evidence is uncontradicted or undisputed does not violate a defendant's right under the rule and the statute." 357 S.W.2d at 935. In State v. Reynolds, 345 Mo. 79, 131 S.W.2d 552 (1939), the prosecutor said: "Is there anybody, any living soul [who] told you that Roosevelt Reynolds [the appellant] did not enter the cab that night?" The court held the comment did not violate the statute because two other people "might have known" about the matter and could have testified. 345 Mo. at 88, 131 S.W.2d at 557. See also State v. Bell, 442 S.W.2d 535, 538 (Mo. 1969), cert. denied, 397 U.S. 949 (1970); State v. Dulaney, 428 S.W.2d 593, 596 (Mo. 1968); and State v. Varner, 329 S.W.2d 623 (Mo. 1959).

15. "We have also consistently held that it was not a violation of the statute to state that evidence was uncontradicted, undisputed, or uncontroverted." State v. Hardy, 276 S.W.2d 90, 95 (Mo. En Banc 1955). See State v. Hampton, 430 S.W.2d 160 (Mo. 1968); State v. Varner, 329 S.W.2d 623 (Mo. 1959); State v. Gordon, 253 Mo. 510, 161 S.W. 721 (1913); State v. Fields, 294 Mo. 615, 158 S.W. 518 (1911); and State v. Ruck, 194 Mo. 416, 92 S.W. 706 (1906).
failure to take the stand is established."16 This interpretation of the statute stems from a literal reading that it forbids only comments that the accused did not testify, not comments on the amount of evidence presented by the defense.17 The standard in Missouri to judge the propriety of the prosecutor's arguments to the jury is whether the jury's attention was directed to the failure of the defendant to testify.18 The rationale for this seems to be that "[a] prosecutor has the right and duty to present the strength of the state's case and the weakness of the defense. A defendant cannot tie the hands of the prosecutor merely by putting on no evidence at all."19

From the facts present in State v. Hutchinson,20 it appears that the Missouri Supreme Court may not have followed former Missouri decisions. The dissenting opinion of Judge Seiler in Hutchinson points out that only three witnesses had testified at the trial—the owner of the car, her husband, and the arresting officer.21 The only person left who could have shed any light on the occurrence in question appeared to be the defendant, since he was the only other person present at the scene of the crime. An early Missouri case already held that when the defendant is the only person who could testify for the defense and the prosecution points out the failure of the defense to offer evidence, this is a comment on the failure of the defendant to take the stand which is forbidden.22

It would seem that the Hutchinson jury's attention was directed to the failure of the defendant to testify because of the comments of the prosecution. This being so, the Missouri standard for reversible error was met by these comments and a new trial should have been ordered. The failure of the Missouri Supreme Court to do so indicates that the previous cases holding that reversible error was created by comment on the failure of the defense to offer evidence when the defendant was the only one who could have testified may have been tacitly rejected by the court. Such action by the court is somewhat questionable since the allowance of such comments may jeopardize the constitutional rights of the defendant to a fair trial.

The fifth amendment right of freedom from self-incrimination has been made applicable to the states through the fourteenth amendment.23 Griffin v. California24 considered the constitutionality of a California constitutional provision that allowed comment on the failure of the defendant

17. "[T]he prohibition of § 546.270, RSMo 1959 and Criminal Rule 26.08 is against comment that the accused did not testify; not that the defendant did not offer any evidence." State v. Morgan, 444 S.W.2d 430, 439 (Mo. 1969).
18. "The ultimate test of whether the prohibition has been violated is whether the jury's attention was called to the fact that the accused did not testify." State v. Hayzlett, 265 S.W.2d 521, 523 (Mo. 1954). "In order to work prejudice, it must be demonstrated that the attention of the jury was directed to the fact that accused did not testify." State v. Murray, 280 S.W.2d 809, 811 (Mo. 1955).
20. 458 S.W.2d 553 (Mo. En Banc 1970).
21. Id. at 559 (dissenting opinion).
to testify by both the prosecution and the court.\textsuperscript{25} The United States Supreme Court said:

\textit{[T]he fifth amendment, in its direct application to the federal government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.}\textsuperscript{26}

The Missouri Supreme Court has ruled that \textit{Griffin} does not directly apply to Missouri because it construed a California constitutional provision which permitted such comment by the prosecution and the court. The court has stated that "in no event could this or any other case in Missouri involve the same problems presented in \textit{Griffin v. State of California."}\textsuperscript{27}

However, the \textit{Griffin} decision appears broader than the Missouri court has construed it. The Court's intention was apparently "to prevent the comments of a judge or prosecutor from being converted into evidence of guilt."\textsuperscript{28} \textit{Griffin} makes clear that the Constitution will not tolerate comment by the prosecution on the failure of the defendant to testify. It would seem that a prosecutor's direct comment under constitutional authority does present the same problem as a prosecutor's comment on the lack of evidence offered that is an allusion to the failure to testify.

While the Missouri decisions seem to indicate that the defendant has the burden of showing that a comment by the prosecution on his failure to testify was used by the jury as evidence of his guilt,\textsuperscript{29} the United States Supreme Court has made it clear that a federal standard is to be applied in these situations, with the state bearing the burden of proving that the prosecutor's comments did not contribute to the conviction.\textsuperscript{30} In \textit{Hutchinson}, the prosecutor's comment that the defendant "had his chance" to present evidence but did not and the entire line of his closing argument, seem to indicate that the defendant was the only person who could testify for the prosecution. The jury could reasonably assume that such comments were on his failure to testify. It would be hard to show under the federal standard that these comments did not contribute to the defendant's conviction. In light of \textit{Griffin}, it would appear that the comments by the prosecution in \textit{Hutchinson} constituted reversible error.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{25} CAL. CONST. art. I, § 13 provides (in part):
\begin{quote}
\[\text{In any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court or by counsel, and may be considered by the court or by the jury.}\]
\end{quote}
\item \textsuperscript{27} \textit{State v. Kennedy}, 396 S.W.2d 595, 598-99 (Mo. 1965).
\item \textsuperscript{28} 17 SYRACUSE L. REV. 80, 81 (1965).
\item \textsuperscript{29} \textit{See, e.g., State v. Snyder}, 182 Mo. 462, 82 S.W. 12 (1904), and State v. Hampton, 430 S.W.2d 160 (Mo. 1968).
\item \textsuperscript{30} \textit{Chapman v. California}, 386 U.S. 18 (1967).
\item \textsuperscript{31} The application of \textit{Griffin} to the states may be shown in the following examples: In Schultz v. Yeager, 293 F. Supp. 794 (1967), the United States District Court for New Jersey granted a writ of habeas corpus for the petitioner on
\end{itemize}
If the Missouri Supreme Court in *State v. Hutchinson*, had followed the prior interpretation of the Missouri statute forbidding comment by counsel on the failure of the defendant to testify, they would have vacated the conviction and granted a new trial. The defendant was the only person who could testify for the defense and the prosecution comment on the failure of the defense to present any evidence could have led the jury to believe that the reference was to the failure of the defendant to testify. In addition, a serious question arises as to whether any comment by the prosecutor, even one which has previously been held not to violate the statute, is allowable in light of *Griffin* when such comment alludes to the failure of the defendant to testify. Of course, the difficult question is when does such comment allude to the failure to testify. From the facts in *Hutchinson* and the apparent rejection by the Missouri Supreme Court of its earlier decision therein, it is arguable that Missouri has stepped outside the limits of the Constitution.

**Robert M. Hill**

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the issue of prosecutorial comments (thereby, in *essa*, reversing the state court's rejection of an appeal on the same grounds), saying "[B]efore a federal constitutional error can be held harmless, the state court must now be able to declare a belief that the alleged error was harmless beyond a reasonable doubt." 293 F. Supp. at 806. In *Smith v. Decker*, 270 F. Supp. 225 (N.D. Tex. 1967), the United States district court granted a writ of habeas corpus from a conviction in Texas, and stated the standard as "[W]hether (or not) there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 270 F. Supp. at 226. In *Mitchell v. Pinto*, 438 F.2d 814 (3rd Cir. 1971), the court reversed the denial of a writ of habeas corpus by the New Jersey district court because of comment by court and prosecution on the defendant's failure to testify.

32. § 546.270, RSMo 1969, quoted note 9 supra.

33. There would seem to be four categories of cases involving comment on the failure of the defendant to testify. Category I involves the situation where the prosecutor clearly says "The defendant did not testify," and is error both under *Griffin* and the Missouri line of cases. Category II involves the prosecutor saying "The state's evidence on point A is undisputed" and would not be error under either the *Griffin* or Missouri rule. Category III involves the prosecutor saying "The defense offered no evidence." When the defendant is clearly the only one who could testify in his behalf, *Griffin* and the Missouri cases before *Hutchinson* held this to be error. Category IV involves this same statement when others are available to testify for the defense. This, under both tests, is not error, although it could be argued that even this comment touches the defendant. He is engulfed in its scope, and his failure to testify would seem to be pointed out. Of course, there is not error if the prosecutor remarks on the failure of the defense to call a specific person if that person is not the defendant.

34. Perhaps of interest is the concurring opinion of Judge Donnelly. If Missouri continues its reasoning in *Hutchinson* in future cases, Judge Donnelly suggests the following instruction be given to the jury:

The law does not compel a defendant in a criminal case to take the witness stand and testify and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of [the] defendant to testify.

*State v. Hutchinson*, 458 S.W.2d 553, 558 (Mo. En Banc 1970) (concurring opinion).
JOINDER OF OFFENSES—COLLATERAL ESTOPPEL
UNDER THE FIFTH AMENDMENT

Ashe v. Swenson¹

The Supreme Court of the United States held in Ashe v. Swenson that an issue once litigated in the prosecution of a criminal defendant cannot be relitigated in a subsequent prosecution by the same sovereign government against the same defendant, thereby elevating the doctrine of collateral estoppel to a constitutional level. As a result of this embodiment of collateral estoppel into the fifth amendment's guarantee against double jeopardy, a doctrine already recognized by the federal courts, the Missouri Supreme Court Committee on Rules has amended rule 24.04 of the Missouri Rules of Criminal Procedure² to allow the joinder of offenses which are part of the same transaction or which constitute parts of a common scheme or plan.³

Ashe's conviction arose from an armed robbery in which several armed, masked men broke into a house and took money and jewelry from six men playing poker inside. Ashe went to trial separately on the charge of robbing one of the poker players, Knight. Knight and three other victims testified at the trial, establishing clearly (the defense presented no evidence) that an armed robbery had occurred and that each poker player had suffered losses.⁴ But the state's evidence identifying Ashe as one of the robbers was not conclusive. The jury was instructed that in order to find Ashe guilty, they must determine two facts—that something was taken from Knight and that Ashe participated in the robbery. The verdict was "not guilty due to insufficient evidence." Six weeks later Ashe was tried for the robbery of a second victim, Roberts. This time he was convicted.

Ashe appealed to the Supreme Court of Missouri, contending that the Knight prosecution was a previous trial for the same offense.⁵ His argument was that the Roberts' prosecution involved the same issue decided in his favor by the Knight jury; however, the court rejected this double jeopardy plea, and found that the cases involved two distinct issues—whether Ashe robbed Knight and whether Ashe robbed Roberts.⁶

A similar analysis was made by the Missouri court in State v. Williams,⁷ a case involving the armed robbery of five bank messengers. The court there ruled that a separate and distinct case can be made out for each person robbed in the same transaction.⁸ This is the separate or several offense doctrine,⁹ which was outlined in State v. Moore¹⁰ as follows: "Distinct and

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² The amendment became effective July 31, 1971.
³ Supreme Court Orders, 26 J. Mo. B. 608 (1970).
⁴ As a result of the robbery, not the poker game.
⁵ State v. Ashe, 350 S.W. 2d 768 (Mo. 1961).
⁶ Id. at 770.
⁷ 263 S.W. 195 (Mo. 1924).
⁸ Id. at 197.
¹⁰ 326 Mo. 1199, 33 S.W. 2d 905 (1930).
separate offenses are not to be held merged because they happen to grow out of the same transaction."11 In other words, the fact that separate offenses are part of the same transaction is irrelevant to the issue of double jeopardy. What is relevant is the evidence needed to prove the various acts. Whether a defendant's acts comprise the same offense, or separate or several offenses, is determined by the "same evidence" test enunciated in 1796 in the English case of King v. Vandercomb & Abbott:12

Unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts in the second indictment, an acquittal on the first indictment can be no bar to the second.13

After a motion to vacate his sentence was denied,14 Ashe filed a petition for a writ of habeas corpus with the United States District Court for the Western District of Missouri.15 The court denied the writ and the United States Court of Appeals for the Eighth Circuit affirmed. The eighth circuit applied the "same evidence" test, saying that "[a] robbery of one man (Roberts) ordinarily requires proof of facts different from those required to prove a robbery of another man (Knight)."16

Both the district court and the court of appeals felt compelled to follow Hoag v. New Jersey,17 in which the United States Supreme Court held that the conviction of robbing a fourth victim, after defendant had been acquitted of robbing three other victims of the same robbery, was not a violation of the due process clause of the fourteenth amendment. Although a majority of the Court doubted that collateral estoppel was a constitutional requirement,18 it did not rule either way on the issue because it felt bound by the state court's holding that it was impossible to determine the issues on which the jury based its verdict of not guilty.19

The Hoag case thus appeared to be a substantial obstacle in Ashe's quest for a writ of habeas corpus. However, on the basis of the intervening case of Benton v. Maryland,20 which held that the fifth amendment guarantee against double jeopardy is enforceable against the states through the fourteenth amendment, the Supreme Court reversed the court of appeals and freed Ashe. Justice Stewart, writing for the majority in Ashe,21 noted that the due process approach of Hoag was now inapplicable because, under Benton, "[t]he question is no longer whether collateral estoppel is a re-

11. Id. at 1205. 33 S.W.2d at 907.
13. Id. at 461. For a Missouri application of this test, see State v. Hayes, 296 Mo. 55, 246 S.W. 948 (1922).
18. "Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement . . . . However, we need not decide that . . . ." Id. at 471.
quirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy."  

Until the Benton case, Justice Stewart pointed out, this question had been merely academic. The federal courts had already come to recognize that as the number of statutory offenses increased, the common law situation of a single course of criminal conduct yielding but a single offense was being replaced by a situation where, through specificity of draftsmanship and overlapping of statutory offenses, prosecutors were able to spin out numerous crimes from a single criminal transaction.  

The federal courts chose to prevent the potential for abuse in re-prosecutions by applying the doctrine of collateral estoppel. Justice Stewart pointed out that this doctrine has been recognized at least since the case of United States v. Oppenheimer, decided in 1916. Whether this federal safeguard was a constitutional requirement did not have to be decided until the guarantee against double jeopardy was applied to the states. The Court took the opportunity provided by Ashe to hold that it was.

The mere incorporation of collateral estoppel into the Constitution has little effect on Missouri, however, because it is one of many states which, like the federal courts, has recognized (in dicta) that the doctrine of res judicata is applicable to criminal prosecutions if there has been an adjudication of the fact or issue in question. But no Missouri case has been uncovered where such an adjudication foreclosed a subsequent prosecution by the state. This may be due to Missouri's hypertechnical determination of "same offense," which virtually voids the effect of collateral estoppel. For example, State v. Ashe yielded a perfect opportunity to apply collateral estoppel, but the court did not even consider it—apparently because the analysis dictated by the separate or several offense doctrine allowed the issue in each prosecution to be distinguished.

22. 397 U.S. at 442.
23. Id. at 445 n.10.
24. Id.
25. 242 U.S. 85 (1916). Respondent argued in his brief that Oppenheimer did not apply because its holding that an indictment dismissed on the erroneous conclusion that it was barred by the statute of limitations cannot be the subject of a second prosecution was based on res judicata, not collateral estoppel. But the Court indicated that there was no necessity to distinguish the two related doctrines. Brief for Respondent at 16, Ashe v. Swenson, 397 U.S. 436 (1970). 
Collateral estoppel has been expressly recognized by the federal courts, however: Even though there has been no formal acquittal of the particular offense on trial, a prior judgment of acquittal on related matters has been said to be conclusive as to all that the judgment determined. The matter is one of collateral estoppel of the prosecutor. United States v. DeAngelo, 138 F.2d 466, 468 (3d Cir. 1943). 
27. See State v. Chamineak, 343 S.W.2d 153 (Mo. 1961).
28. 350 S.W.2d 768 (Mo. 1961).
29. In addition, the court saw little need for the use of collateral estoppel to prevent harassment of the accused. Rather, it would place its faith in prosecutorial discretion: Assuredly our prosecutors are aware that the concept of double jeopardy is designed to prevent the government from unduly harassing an accused, and we are confident that they will not resort unfairly to multiple indict-
However, in *Ashe v. Swenson* the Supreme Court rejected this oversimplified approach and replaced it with the practical method of the federal decisions. This method requires a thorough examination of the prior record to see if a "rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."30 In applying this method to the Knight prosecution, the Court saw that, according to the jury instructions, there were two issues—was anything taken from Knight and was Ashe one of the robbers. The evidence as to the first issue was substantial and uncontradicted, while as to the second issue it was inconclusive. Thus the Court concluded:

The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. The federal rule of law, therefore, would make a second prosecution for the robbery of Roberts wholly impermissible.31

The Court then found the federal method to be a constitutional requirement.32

Justice Brennan, in his concurring opinion, accused Missouri of holding back informations against Ashe in order to have something to fall back on in case Ashe was acquitted at the first trial.33 Actually, however, the prosecutor had no choice but to hold back informations (prior to the amendment of rule 24.04), because of the well established Missouri rule that a defendant may not properly be convicted at the same trial of two distinct felonies except in instances specifically provided for by statute.34 The corollary to this rule is that there is misjoinder when separate and distinct offenses are included in one information or indictment.35 However, since such misjoinder is not wrong as a matter of law, the defendant may lose the benefit of the rule by not making timely objection.36 When the misjoinder is called to the court's attention it is within the judge's discretion whether to force the prosecutor to elect which of the charges he wishes to go to the jury.37 Nonetheless, if an election is requested, the defendant can be convicted of only one crime at any one trial.

This leaves the question of what there was about the *Ashe* case that caused the Missouri Supreme Court Committee on Rules to except crimes

ments and successive trials in order to accomplish indirectly that which the constitutional interdiction precludes.


30. 397 U.S. at 444.
31. *Id.* at 445.
32. *Id.*
33. *Id.* at 457 (concurring opinion).
34. See State v. Terry, 325 S.W.2d 1, 4 (Mo. 1959). Although Terry stated the rule, the court actually held that the rule could be waived if the prosecutor was not asked to elect between the charges. For a later case explaining the circumstances under which the rule can be waived, see State v. Bursby, 395 S.W.2d 155 (Mo. 1965).
arising out of the same transaction from the above stated rules.\textsuperscript{38} Actually the bare holding of \textit{Ashe} need not have provoked any change, given the following premises: Collateral estoppel, as promulgated in \textit{Ashe}, applies only when an issue has been previously adjudicated in defendant's favor; whether an issue is decided in defendant's favor or not depends upon the evidence (or lack of it); and wholesale joinder of charges will in no way strengthen the evidence. Thus it would seem that the state has no better chance of winning on six charges of robbery than on one, and broader joinder power will not circumvent the decision in \textit{Ashe}.\textsuperscript{39}

Since the bare holding of \textit{Ashe} need not have provoked the rule change, Justice Brennan's concurring opinion\textsuperscript{40} may well have caused the rules committee to broaden Missouri's joinder rule. Justice Brennan views the double jeopardy clause as requiring the joinder of all charges against the defendant that arise from a single criminal act, occurrence, episode or transaction. In other words, in defining what "same offense" means in the double jeopardy clause, Justice Brennan would use a "same transaction" test rather than the "same evidence" test. This "same transaction" test would allow the state only one trial for each course of conduct by the defendant, regardless of how many separate crimes were committed therein and regardless of whether the first trial resulted in acquittal or conviction. Prior to \textit{Benton v. Maryland} (when each state could have its own double jeopardy standards) the Supreme Court of Missouri rejected the "same transaction" test, saying:

\begin{quote}
[A]n offender is not to be exonerated from responsibility for his acts because his desires or passions persuade or impel him to commit two or more offenses during a transaction . . . .\textsuperscript{41}
\end{quote}

In order to maintain this policy under the "same transaction" test that Brennan would constitutionally impose, the amended rule 24.04, allowing joinder of offenses committed in the same transaction, is a necessity.

But, in deciding \textit{Ashe}, the majority opinion did not go as far as Justice Brennan did. The doctrine of collateral estoppel, though not applicable to very many situations because of the difficulty in determining the issues on which a jury acquits, was broad enough to cover Ashe. The case merely held that "[W]hatever else that constitutional guarantee [of double jeopardy] may embrace, it surely protects a man who has been acquitted from

\textsuperscript{38} Mo. R. Crim P. 24.04 now reads:
All offenses which are based on the same act or on two or more acts which are part of the same transaction or on two or more acts or transactions which constitute parts of a common scheme or plan may be charged in the same indictment or information in separate counts, or in the same count when authorized by statute. Any indictment or information may contain counts for the different degrees of the same offense or for any one of such degrees.

\textsuperscript{39} Normally, multiple charges against a defendant might unduly prejudice a jury against him. But in a situation such as Ashe's, where the multiple charges arose out of the same transaction, there is no undue prejudice because even if he was only charged with one crime, evidence of all six would be admissible. \textit{See} \textit{State v. Millard}, 242 S.W. 923, 926 (Mo. 1922).

\textsuperscript{40} Justices Douglas and Marshall joined in Justice Brennan's concurring opinion.

\textsuperscript{41} \textit{State v. Moore}, 326 Mo. 1199, 1205, 33 S.W.2d 905, 907 (1930).
having to 'run the gantlet' a second time.'\textsuperscript{42} The rules committee may have felt that "whatever else" includes protecting a man who has been convicted from having to run the gantlet a second time.

Even though the exception carved out by rule 24.04 is not compelled by the \textit{Ashe} decision, it is nevertheless quite logical. The rules prohibiting joinder of distinct crimes and multiple convictions were formulated to prevent a defendant from having to defend more than one charge at a time and to prevent the jury from using evidence of one offense to convict of another.\textsuperscript{43} These benefits to the accused are not needed when the distinct crimes arise from the same transaction. It seems that when the crimes are thus related the accused should welcome the chance to dispose of all the charges at one time rather than having to present the same evidence at several different trials. And, in cases of multiple crimes, with or without a joinder rule evidence of other crimes is admissible to give a complete picture of the offense charged.\textsuperscript{44} Regardless of whether the "same transaction" test ever becomes constitutionally required or not, the rule change made as a result of \textit{Ashe v. Swenson} is a welcome one in terms of judicial economy and prevention of harassment of the accused.

\textit{Barry M. Katz}

\section*{SIMULTANEOUS DEATH: VALUATION OF LIFE INSURANCE IN THE GROSS ESTATE}

\textit{Estate of Chown v. Commissioner}\textsuperscript{1}

\section*{I. THE CHOWN DECISION}

Harriet and Roger Chown, husband and wife, died in a commercial airline crash on February 25, 1964. Harriet was the absolute owner and primary beneficiary of a $50,000 double indemnity insurance policy on the life of her husband. Their children were named as the secondary beneficiaries. An Oregon probate court found the deaths were simultaneous,\textsuperscript{2} and, under Oregon's Uniform Simultaneous Death Act,\textsuperscript{3} the insurance

\begin{itemize}
\item \textsuperscript{42} 397 U.S. at 445-46.
\item \textsuperscript{43} Hunvald, \textit{supra} note 36, at 373.
\item \textsuperscript{44} \textit{Id.}
\item 1. 428 F.2d 1395 (9th Cir. 1970).
\item 2. \textit{Id.} at 1396.
\end{itemize}

\begin{quote}
Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously \textit{the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.}
\end{quote}

In light of this statute the \textit{Chown} court stated that "\textit{N}othing became payable to her as beneficiary by reason of Roger's death." 428 F.2d at 1397. Missouri has an identical statute, § 471.040, RSMo 1969.

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company paid the proceeds of the policy directly to the secondary beneficiaries.\textsuperscript{4} Harriet's executor included no part of the proceeds in her federal estate tax return, but included an amount representing the interpolated terminal reserve value of the policy\textsuperscript{5} plus unearned premiums and dividend accumulations.\textsuperscript{6} The Commissioner of Internal Revenue determined that the entire proceeds should have been included in the estate and assessed a deficiency which was later upheld by the Tax Court.\textsuperscript{7} The Ninth Circuit Court of Appeals reversed and upheld the executor's valuation.\textsuperscript{8} The issue in \textit{Chown} was the amount to be included in the "gross estate" of an owner-beneficiary whose death is simultaneous with the insured.

\textbf{II. Valuation of the Owner-Beneficiary Interest in a Life Insurance Policy}

The federal estate tax is an excise on the transfer of interests in property, the "gross estate," that results on death.\textsuperscript{9} The value of a decedent's "gross estate" is defined by section 2031 of the Internal Revenue Code of 1954 as, "the value at the time of his death of all property, real or personal,

\textit{etc.}
tangible or intangible, wherever situated." Section 2033 further provides that "[t]he gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death." Although these two sections refer to all property, section 2042 is specifically directed to life insurance. Under this section, the "gross estate" includes amounts receivable by the executor as the proceeds of insurance on the decedent's life or amounts receivable by other beneficiaries if the insured died possessed with any of the "incidents of ownership." The term "incidents of ownership" refers to the right of the insured, or his estate, to receive the economic benefits of the policy, including the right to change beneficiaries, to surrender or cancel the policy, to assign the policy or revoke an assignment, and to obtain a loan on the policy. Furthermore, even when an owner-beneficiary paid for the policy and retained it physically, the insured has been held to possess incidents of ownership in flight insurance when he merely signed the application.

When an owner other than the insured dies possessed of these "incidents of ownership," section 2033 requires inclusion in his "gross estate" of any ownership interest in the policy. The amount included under this section, as determined by the Treasury Regulations, is the selling price of comparable contracts by an insurance company regularly engaged in the sale of contracts of that character. However, because this value is not readily ascertainable on contracts in force for some time and on which further premiums are payable, an alternative method of valuation is provided whereby the value will be the interpolated terminal reserve value at the date of death plus the unused portion of the last premium paid. It should be noted that the value determined by this alternative method is only an approximation and should not be used if it is not reasonably close to the actual value of the contract.

In light of the above sections, if an owner dies before the insured, the amount includible in the "gross estate" of the owner is the unmatured value of the policy, i.e., the replacement value or, alternately, the interpolated terminal reserve value. If the owner (who is not the beneficiary) dies after the insured's death, the amount includible in the owner's estate will be zero because the "incidents of ownership" will have terminated.

12. Id.
19. See note 5 supra.
21. Id.
22. See, e.g., Goodman v. Commissioner, 156 F.2d 218 (2d Cir. 1946); Estate of Ethel M. Donaldson, 31 T.C. 729 (1959).
when the policy matured upon the death of the insured. If the owner is the beneficiary and dies after the insured, the entire proceeds of the policy will be includible in the owner-beneficiary's "gross estate" since the policy will have matured, causing the full proceeds to be due and payable to the owner-beneficiary. These rules become difficult to apply in cases such as Chown where the insured and the owner-beneficiary die simultaneously.24

III. THREE APPROACHES TO THE SIMULTANEOUS DEATH SITUATION

In the situation where the owner-beneficiary and the insured die simultaneously there are three possible solutions to the question of what amount is includible in the owner-beneficiary's gross estate: (1) An amount representing the full proceeds of the policy, (2) zero, or (3) an amount representing the interpolated terminal reserve value.

The first possible solution is to value the owner-beneficiary's interest at an amount representing the full proceeds of the policy. The government advances this solution on the theory that at the moment of the death of the insured there is a split second of time within which the owner-beneficiary is entitled to the full proceeds of the policy.26 The taxpayer's position in rebuttal is that there is no split second of time within which the owner-beneficiary could have been entitled to the proceeds because the initial premise is that the deaths were simultaneous.26 An alternative theory supporting the full proceeds valuation (at least when a plane crash is involved) is based on the idea that, just prior to the death of the insured but after the plane is in trouble, the death of the insured is so imminent that the value of the policy to the owner-beneficiary increases to an amount near or equal to the full proceeds of the policy, and this is its value when the owner-beneficiary dies moments later.27 Opponents of this "falling plane" theory point out that as the insured's death becomes increasingly imminent, the beneficiary's death becomes equally imminent; therefore, any increase in value attributable to the impending death of the insured is offset by an equivalent decrease in value to the beneficiary due to his impending death.28

A second possible solution is to include nothing in the gross estate of the owner-beneficiary. In support of this valuation, the taxpayer's estate argues that at the moment of death there is no value by reason of the bene-

27. Estate of Harriet H. Chown, 51 T.C. 140, 143 (1968). This theory assumes that a "willing buyer," knowing of the insured's impending death, would be willing to pay the owner-beneficiary an amount equal to the proceeds of the policy to obtain his interest. See note 39 and text accompanying notes 56-59 infra.
28. See Estate of Chown v. Commissioner, 428 F.2d 1395, 1398 (9th Cir. 1970). See also Commissioner v. Estate of Noel, 380 U.S. 678, 684 (1965), where the Court stated:
We hold that estate tax liability for policies "with respect to which the decedent possessed at his death any of the incidents of ownership" depends on a general, legal power to exercise ownership, without regard to the owner's ability to exercise it at a particular moment.
ficiary rights since the beneficiary has not survived, and there is no value by reason of the ownership rights since the policy has matured, thereby terminating the incidents of ownership. 29 Another theory supporting the "zero valuation" is to use the "falling plane" rationale but focus attention on the impending death of the beneficiary to establish that a "willing buyer" would not purchase the beneficiary's fleeting prospects in the policy proceeds; therefore, his interest has no value at the moment of death. 30 Finally, some argue in support of the zero valuation that the estate tax is a tax on the transfer of property by the decedent at death and is not a tax on property of the decedent owned at death but not transferred. 31 If this premise is accepted, then, since the heirs or devisees of the owner-beneficiary receive nothing of value by reason of the insurance policy, nothing is includible for estate tax purposes. 32 The government might possibly rebut this contention by refusing to accept the basic premise because there are arguably other types of property which are includible in the gross estate of the deceased, but do not involve a transfer of property. 33

The third possible solution is to include an amount equal to the interpolated terminal reserve of the policy in the gross estate of the owner-beneficiary. This is the normal valuation rule where the owner of a life insurance policy dies before the insured. 34 Its application to the simultaneous death situation is supported in part by the rebuttal of the underlying theories for the other two possibilities as outlined above and in part by the fact that the government's own regulation establishes this valuation method. 35 By its terms, this regulation is applicable except in the case of unusual policies 36 and the supporters of this theory point out that although this is an unusual death situation, there is nothing unusual about the policy. 37

IV. HOW THE COURTS HAVE RESOLVED THE VALUATION PROBLEM

On facts identical to Chown, a federal district court in Old Kent Bank & Trust Co. v. United States 38 held that the value of the ownership interest in the policy at the time of death was zero. The court reasoned that, since the policy matured at the instant of the simultaneous death, the "incidents

31. See text accompanying notes 9-12 supra.
34. See text accompanying notes 22-23 supra.
36. Id.
37. See Estate of Chown v. Commissioner, 428 F.2d 1395, 1398 (9th Cir. 1970). See also note 63 and accompanying text infra.
of ownership” were worth nothing. Since rights to the proceeds then vested in secondary beneficiaries, no potential buyer would pay for the interests held by the owner. Thus, according to the district court, nothing of value passed through to the estate.\(^39\) However, the court of appeals reversed, holding that the interpolated terminal reserve value was the proper amount includible in the owner’s estate.\(^40\)

The Tax Court in Choun held that the entire proceeds of the policy were includible in Mrs. Chown’s estate.\(^41\) The court reasoned that the policy matured and the proceeds became payable at the instant of Roger’s death.\(^42\) The court considered the interpolated terminal reserve value improper as it was not “consistent with the actual fair market value”\(^43\) of the policy at Harriet’s death. Instead, the Tax Court reasoned that as death approached the policy neared face value and the entire proceeds were, therefore, includible in Harriet’s estate. The ninth circuit rejected this valuation, reasoning that although Mrs. Chown’s chances of immediate payment increased as Roger approached death, her chances of exercising control over the policy or proceeds were correspondingly decreasing at the same time.\(^44\) The court stated that inclusion of the entire proceeds “rests on an assertion that what one at the same instant ‘acquires’ and ‘loses’ one has rather than has not at that instant.”\(^45\) Had Roger died first the entire proceeds would have been includible in Harriet’s estate because she would have become entitled to the proceeds as beneficiary, not as a result of valuing her ownership interest.\(^46\) Furthermore, the court rejected the reasoning of the Tax Court because it was, by implication, based on an unfounded presumption that Roger died first (since nothing else could “fully mature” the policy).\(^47\)

Valuation based on the terminal reserve value of the policy was held proper on appeal in both Chown and Old Kent Bank. The Chown court reasoned that the value was other than the interpolated terminal reserve only between the moment something went wrong in flight and the deaths, and that there was no reason to determine estate tax liability by focusing

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39. Id. at 52-53. Although Treas. Reg. § 20.2031-8 (a) (1), T.D. 6680, 1963-2 Cum. Bull. 417, expresses the valuation in terms of the selling price of comparable policies by an insurance company, courts have also spoken of an amount a “willing buyer” would pay a “willing seller” for the contract. Goodman v. Commissioner, 156 F.2d 218, 220 (2d Cir. 1946). “The ‘willing buyer and seller’ are a hypothetical buyer and seller having a reasonable knowledge of relevant facts.” United States v. Simmons, 346 F.2d 213, 217 (5th Cir. 1965). Regardless of the language employed, the amount required to be included in the gross estate under § 2033 of the Internal Revenue Code is the value of the ownership interest transferred at death.

42. Id. at 143.
43. Id. In Estate of James Stuart Pritchard, 4 T.C. 204 (1944), a case not involving simultaneous death but a gift in contemplation of death, the court reasoned that an important element in the value of life insurance is collectibility. As death approaches, the time of collectibility nears and, therefore, the value approaches the face value.
44. 428 F.2d at 1399.
45. Id. at 1398. See also note 28 supra.
46. 428 F.2d at 1399.
47. Id. at 1398.
on this brief instant of time. The Old Kent Bank court similarly reasoned that a decedent policy owner's interest at death would ordinarily be valued at the interpolated terminal reserve value, and to value the interest transferred as the entire proceeds would impose a substantially higher tax merely because of simultaneous death. The court in Old Kent Bank stated the essence of the entire valuation problem as follows:

[T]he seeking a proper index for valuation, the Government looks at the value of the proceeds accruing to the beneficiaries, while the District Court looked at the value of the rights remaining in Mrs. Goodwin's estate.

Both courts agreed that the value of the rights or interest in the policy transferred must determine the amount includible in the gross estate and the terminal reserve value most nearly represents the value of the interest transferred.

In Estate of Ellen M. Wien, the Tax Court, shortly after its decision in Chown, again held the value of the interest transferred for estate tax purposes equaled the entire proceeds of the policy. This case is particularly significant in that it involved a husband and wife, each the owner-beneficiary of a life insurance policy on the other's life. The fifth circuit reversed, holding that the interpolated terminal reserve was the proper valuation of the interest transferred in both policies. In Estate of Meltzer v. Commissioner, the fourth circuit, on facts similar to Chown, reversed the full proceeds valuation of the Tax Court and held the interpolated terminal reserve value applicable.

After the decisions in Chown and these subsequent cases, the question of determining the amount includible in the "gross estate" of an owner-beneficiary who dies simultaneously with the insured has been resolved in four circuits by application of the interpolated terminal reserve value.

48. Id. at 1399.
50. Id. at 394.
51. 51 T.C. 287 (1968).
52. Estate of Wien v. Commissioner, 441 F.2d 32 (5th Cir. 1971). Judge Tuttle's dissenting opinion favored a full proceeds valuation. He considered it to be a "physical impossibility" that in the same accident the wife could die first for one purpose and the husband for another. Judge Tuttle concluded his dissenting opinion by stating:
In sum, I think the true facts should be established—that is, that one of the couple died first (even momentarily) if that be the fact. Alternatively, I think that if all ownership rights were extinguished at simultaneous death, if that should be the finding, then all rights merged into the insureds at the moment of their death and all was part of the taxable estate. Id. at 44 (dissenting opinion).
53. 439 F.2d 798 (4th Cir. 1971).
54. The four circuits following the interpolated terminal reserve valuation are as follows: Estate of Wien v. Commissioner, 441 F.2d 32 (5th Cir. 1971); Estate of Meltzer v. Commissioner, 439 F.2d 798 (4th Cir. 1971); Old Kent Bank & Trust Co. v. United States, 430 F.2d 392 (6th Cir. 1970); Estate of Chown v. Commissioner, 428 F.2d 1395 (9th Cir. 1970). It should also be noted that the Uniform Simultaneous Death Act was in effect in similar form in all four cases.
All four circuits apply this method of valuation notwithstanding criticisms of it and the availability of other valuation methods. A comparison of this method with possible alternative valuation methods indicates that the terminal reserve value most accurately represents the interest transferred in the simultaneous death situation.

V. How Valid Is the Terminal Reserve Method of Valuation?

Analysis of the practical effects of the three possible valuations in simultaneous death situations strongly supports application of the interpolated terminal reserve method. Valuation of the interest transferred as the amount of the full proceeds of the policy, or as zero, results in greater or lesser tax liability in simultaneous death cases than in otherwise similar non-simultaneous death cases. The interpolated terminal reserve valuation neither discriminates for nor against simultaneous death, and thus provides the most practical and fairest solution to the valuation problem.

As previously mentioned, some people have argued that a valuation based upon a "willing buyer" test should be applied. This test would value the ownership interest transferred as the amount a "willing buyer" would pay a "willing seller" for the insurance contract at the moment of the insured's death. The district court in Old Kent Bank employed such a test in finding that, at the moment of simultaneous death, "a potential buyer would have paid nothing for the interest transferred to the heirs." On appeal, the Sixth Circuit Court of Appeals rejected application of the "willing buyer" test to provide either a zero or full proceeds valuation. The court reasoned that the buyer would not know the sequence of death and this uncertainty would make the value of the policy highly speculative. Accordingly, there is no assurance that a hypothetical arm's length buyer would be willing to pay the amount of the full proceeds for the interest transferred. Proper application of the "willing buyer" test requires knowledge by the buyer of the exact instant and sequence of death. These facts were not proven in Chown and evidence of them is doubtful in cases based on similar circumstances. Thus, because the "willing buyer" test must be applied after the fact to the moment of death, it is of little analytical benefit in the simultaneous death situation. The interpolated terminal reserve method of valuation is far less speculative than the "willing buyer" test in computing the value of the interest transferred.

The interpolated terminal reserve value has, however, been subjected

55. See text accompanying notes 49-50 supra.
56. See note 39 and text accompanying notes 27 and 30 supra.
59. Id. at 395 states:
As the District Court pointed out, there is no showing that such a buyer could depend on the deaths occurring simultaneously. "Will the deaths be treated as simultaneous? Will the decedent die first? Will the insured die first? The value of the policy depends on the answers to these questions—answers which can only be given after death, again making the value of the policy highly speculative . . . ."
to criticism in the simultaneous death situation. It has been argued that one reason for not applying this valuation is the exception to Treasury Regulation 20.2031-8 (a) (2). This exception states the interpolated terminal reserve value should not be applied if, because of the unusual nature of the contract, the approximation resulting from the terminal reserve method is not reasonably close to the full value of the contract.60 The Tax Court in Chown relied on this exception in rejecting the interpolated terminal reserve valuation. Treating the policy as fully matured, the Tax Court stated that the terminal reserve value was "not consistent with the actual fair market value of the policy at the time of Harriet's death . . . ."61 However, the Tax Court held the interpolated terminal reserve value inapplicable not because of the unusual nature of the contract but because the deaths were simultaneous.62 The court of appeals said this was a misapplication of the exception and applied the terminal reserve valuation.63

The use of the interpolated terminal reserve valuation has also been criticized because it requires reliance on the presumption that the insured survived at least momentarily,64 whereas the deaths of the owner-beneficiary and the insured were in fact simultaneous. However, the finding of simultaneous death under the Uniform Simultaneous Death Act is itself a presumption that arises only in the absence of evidence to the contrary.65 The valuation problem is, in essence, the problem of selecting an assumed sequence of death that will be fairest for estate tax purposes, when evidence as to the moment of death is unavailable. Therefore, it appears that the criticism is actually directed at the assumed sequence of death implicit in the use of the interpolated terminal reserve method of valuation, rather than at the method per se. Since the probability of both deaths occurring at precisely the same instant is very small,66 in most cases where the sequence of death is not provable a finding of simultaneous death may be an unwarranted assumption. An assumption that either the insured survived or the

62. Id.
63. Estate of Chown v. Commissioner, 428 F.2d 1395, 1398 (9th Cir. 1970).
The court of appeals in Old Kent Bank & Trust Co. v. United States, 430 F.2d 392 (6th Cir. 1970), noted similar misconstruction of the exception in rejecting the government's argument that the interest transferred should be valued as the amount of the full proceeds. The court, after noting the exception, stated:
This latter regulation does not apply when the insurance contract is of an "unusual nature," and the Government contends that it is for that reason inapplicable here. We disagree. In this case, it is the circumstance of simultaneous death which is unusual, not the character of the contract (which, for all that appears, is a perfectly ordinary life insurance policy). Id. at 394.
64. See 23 Sw. L.J. 740, 744 (1969).
65. § 471.040, RSMo 1969.
66. In Estate of Wien v. Commissioner, 441 F.2d 32, 44 (5th Cir. 1971) (dissenting opinion), Judge Tuttle refers to the probability of simultaneous death as follows:
I think the likelihood of absolute simultaneous death is so remote that I think both taxpayer and the Commissioner are entitled to have the fact determined so that the tax events flowing therefrom can properly be assessed.
owner-beneficiary survived may well be factually more correct; but to base valuation on one or the other of these assumptions may lead to unfairness. Uniform state statutes, although not controlling on questions of estate tax liability, assume simultaneous death in absence of evidence to the contrary, but distribute insurance proceeds as if the insured had survived. An interpolated terminal reserve valuation is logically consistent with this type of distribution. Thus, the interpolated terminal reserve results in the most practical taxation of an "ownership interest" in cases where evidence of the moment of death is unavailable.

VI. Conclusion

The interpolated terminal reserve value has been the traditional means of valuing the decedent's interest in the policy when the insured survived. Such valuation is definite, easily determined and represents the value placed on the policy by the insurance company at the moment of death. When weighed against the speculative nature of a "willing buyer" test or reasoning which places an unwarranted advantage or burden on an estate merely because of a simultaneous death, the terminal reserve method of valuation is the most rational solution to the valuation dilemma.

JOHN R. LONGLETT

LIABILITY OF DRUG MANUFACTURER UNDER FAILURE TO WARN NOTIONS

Stahlheber v. American Cyanamid Co. 1

On April 5, 1964, Mrs. Stahlheber, age 41, attended a "feeding station" in order to take an oral polio vaccine. She was given Trivalent Orimune, 2 which contains attenuated live polio virus that combats polio strains types one, two and three. The vaccine was a prescription item 3 manufactured under federal regulation by the Lederle Laboratories Division of defendant manufacturer, American Cyanamid. Nineteen days later, the plaintiff was afflicted with a paralysis which spread over her lower trunk, limbs and extremities. The plaintiff and her husband 4 filed suit against defendant alleg-

67. See note 4 supra.

1. 451 S.W.2d 48 (Mo. 1970).
2. Id. at 51. Trivalent Orimune is the trade name for the defendant's "trivalent" vaccine, in which all three types of attenuated polio virus are used. Originally, an oral live virus vaccine was administered separately for each of the three types of polio virus. These vaccines are termed monovalent.
3. Davis v. Wyeth Laboratories, Inc., 399 F.2d 121, 122 (9th Cir. 1968). Oral polio vaccine is a prescription item.
4. Mo. R. Civ. P. 66.01 (c) provides:
   (c) Consolidation—Injury to Spouse. If an injury, not resulting in death, is inflicted upon the person of one spouse, and causes
ing that defendant was negligent in failing to warn persons receiving its vaccine of the possibility that adult persons doing so might become afflicted with poliomyelitis. The circuit court awarded a $130,000 judgment to Mrs. Stahlheber and a $20,000 judgment to her husband. The Missouri Supreme Court, on appeal, affirmed Mrs. Stahlheber's judgment, and reversed the judgment in favor of Mr. Stahlheber on the grounds of inadequacy of the damage award.\(^5\)

It is significant that Stahlheber was tried on a negligence theory (failure to warn) rather than a strict liability theory as seemingly sanctioned by the Restatement (Second) of Torts section 402A.\(^6\) Strict liability under the Restatement (Second) would require only a finding that the product was "defective," which has been construed to mean unreasonably dangerous when put to reasonably contemplated uses and having qualities inconsistent with the normal consumer's expectations.\(^7\) In comment \(k\) to section 402A, however, there is a caveat to the main body of the section which concedes that some products (\(e.g.,\) drugs and vaccines) are incapable of being made safe for their intended and ordinary use, given the present state of human knowledge.\(^8\) Such products, where accompanied by an adequate warning of action therefore accrue to the injured spouse and also to the other spouse for loss of consortium and services, or either, they shall be enforced in one action brought by both spouses. The cause of action of a spouse so required to join in an action as a party plaintiff under this Rule shall be barred by failing to join therein after the defendant has given to such spouse thirty days' notice in writing of the pendency of the action and of the necessity to join therein; such notice shall be given either by personal service within or without the state and proof thereof by the return of an officer or by affidavit, or by the filing of a United States Post Office Registry receipt signed by such spouse. If such service cannot be obtained, then the Court may in its discretion stay the pending proceeding.

5. 451 S.W.2d at 48.

6. Restatement (Second) of Torts § 402A (1965). This section reads as follows:

   (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

   (a) the seller is engaged in the business of selling such a product, and

   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

   (2) The rule stated in Subsection (1) applies although

   (a) the seller has exercised all possible care in the preparation and sale of his product, and

   (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.


8. Restatement (Second) of Torts, Explanatory Notes § 402A, comment \(k\) at 353-54 (1965). The comment reads:

\(k.\) Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common

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of their risks, are not defective, nor unreasonably dangerous. Conversely, if the warning is absent or inadequate, regardless of the product's desirable benefits, strict liability attaches. It will be assumed, for purposes of this discussion, that comment k incorporates some requirements traditionally associated with "negligence." (In Basko v. Sterling Drug, Inc.,9 the United States Court of Appeals for the Second Circuit made this assumption.) While some difference in approach may exist, comment k deals in terms of "norms" and "departures" which are substantially analogous to the basic theory of negligence.

Whether assessing liability arising out of prescription drug or vaccine use in terms of traditional negligence theory, or under the transfigured fault notions implicit in comment k, some basic questions typically are presented.

The first question involves when it becomes necessary for a drug manufacturer to give a warning. The warning should be given, as the jury instruction in Stahlheber demonstrates, when the drug manufacturer knew or, by using the skill of an expert in the defendant's business, could have known of the dangerous potentiality of said product.10 Excepted from this rule are obvious dangers such as a knife cut and some allergic reactions.11 Johnston v. Upjohn Co.,12 a Kansas City Court of Appeals case, recognized the above rule, and held that no evidence was presented that defendant drug manufacturer could have had knowledge that the administration of

in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is enjected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

its antibiotic might cause the reaction plaintiff experienced. Hence, no
warning was required.\textsuperscript{13}

The second question is whether some warning was in fact given by the
pharmaceutical company. This is a fact question for the jury as declared
in \textit{Stahlheber}.\textsuperscript{14}

The third question is whether the warning was adequate. In \textit{Brown v. H. K. Mulford Co.},\textsuperscript{15} a case involving injuries from allegedly defective hog
cholera serum, the plaintiff claimed that defendant negligently failed to
divulge to the treating veterinarian, or to the plaintiff, the serum's
dangerous character. The court reversed a jury verdict for plaintiff on appeal, holding that the following warning given by defendant was adequate:\textsuperscript{16}

It is only with the greatest care and best judgment on the part
of skilled and qualified veterinarians that the Serum-Virus \ldots may
be safely used. \ldots If the dose of serum is too small in proportion
to the dose of virus, or serum weak in potency is used, or the ani-
imals are unusually susceptible, hog cholera may insue. \ldots This
disadvantage \ldots must be considered seriously.\textsuperscript{17}

Another example of an adequate warning is found in \textit{Carmen v. Eli Lilly & Co.},\textsuperscript{18} an Indiana case centering on the use of rabies vaccines by humans. The warning given in that case read:

\begin{center}
\textbf{REMOTE ILL EFFECTS OF TREATMENT}\end{center}

Occasionally, in addition to the local reactions observed during
treatment, there have been disturbances ascribed to the treat-
ment, such as "treatment paralysis" coming on during the treat-
ment or immediately afterward, and in a very few cases a fatal
paralysis has occurred. Remlinger in the study of 107,712 cases
found forty cases of paralysis, two resulting fatally. \ldots

It is well for the physicians to have these facts in mind although
the dangers are very remote and do not affect the value or necessity
of treatment.

There are no contraindications. \ldots \textsuperscript{19}

The judgment entered for defendant manufacturer was sustained, the court
holding that "any reasonably prudent adult person would be fully informed
from it [the warning] as to the results that might flow from the use of the
vaccine so that he could thereby decide whether or not he would submit
himself to the treatment. \ldots"\textsuperscript{20} In holding the foregoing admonition dis-
positive on the adequacy issue the court disregarded plaintiff's argument
that the expression in the pamphlet that the "treatment is harmless \ldots"
and the ambiguity in the pamphlet considered as a whole prevented a submissible case on adequacy of warning from being made.

While this precise issue of "adequacy" of warning did not reach the jury in Stahlheber, for purposes of comparison, the defendants pointed to a warning from a pamphlet accompanying the vaccine which read as follows:

Printed in U.S.A., Oct. 1963
Only in adults receiving type 3 has a question of safety been raised following administration of the vaccine during the summer season of 1962 when less than one per million vaccinees developed a neurologic disease resembling poliomyelitis. . . . Critical analysis did not prove that any of the illness could be attributed to the vaccine virus and their true significance is still under study. . . .

There are no known contraindications to oral poliovirus vaccine.\(^{21}\) This statement closely resembles the warning in the Carmen case referred to earlier. However, the presence of two Surgeon General's Reports on the vaccine in Stahlheber\(^{22}\) would seem to provide a firmer basis for doubt about the polio vaccine's safety than the mild disclaimer indicated by the defendant's pamphlet. For example, the Surgeon General's reports stated that type three vaccine should be restricted to pre-school and school-age children and to adults in high risk groups such as those traveling in epidemic areas.\(^{23}\) Moreover, the second and more recent Surgeon General's report recommended that in the case of adults, especially above the age of 30, potential risks are inherent in the vaccine. This conclusion was supported by the observation that the need for immunization diminishes with advancing age.\(^{24}\)

Since reasonable care in conveying a warning rather than actual notice is the usual test,\(^{25}\) a fourth question concerns the mode to be used to convey the warning. The manner chosen to announce the alleged warning in Stahlheber (a pamphlet accompanying vaccine bottles) satisfies the standards set by Missouri case law.\(^{26}\) Despite this recognition of the adequacy of warning inferred from accompanying written matter, in Sterling Drug, Inc. v. Yarrow\(^{27}\) (a negligence theory case) a federal court held that defendant manufacturer's "detail men" (sales representatives who frequently visited customer physicians) should have personally advised physicians of the drug's harmful effects, instead of relying upon letters or announcements.\(^{28}\)

\(^{21}\) 451 S.W.2d at 61-62.
\(^{22}\) Id. at 58. See REPORT OF THE SPECIAL ADVISORY COMMITTEE ON ORAL POLIOMYELITIS VACCINE TO THE SURGEON GENERAL (Sept. 20, 1962), and the supplementary report dated Dec. 18, 1962.
\(^{23}\) 451 S.W.2d at 58.
\(^{24}\) Id.
\(^{25}\) RESTATEMENT (SECOND) OF TORTS § 388 (1955). The relevant portion reads: "(c) fails to exercise reasonable care to inform them of its dangerous conditions or of the facts which make it likely to be dangerous."
\(^{27}\) 408 F.2d 978 (8th Cir. 1969) (applying South Dakota law).
\(^{28}\) Id. at 993.
In *Davis v. Wyeth Laboratories, Inc.* the federal court chose to use the legal theory outlined in comment \( k \), instead of the traditional theory of negligence. *Davis* held that warnings on the labels of vaccine bottles are not enough since many consumers would not notice such warnings. The opinion recommended the use of advertisements, posters, written releases or verbal statements. However, the opinion did not indicate if the use of one, a combination, or all of the above means would be required by the court.

The notions of reasonable care and actual notice raise an additional problem, subsidiary to the adequacy of the warning. The usual rule for non-prescription drugs requires the manufacturer to use reasonable care in warning consumers of its product's risks. In contrast, for prescription drugs, according to Missouri case law, the manufacturer must make reasonable efforts to warn the *patient's doctor* of the drug's risks. In support of this rule, it is reasoned that prescription drugs (and vaccines) by definition encompass greater inherent risks than non-prescription items. Consequently, a doctor should act as a "learned intermediary" between the producer and the patient to advise and better protect the patient. The issue of who should receive the warning was not reached in *Stahlheber*. The legal theory relied upon in *Stahlheber*, however, was "failure to warn persons" rather than "failure to warn the plaintiff's doctor." Hence, the facts and legal theory of *Stahlheber* suggest a final question: For prescription drugs, to whom should an adequate warning be aimed when the manufacturer and "consumer-patient" have no "learned intermediary" between them, as in mass-immunization programs similar to the one in *Stahlheber*?

It is submitted that *Davis v. Wyeth Laboratories, Inc.* [the Restatement (Second) comment \( k \) case] contains an appropriate answer to this question. The *Davis* opinion recommends that, in a "mass immunization situation" where prescription items are dispensed without a doctor's direct supervision, the consumer-patient should be the target of the warning. It would seem almost certain that the Missouri courts will adopt the requirement that a warning be given to the consumer in this situation, for otherwise the law would be in the anomalous position of requiring a warning to

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29. 399 F.2d 121 (9th Cir. 1968). Applying Idaho law, the court reversed a lower court's dismissal and remanded with instructions to try the case under comment \( k \) notions.
30. *Id.* at 131.
31. *Id.*
32. *Arnold v. May Dep't Stores Co.*, 337 Mo. 727, 737, 85 S.W.2d 748, 753-54 (1935).
35. 451 S.W.2d at 48.
36. The author is referring to a school "feeding station" dispensing oral polio vaccine, a prescription item, apparently without the presence of a physician to receive the manufacturer's warning and to advise and protect the people receiving the vaccine.
37. 399 F.2d 121 (9th Cir. 1968).
38. *Id.* at 131.
the consumer for non-prescription drugs and not requiring one for certain prescription drugs.

The appropriate mode or manner by which a warning must be conveyed has not yet been made clear in cases of this type. However, the general rule governing the effectiveness of contractual terms printed on bills, letterheads and tickets to the effect that such terms must be called to the attention of the other party or so laid before him that he may reasonably, and is in fact, believed to have been made aware of such terms,\(^3\) may provide an influential analogy.

V. Kennen Rohrer

THE ARKANSAS PRISON SYSTEM—AN UNCONSTITUTIONAL OUTRAGE

_Holt v. Sarver\(^1\)_

Arkansas has the best prison system in the United States.\(^2\)

Eight class actions were brought by inmates of the Arkansas Penitentiary System against the members of the State Board of Corrections and the State Commissioner of Corrections, in the United States District Court for the Eastern District of Arkansas. Petitioners alleged that Arkansas prison conditions and practices were a violation of the prohibition against cruel and unusual punishment in the eighth and fourteenth amendments to the United States Constitution,\(^3\) and prayed for a declaratory judgment as to the truth of these allegations and for appropriate permanent injunctive relief. The court was satisfied that federal jurisdiction properly existed under 28 U.S.C. § 1343 (3) and 42 U.S.C. § 1983,\(^4\) and that conditions and practices in the Arkansas Penitentiary System were such that confinement of persons therein amounted to cruel and unusual punishment. The court also sustained the claim that racial discrimination existed and had to be eliminated.\(^5\)

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\(^{39}\) See A. Corbin, _Contracts_ § 33 (1963).

3. The petition also claimed that racial segregation of the inmates existed in contravention of the fourteenth amendment to the United States Constitution, and that the use of convicts to do forced, unpaid labor was prohibited by the thirteenth amendment to the United States Constitution. 309 F. Supp. at 364.
5. The allegation that uncompensated work done by the prisoners violated the thirteenth amendment was rejected. Reference was made to Heflin v. Sanford,
The court observed that this was the first time the constitutionality of an entire penal system had ever been attacked. Evidence presented to the court from motion pictures and the testimony of penal experts, inmates, and free world employees of the penitentiary demonstrated why the Arkansas system quite properly earned such a nefarious distinction. In reaching its decision, the court was particularly influenced by evidence relating to the trusty system, the conditions in the prison barracks, intolerably unsanitary and psychologically damaging isolation cells, and the failure to provide any sort of rehabilitation program.

A brief description of the dehumanizing existence of the inmates graphically illustrates why an entire prison system could be held to violate the eighth amendment. With the exception of inmates in isolation cells, all prisoners were housed in 100-man dormitories, affording the individual inmate no privacy. Prisoners high on smuggled drugs and alcohol ran wild.

142 F.2d 798, 799-800 (5th Cir. 1944), where the court noted that there is a difference between "involuntary servitude" and "uncompensated service," and that the thirteenth amendment forbids the former, with the exception of punishment for criminal offenses, but does not prohibit the latter. The Holt court reached the same conclusion in spite of evidence that showed the convicts were made to labor long hours six days a week, in all kinds of weather, doing the particularly harsh and tedious work of harvesting crops. Arkansas is one of a very few states that pays a convict nothing for his work. Literally the only way the men can earn money is to sell their blood at $5 a pint. 309 F. Supp. at 370-71.

6. This certainly was not the first time that Arkansas prisoners had attempted to lay their grievances before the federal courts. Since 1965 there have been five published opinions of cases dealing with specific practices found to be in violation of the Constitution. See Courtney v. Bishop, 409 F.2d 1185 (8th Cir. 1969); Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967), rev'd in part, 404 F.2d 571 (8th Cir. 1968); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); and Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965). Talley and Jackson outlawed corporal punishment by the use of a whipping strap and two devices known as the "Tucker telephone" and the "teeter board." The "Tucker telephone," a particularly grisly torture, involved the connection of electrodes to a convict's penis and big toe. An electric shock was then generated. In Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969), it was held that a state had a constitutional duty to use ordinary care to protect the lives and safety of prisoners, and that Arkansas had failed in this duty. In addition, that court ruled that the overcrowded conditions of the Cummins Unit isolation cells were unconstitutional.

7. The prisoners in the isolation cells were mistreated by their trusty guards. They were ill-fed and had nothing to do. The Cummins Unit's cells were overrun by rats. Periodically, emotionally disturbed inmates went on rampages and destroyed what little fixtures they had in their cells. The court noted that many of the problems are caused by these hardened prisoners themselves. Specifically, with respect to this problem, the court ordered that the diet of these prisoners be improved; that they be allowed to dine in the dining hall; and, further, that they be supervised more closely by civilians rather than by trusties alone. 309 F. Supp. at 384-85.

8. The Tucker Unit officials had started an educational program for the men prior to the district court's opinion. Nothing had been done at the Cummins Unit. Although the court said that absence of a program of training or education by itself is not constitutionally impermissible, the failure to provide any sort of rehabilitative plan was a factor which contributed to the overall unconstitutionality of the operation. 309 F. Supp. at 378-79.

at night. The weaker men were victims of stabbings and sexual assaults. Sanitary conditions were deplorable, and medical and dental facilities were very inadequate. Those inmates not fortunate enough to be trusties were forced to work long hours in the fields in all kinds of weather. All of these conditions were compounded by the fact that, quite simply, the trusties ran the prison. Testimony indicated that 90 percent of all prison duties were performed by trusties, including the armed guarding of other inmates. The trusty system and the conditions in the barracks were the two most significant factors which caused the court to hold as it did.

No specific individual relief was granted. Instead, the court ordered injunctive relief for the prisoners as a class. Because it recognized that states have a duty and right to imprison convicted criminals and maintain order and discipline within their prisons, the court moved cautiously in fashioning a remedy. The commissioner was ordered to make a prompt and reasonable start towards elimination of the unconstitutional evils of the system. This effort was required to be vigorous, prompt, and in good faith as funds became available. However, the allowable period to bring about this reform was to be measured in months, rather than years.

Respondents were required to submit periodic reports showing the steps being taken to the court and to counsel for the petitioners. The court also required that certain minimum steps be taken immediately. High priority was given to overhauling the trusty system. The court ordered that the trusties be stripped of their authority over other inmates. Equally important was the critical need for change in the overcrowded condition of the barracks. The court ordered the barracks divided into smaller, more easily controllable units, so that order could be established and inmates could be protected from assaults by other inmates. The court warned that if it believed its orders were not being heeded the present remedies would

10. It is estimated that approximately 80% of the inmates at Tucker were either homosexuals or had homosexual experiences. Id. at 75.

11. The penologists testified that it is desirable to give prisoners trusted positions, but that excessive reliance on the trusty system, such as that allowed in Arkansas, is bad. At the Cummins Unit, thirty-five free world employees were in charge of 1,000 men. The trusties could have easily taken over the prison, but they did not—perhaps because trusties had great power and many privileges. A clever trusty can earn a great deal of money for himself by dealing in drugs, food, medicine, and liquor, and by selling coveted jobs to the other prisoners. They also had the power to punish and could enforce their orders because they were armed. The Holt court heard evidence that a trusty gate-guard had recently killed another prisoner whom he felt was escaping. No one questioned the guard’s judgment or true intentions. The court felt that eventually the trusties must be stripped of their wide authority, but for the present, complete elimination of the system would not be practical. Due to the fact that gate-guards control the movement of contraband into the prison, the court ordered trusty gate-guards replaced with free world personnel. It was also decided that supervision of the prisoners in the field should no longer be done by armed trusties. It was ordered that civilian personnel take over this duty immediately, for the protection of the inmates. 309 F. Supp. at 373-75, 384.

12. 309 F. Supp. at 383. The court noted that appropriations by the Arkansas Legislature had increased over the past several years, and that the Governor had issued a call for the legislature to meet in special session to consider the problems of the prison system. Id.
have to be reviewed and revamped for the simple reason that, one way or another, Arkansas was going to have a prison system compatible with the United States Constitution.13

The protection afforded by the cruel and unusual punishment clause of the eighth amendment has been given a broader and broader ambit by the courts. It is fairly clear that the term "cruel and unusual punishment" is not subject to an inflexible definition, but, instead, moves with the mood of society's concept of decency.14 At first the prohibition against cruel and unusual punishment was used to ban specific practices which amounted to torture, seemed unnecessarily cruel, or shocked the sensibilities of the community.15 This included drawing and quartering a convicted offender, burning him at the stake, cutting off parts of his body, or disemboweling him.16 Later, it was suggested that a punishment wholly out of proportion to the offense might be constitutionally invalid.17

The Holt decision does not mark the first time that the Arkansas prisons have come under the scrutiny of the federal courts. The disciplining of Arkansas inmates by shocking them with electrical devices or whipping them with four-foot long, four-inch wide straps has previously been declared cruel and unusual punishment.18 By contemporary standards such tortures would seem to be blatantly objectionable. However, until just recently, they were still in use in Arkansas.19 How such a situation could exist

13. The district court's decision was affirmed by the United States Court of Appeals for the Eighth Circuit in Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971). The appellate court found the lower court's findings to be supported by "overwhelming substantial evidence." Id. at 307-08. Further, on remand, the lower court was ordered to continue to require up-to-date reports to be submitted by prison officials to insure that the constitutional deficiencies were being cured. Id. at 509. However, the eighth circuit noted that supervision of state prisons by federal courts should not exist for any longer than is necessary to rectify conditions violative of constitutional rights. Id.


17. Weems v. United States, 217 U.S. 349 (1910); O’Neil v. Vermont, 144 U.S. 323, 331 (1892). In Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), the Court of Appeals for the Fourth Circuit ruled that the eighth amendment bars execution for a rape in which the victim's life was neither taken nor endangered, since death is an excessively disproportionate penalty for such an offense.

18. See note 6 supra.

19. Efforts to use the Arkansas state courts as a means of halting these practices and prosecuting those prison employees responsible were largely unsuccessful. Following a 1966 investigation by the Arkansas Criminal Investigation Division, several former employees at the Tucker Unit were charged with having violated Ark. Stat. Ann. § 46-158 (1947). This statute made it a felony for any penitentiary employee to inflict a punishment on a convict in excess of the punishment pre-
can be explained in part by the courts’ traditional reluctance to head the complaints of convicts regarding prison conditions.

It is clear today that federal courts are open to a state prisoner alleging an obvious violation of federally guaranteed constitutional rights. This was not true in years past. At one time, it was a well established principle that a convict serving a valid sentence lost all his individual rights and was "for the time being a slave of the State." Gradually, largely through litigation in federal courts, it was accepted that a convict retained all his rights “except those expressly, or by necessary implication, taken from him by law.” Two avenues became available to the prisoner seeking review—a writ of habeas corpus and a suit under the Federal Civil Rights Act of 1871.

Inspite of these readily available procedural tools, prisoners were still hampered in their quest for redress by several judicially created doctrines. The most persuasive and potent of these was the principle that the administration of prisons is an area where the courts should maintain a “hands-off policy.” In recent years this arbitrary rule has been relaxed in favor of an examination by the courts of the merits of each specific complaint; described by the Penitentiary Board. The Circuit Court of Jefferson County, Arkansas held the statute to be unconstitutional under article 4 of the Arkansas Constitution, and the information against the employees was dismissed. The Supreme Court of Arkansas affirmed that ruling. State v. Bruton, 246 Ark 295, 437 S.W.2d 795 (1969). In all fairness to the Arkansas judiciary, it must be noted that the highest Arkansas court is on record as deploring the whipping of convicts. Werner v. State, 44 Ark. 122 (1884).

20. See Sostre v. McGinnis, 441 F.2d 178 (2d Cir. 1971); Wilwording v. Swenson, 439 F.2d 1331 (8th Cir. 1971); Burns v. Swenson, 430 F.2d 771, 775 (8th Cir. 1970).


23. Under the federal habeas corpus statute, federal courts are allowed to grant the writ when a person shows that he is unlawfully in custody. 28 U.S.C. § 2241 (c) (3) (1964).

24. 42 U.S.C. § 1983 (1964); 42 U.S.C. § 1985 (3) (1964). The decisions rarely differentiate between the two sections as separate causes of action, probably because most petitions either meet the requirements of both or neither. Both sections allow injunctive relief and civil damages. See Dodd v. Spokane County, 393 F.2d 350 (9th Cir. 1968) and Mizell v. North Broward Hospital Dist., 427 F.2d 468 (5th Cir. 1970).


but, of course, this injury takes place only when it is alleged that a civil right has been abused.\textsuperscript{27}

In the past, the federal courts required a petitioner to take complete advantage of remedies afforded by state courts before federal suit could be brought under the civil rights statute\textsuperscript{28} or by a writ of habeas corpus.\textsuperscript{29} This obstacle was partially eliminated by the Supreme Court's ruling in \textit{Monroe v. Pape}\textsuperscript{30} that exhaustion of state remedies is not a condition precedent to bringing suit in federal court under the civil rights statute. As a result of that decision, jurisdiction of most complaints alleging unconstitutional prison conditions is asserted under the statute\textsuperscript{31} rather than through the use of a writ of habeas corpus.\textsuperscript{32} The effectiveness of a writ of habeas corpus is still hampered by contentions that state remedies were available.\textsuperscript{33}

Finally, a major impediment to petitions alleging eighth amendment violations in state prisons was set aside by the United States Supreme Court in \textit{Robinson v. California}.\textsuperscript{34} The Court ruled that the prohibition against

\textsuperscript{27} Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970); Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Howard v. Swenson, 426 F.2d 277 (8th Cir.), cert. denied, 400 U.S. 948 (1970); Palmigiano v. Travisono, 317 F. Supp. 776 (D.C.R.I. 1970). The federal courts will not interfere in internal operations and administration of prisons unless there is a clear abuse of the prisoner's civil rights. To this extent the "hands-off policy" still exists. Haggerty v. Wainwright, 427 F.2d 1137 (5th Cir. 1970).

\textsuperscript{28} Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961); Siegel v. Ragen, 180 F.2d 785 (7th Cir. 1950).


\textsuperscript{32} See United States v. Muniz, 374 U.S. 150 (1963); Ex parte Hull, 312 U.S. 546 (1941); Glenn v. Ciccone, 370 F.2d 361 (8th Cir. 1966); Sutton v. Settle, 302 F.2d 286 (8th Cir. 1962); United States \textit{ex rel. Turnbaugh} v. Bibb, 252 F.2d 217 (7th Cir. 1958); Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945); Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966) \textit{rev'd on other grounds}, 382 F.2d 353 (6th Cir. 1967); Davis v. Berry, 216 F. 413 (S.D. Iowa 1914), \textit{rev'd on other grounds}, 242 U.S. 468 (1917).

\textsuperscript{33} See McNeece v. Board of Educ., 373 U.S. 668 (1963); Dodd v. Spokane County, 393 F.2d 330 (9th Cir. 1968). However, in Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court further broadened the habeas corpus jurisdiction of the federal judiciary by holding that federal courts have the power to grant relief despite the applicant's failure to have sought a state remedy which was no longer available to him at the time he petitioned for the writ of habeas corpus.

cruel and unusual punishment had been extended to the states by the fourteenth amendment.35

At the present time, therefore the judiciary seems willing to open the courts to prisoner-petitioners. Many of the previously discussed devices which stalled prisoners’ efforts to bring their grievances before the courts have been eliminated or modified. Logically, the next question that must be asked is: How far will these courts be willing to go in protecting the prisoner now that they have agreed to hear him?

Given the unique conditions in certain units of the Arkansas system, the Holt court showed that it was prepared to take bold steps to insure that the civil rights of Arkansas prisoners were not abused. This dramatic decision is illustrative of the fact that cruel and unusual punishment is an illusive concept. At least it is clear that it is not a static constitutional principle.36 It is possible that Holt heralds a broader use of the eighth amendment as a vehicle for court-initiated prison reform.37 Thus, it may be beneficial to speculate as to what ultimately could be accomplished through its use.

The subject of prison reform is controversial because people disagree on the objectives of penal institutions. Four theories are generally recognized: Prisons should (1) rehabilitate, (2) punish, (3) isolate the criminal, or (4) deter future wrongdoers.38 In Holt it was said that most penologists feel very strongly that their primary purpose is to rehabilitate the inmate so that he can be returned to society as a useful citizen.39 But it is also agreed that the first duty of any prison official is to secure the prisoner and prevent his escape.40 Not surprisingly, the rehabilitative effort must suffer by necessity.41

The Holt court talked in some detail about the program of rehabilitation at the Arkansas Penitentiary.42 While it did not feel that the failure to provide educational or vocational training is unconstitutional per se, the lack of such a program was a factor in its decision. The court concluded its discussion of rehabilitation with the observation that today’s sociological theories are tomorrow’s constitutional law.43 Reasoning from that significant prophecy, it might be argued that a prison system which fails to make an affirmative effort to rehabilitate inmates is constitutionally suspect under

36. See cases cited note 14 and accompanying text supra.
37. Prison reform is a timely and controversial national issue. Many people are questioning the entire theory behind penology. See President’s Commission On Law Enforcement And Administration Of Justice, Task Force Report (1967).
41. Comment, Judicial Intervention in Prison Administration, 9 WM. & MARY L. REV. 178, 179 (1967). The author of this article is of the opinion that the complexities of the prison administrator’s task contributes greatly to the “hands-off” attitude of the courts.
42. See note 8 supra.
43. 309 F. Supp. at 379.
the eighth amendment. The logic of such a proposition is not so unreasonable if the following hypotheses are accepted. First, in the absence of rehabilitation, conditions and practices may surface which in and of themselves are unconstitutional. In other words, the failure to affirmatively provide a meaningful program of work and study may cause a prison to degenerate to a point where imprisonment there becomes violative of the Constitution.44 Secondly, it is not unreasonable to say that lengthy incarceration behind prison walls can affect a man's mind. With nothing constructive to do and no hope that his imprisonment will benefit him in any way, a prisoner's mental health could be adversely affected. Arguably, any punishment which could undermine the sanity of a prisoner or destroy his spirit would be cruel and unusual.45

The preceding argument would not necessarily be difficult for a court to accept. This is not the problem. The real problem with using the courts as a vehicle for prison reform lies in finding a workable remedy.46 This difficulty may have influenced the courts in developing a "hands-off policy" towards penal institutions. It is rather a simple matter to enjoin specific practices like whipping or electrical shock devices,47 but, as the court observed in Roberts v. Peppersack,48 there is a very tenuous distinction between the need for secure and orderly prisons and the civil rights of inmates.49 Obviously, when a court declares an entire penitentiary system illegal, the men can not be set free. Still, that irrational remedy must not be dismissed out of hand in light of the tough, threatening stance of the Holt court when it said: "However constitutionally tolerable the Arkansas system may

44. This is not at all unreasonable when the example of the Arkansas Penitentiary System is considered. A good argument can be made that the conditions at Tucker and Cummins were partly a product of a failure to provide the convicts with anything worthwhile to occupy their time. The work the men were made to do did not motivate them to prepare for their eventual release. Men who are forced to live with no purpose conceivably create conditions among themselves which may make their imprisonment unconstitutional. Note the heavy use of drugs and liquor and the constant rapes and assaults. These very factors weighed heavily in the Holt court's holding that the Arkansas system provided cruel and unusual punishment. Id at 377-79.

45. The loss of sanity argument has always been advanced when prisoners have attacked the constitutionality of solitary confinement. Courts have not said that such isolation is unconstitutional per se. Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970). However, in Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), the court ruled that subjecting a prisoner to a situation which provided a very real possibility of loss of his mind was cruel and unusual. That court limited the maximum period in solitary confinement to 15 days. In Holt the conditions in the isolation cells were a factor, although not a critical one, in the ultimate holding. See note 7 supra.

46. The Holt decision was appealed to the Court of Appeals for the Eighth Circuit. See note 13 supra. During the course of the oral argument before the eighth circuit one of the appellate judges remarked that finding an appropriate remedy is the most difficult problem that must be solved in dealing with the rights of prisoners.

47. See note 6 supra.


49. Id. at 427.
have been in former years, it simply will not do today as the Twentieth Century goes into his [sic] eighth decade.\textsuperscript{50}

Despite this warning, the Holt court was not at all ready to close down a prison system. Instead, an attempt was made to find some sort of middle ground to the dilemma of decreeing an appropriate remedy. As previously stated, the district court required Commissioner Sarver to submit periodic reports to the court and to counsel for the petitioners. To date, three such reports have been made. These reports indicate that the State of Arkansas is making commendable progress towards correcting conditions at the prison units. Following the district court's decree the legislature met in an extraordinary session and voted a $4 million appropriation for the penal system. This money has been used to hire additional free world guards and to construct new buildings, including a new maximum security unit. A report, filed on May 8, 1970 and approved by the district court on May 28, 1970, detailed steps taken to disarm the trustees and to protect inmates from attacks by other inmates. (This information was obtained from two sources—(1) counsel for the petitioners,\textsuperscript{51} and (2) the opinion of the appellate court, which upheld the lower court's decision.\textsuperscript{52}) The contents of subsequent reports and the court's reaction to them are unknown to this writer.

The appellate court's affirmance of Holt v. Sarver was not unexpected. The court realized that the facts clearly sustained petitioners' claim that they were victims of cruel and unusual punishment. The court found nothing wrong with the remedy prescribed by the district court and indicated that the lower court had the go ahead to continue to enforce its holding in the same manner as it had previously.

\textsuperscript{50} 309 F. Supp. at 381. In another part of the opinion the court grimly stated that "[u]nless conditions at the Penitentiary farms are brought up to a level of constitutional tolerability, the farms can no longer be used for the confinement of convicts." Id. at 389.

\textsuperscript{51} The writer of this note corresponded with the attorneys for the petitioners and also met them personally the day Holt was argued before the United States Court of Appeals for the Eighth Circuit. During these oral arguments, counsel for the petitioners showed motion pictures of the Tucker and Cummins Units, and commented on the efforts that had been taken following the lower court's decision.

\textsuperscript{52} Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971). See note 13 supra. On appeal, the State's Assistant Attorney General, representing Commissioner Sarver, argued that what was really involved in the case was a suit against the state, not against an individual state official, in contravention of the eleventh amendment to the United States Constitution. This amendment gives a state sovereign immunity against suits brought against it in federal courts without its consent. Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944). The eleventh amendment has been further interpreted to bar a suit against an officer of a state, even though the state itself is not made a party defendant. In such cases the courts have ruled that the state is nevertheless the only real party against which the relief is asked. Cooper S.S. Co. v. Michigan, 194 F.2d 465 (6th Cir. 1952). However, this argument was made in civil rights actions and rejected. See Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372 (N.D. Ala.), aff'd, 358 U.S. 101 (1958); Cook v. Davis, 178 F.2d 595 (5th Cir. 1949), cert. denied, 340 U.S. 811 (1950). In In re Ayres, 123 U.S. 443, 506 (1887), the Supreme Court ruled that the eleventh amendment does not impinge upon actions under the civil rights statutes which allow relief against
The appellate court seemed confident that it had not created a precedent that was too sweeping. It is doubtful that there are many prisons in this country administered in as objectionable a manner as the Arkansas System was administered prior to Holt. For that very reason counsel for the petitioners, in his oral argument before the court of appeals, suggested that Holt would have little effect on future litigation involving prisoners. His contention must be weighed in the face of his zeal in advocating his case, and his attempts to calm the fears the appellate court may have had about the repercussions of declaring a prison system unconstitutional. As earlier passages of this casenote have attempted to show, imaginative and conscientious lawyers can see the possibilities of Holt as a vehicle for prison reform. However, regardless of the eventual impact on other prison systems, it is not necessary to speculate as to the effect of Holt on the victims of the Arkansas system. For them the value of the case lies in the action taken to rectify a clearly shameful situation.

Richard B. Scherrer

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individual defendants who act under color of law. The Attorney General's argument was rejected by the appellate court for the same reason. Quoting from an earlier eighth circuit opinion, Board of Trustees of Ark. A. & M. College v. Davis, 396 F.2d 730, 732 (8th Cir. 1968), the court noted that when a state official violates federally guaranteed constitutional rights, he loses his status as an official and is instead accountable for his acts as any individual would be. The state can not protect such a person from immunity under the eleventh amendment. Holt v. Sarver, supra at 906.

53. An indication of this confidence can be found in the court's warning that it was only concerned with legislative and administrative matters and practices in so far as they are questionable from a constitutional viewpoint, not from a sociological viewpoint. Holt v. Sarver, 442 F.2d 304, 308 (1971). This is a typical reaction by federal courts when dealing with problems in the area of prison reform. It shows that the remnants of the old "hands-off policy" are still lurking about.

54. County and city jails may be subject to the same standards announced in Holt. In the recent case of Hamilton v. Schiro, Civil No. 69-2443 (E.D. La., June 26, 1970), it was held that confinement in the Orleans Parish Prison under the conditions existing there constituted cruel and unusual punishment.

55. At the oral argument, counsel for the petitioners, in response to the court's inquiry about the effect of the Holt decision, was of the opinion that "a significant alteration has been made in the prisoners' lives."
THE STANDING TRAIN DOCTRINE—AN OUTMODOED STANDARD OF CARE

Houghton v. Atchison, T. & S. Fe R.R.¹

Plaintiff's automobile struck the defendant's train as the train moved slowly over a public highway crossing. Prior to the plaintiff's accident, the defendant's train had been involved in a collision with a stalled automobile. Because of this situation, defendant's crewmen had been flagging highway traffic coming in either direction toward the crossing. The train was uncoupled, and the engine was moved across the track to clear the highway. After several minutes, the engine backed over the crossing, picked up the freight cars and proceeded on its way at a very slow speed. In the meantime, the crew members who had been flagging traffic boarded the train. Plaintiff, not having had the benefit of the warnings of the crewmen, struck the rear of the train with his automobile. In addition, the following facts were part of the record: (1) the accident occurred on a dark night; (2) the highway was heavily traveled; (3) the train was unscheduled; and (4) (perhaps most importantly) the plaintiff showed that because of the severe angle at which the track crossed the road, the unlighted rear of plaintiff's train was practically moving along plaintiff's line of travel when the collision occurred. On the basis of this evidence, plaintiff won a jury verdict in the circuit court.

A four-to-three majority of the Missouri Supreme Court reversed and held, as a matter of law, that the defendant was not negligent. The court relied on the rule of law, well established in Missouri and many other jurisdictions, that a railroad is never guilty of negligence for failure to warn when it obstructs a highway crossing unless the plaintiff can show that there were some special circumstances rendering the crossing peculiarly hazardous.² The court held that plaintiff failed to make a submissible case for the jury on this issue of the hazardousness of the crossing.³ Three members of the court dissented, arguing that it would be possible for reasonable men to differ as to the railroad's negligence, and that the evidence presented would support a jury verdict for the plaintiff.

The Houghton decision does not break new ground or overturn existing doctrines. On the contrary, the standing train doctrine, as it has become known, is a firmly established principle of law.⁴ But the opinion does

¹. 446 S.W.2d 406 (Mo. En Banc 1969).
². Id. at 408. For more cases setting forth the rule in Missouri and in other jurisdictions, see State ex rel. Thompson v. Cave, 358 Mo. 414, 215 S.W.2d 435 (En Banc 1948); Dimond v. Terminal R.R. Ass'n, 346 Mo. 333, 141 S.W.2d 789 (1940); Pennsylvania R.R. v. Goldenbaum, 269 A.2d 229 (Del. 1970); Ward v. Louisville & N. R.R., 489 S.W.2d 315 (Ky. 1969); Kansas, O. & G. Ry. v. Painter, 333 F.2d 547 (Okla. 1958); Murphy v. Southern Pac. Co., 223 Ore. 522, 355 P.2d 256 (1960); and Fort Worth & D. Ry. v. Williams, 375 S.W.2d 279 (Tex. 1964).
³. 446 S.W.2d at 410.
⁴. See State ex rel. Thompson v. Cave, 358 Mo. 414, 215 S.W.2d 435 (En Banc 1948), where the court observed:

In this jurisdiction it is established law that a railroad is not guilty of negligence in blocking a public road crossing without providing warnings or signals, unless there are special circumstances which make the crossing peculiarly hazardous . . . . Id. at 417-418, 215 S.W.2d at 436.
illustrate, rather dramatically, a judicial philosophy originating in the early
days of negligence law which looks toward a continuing reduction of the
role of the jury.\(^5\) This philosophy is based upon the assumption that, since
"the same or similar circumstances" continually recur in litigation, standards
of care applicable to such circumstances can be fixed as a matter of law so
that certain types of conduct can be classified as "negligent" or "not negli-
gent" as a matter of law.\(^6\) On appellate review these standards of care can
be further refined, with the result that triers of fact in subsequent litigation
can resolve disputes purely in terms of principles of law.\(^7\)

Beginning with Justice Holmes' development of the stop, look and
listen rule in the now famous case of *Baltimore & O.R.R. v. Goodman,\(^8\)* ac-
cidents at railroad crossings became a chief area in which courts were moved
to take certain factual situations and reduce from them standards of care
equivalent to rules of law. Basic to all litigation in this area is the common
fact of a moving object coming into contact with a train. Justice Holmes
recognized this common fact when he developed his rule in *Goodman.* It
was his contention that it would someday be possible to apply a standard of
care to all sets of circumstances, and consequently lessen the need for a jury's
view on the matter.\(^9\) Not too many years later, Justice Cardozo rejected this
rule in *Pokora v. Wabash Ry.,\(^{10}\)* and advised the use of "caution in framing
standards of behavior that amount to rules of law."\(^{11}\) Although *Goodman*

\(^5\) Nixon, *Changing Rules of Liability in Automobile Accident Litigation,*
3 LAW & CONTEMP. PROB. 476, 478 (1935). *But see* Grand Trunk Ry. v. Ives, 144
U.S. 408, 417 (1892), where the Court stated:

There is no fixed standard in the law by which a court is enabled to
arbitrarily say in every case what conduct . . . shall constitute ordinary
care, under any and all circumstances. . . . The policy of the law has
relegated the determination of such questions to the jury, under proper
instructions from the court.

*See also* Toledo & W. Ry. v. Goddard, 25 Ind. 185 (1865); Baltimore & O.R.R.
v. Owings, 65 Md. 502, 5 A. 329 (1886); and Bradley v. Boston & M.R.R., 56
Mass. (2 Cush.) 539 (1848).

\(^6\) Green, *Jury Trial and Mr. Justice Black,* 65 YALE L.J. 482, 485-86 (1956).

*See* Herbert v. Southern Pac. Co., 121 Cal. 227, 230, 53 P. 651 (1898), where the
Supreme Court of California stated:

[T]he cases arising from injuries suffered at railroad crossings have been
so numerous, and upon certain points there has been such absolute accord,
that what will constitute ordinary care in such a case will have been pre-
cisely defined, and, if any element is wanting, the courts will hold as a
matter of law that plaintiff has been guilty of negligence.

\(^7\) Green, *supra* note 6, at 485-86. The author notes that this process tended
to erode the jury's power and strengthen the power of the judges, especially the
authority of those men sitting on the appellate bench.

\(^8\) 275 U.S. 66 (1927).

\(^9\) Id. at 70. *See also* O. Holmes, *The Common Law* 110-11, 120-24 (1881).

\(^10\) 292 U.S. 98 (1934).

\(^11\) Id. at 105. Justice Cardozo's warnings were graphically illustrated in the
case of Torgeson v. Missouri-K.-T. R.R., 124 Kan. 798, 262 P. 564 (1928), when
it appeared that it was safer to approach a crossing slowly and drive straight across
than it was to stop and get out. For an extreme example of an unbending appli-
cation of the duty to stop, *see* Benner v. Philadelphia & R. Ry., 262 Pa. 307, 311,
105 A. 283, 284 (1918), where it was said the duty to stop "is not a rule of evidence
but a rule of law, peremptory, absolute and unbending; and the jury can never
be permitted to ignore it, to evade it, or to pare it away by distinctions and
exceptions."
was only binding on federal courts, several state judicial bodies made an effort to expressly reject the Holmesian rule.

While it would be safe to conclude that most judges and legal scholars realized the shortcomings of standards such as the one promulgated in Goodman, there is disagreement about possible alternatives. Basically, there are two distinct approaches. The first evaluates a litigant's conduct by the standard of care of a reasonable man under the same or similar circumstances. Lying somewhere between this test and the Holmesian approach is a view adopted by some courts whereby certain minimum standards of conduct are fixed. These rules tend to be confined to a very narrow set of circumstances. When these facts alone are present in a case, the judge is able to rule as a matter of law that a certain verdict must be reached. No one jurisdiction has adopted either of these tests in its entirety. Instead, the two alternatives tend to be applied piecemeal throughout the various areas of negligence law.

The standing train doctrine is an example of a judicially defined minimum standard of care. Upon colliding with an immobile train obstructing a crossing, an automobile driver is held to this standard. If no other relevant evidence is offered by the plaintiff-driver, the courts hold he may not recover as a matter of law. However, if the plaintiff can show that the crossing was unusually hazardous, the jury may be allowed to decide the issue of the railroad's negligence. Whether the plaintiff makes a permissible case for the jury on this issue is a question of law and, accordingly, within the court's power to decide.

Houghton is illustrative of the problems that may occur through the use of such judicially defined standards of care. It is submitted that the ultimate result of the case is incorrect and that the dissent's contention that reasonable men could disagree on the issue of the railroad's negligence has more validity. When applied to fact situations in actions for negligence, in the remote confines of an appellate hall of justice, these standards may cease to be consistent with common sense. In borderline or close cases, such rules

16. Id. Theoretically, this process looks to be quite reasonable and practical. But it must be remembered that superficially the Holmesian philosophy appeared to be equally as rational and workable. Just as it had its flaws, so may the more flexible standards of care, although the deficiencies may be less readily apparent and a bit more subtle.
17. For a lengthy explanation of this judicial process, see Comment, Extra-hazardous Railroad Crossings, 7 BAYLOR L. Rev. 170 (1955).
are often applied in what may seem to be an arbitrary manner. Courts are conscious of this problem, and in order to see that justice is done, may resort to stretching the rules or molding the facts to fit the rule. Their purposes are laudable, but such tenuous technicalities do little to instill faith in the legal system. What may be even more unjust is the possibility that a court will conclude that since liability can not be established under a certain legal doctrine, it can not be established at all.\(^{18}\)

A further shortcoming of judicially defined standards of care is their inability to keep pace with changes in technology, new life styles, and reversals in societal priorities. When standards are judicially defined they are rendered inflexible by the grip of stare decisis. The standing train doctrine developed decades ago.\(^{19}\) It can be traced back to an era when judges saw wider applications of their role in negligence litigation.\(^{20}\) Personal injury cases involved more than a controversy between two individuals. Policy considerations played a large part in the ultimate disposition of this type of lawsuit. Appellate judges, in their written opinions, frequently referred to the need for a well integrated transportation system. This need was often emphasized when railroads were the object of a lawsuit.\(^{21}\) The practical result of this was that many of the standards of care formulated to deal with accidents at railroad crossings favored railroads.\(^{22}\) This is not meant to suggest that such a development was unlawful. On the contrary, the courts, in recognizing the need, reflected the community's desire to favor a developing public-service industry.\(^{23}\) However, it is quite possible that the policy considerations which moved an appellate judge to rule as he did thirty years ago may no longer be appropriate to the conditions of the day.\(^{24}\)

The desire to formulate minimum standards can be explained in part by the stability which is achieved by adherence to precedent. However, the area of negligent conduct presents special problems. Each cause of action is different; each has its peculiar set of circumstances. Strict rules of law do not always lend themselves well to this type of litigation. It is submitted that the better approach is to apply general tests of negligence based upon the conduct of the hypothetical but contemporary reasonable man acting under the same or similar circumstances.


\(^{21}\) See Lund v. Pacific Elec. Ry., 25 Cal. 2d 287, 296, 153 P.2d 705, 709 (1944); Seaboard Air Line Ry. v. Watson, 103 Fla. 477, 483, 137 So. 719, 722 (1931); Lockett v. Grand Trunk W.R.R., 272 Mich. 219, 225, 261 N.W. 306, 308 (1935); and State ex rel. Kurn v. Hughes, 348 Mo. 177, 185, 153 S.W.2d 46, 52 (1941), where the courts noted the priority of the railroad at crossings based on the public service railroads perform and the demand from the public for good service and speedy travel.

\(^{22}\) L. Green, *supra* note 20, at 18-19.

\(^{23}\) Id. at 31-34.

\(^{24}\) See W. Prossor, *The Law of Torts* § 58 at 368 (3rd ed. 1964), in which the author points out the continuing evolutions of a more favored position of an injured occupier of land as opposed to early common law emphasis on the right of a landowner to use his land in a free and unrestricted way.
A recent California decision is illustrative. In the case of *Rowland v. Christian*, the California Supreme Court discarded the strict judicially defined common law standards of care owed by a landowner to visitors. The test substituted was whether a person, in the care and use of his property, has acted as a reasonable man in view of the foreseeability of injury to others. In the future, therefore, the traditional classification of the plaintiff as a trespasser, licensee, or invitee will, in California, be merely a circumstance bearing on the reasonableness of the defendant-landowner's conduct.

In justifying its landmark holding, the *Rowland* court systematically discussed each of the main criticisms of the old common law rules. First, the court noted that the old rules were developed in an era when it was felt that the dominance and prestige of the landowning class in England had to be preserved; an era when the courts were especially receptive to arguments advocating the supremacy of property rights. Today, society recognizes the need of an individual to be compensated, for his injuries. The common law doctrines fail to satisfy these humanitarian impulses. Throughout the opinion, the majority cited the criticisms generally made of strict standards—the tendency to apply them in an arbitrary manner in close cases, with the result that an unjust decision may be reached, and the danger that when the strict rules prohibit recovery courts may fail to consider other theories under which recovery could be allowed.

Although not a recent development in the law, the standard of care assumed by a bailee is another example of an area of negligence law where some jurisdictions have repudiated common law distinctions. At common law, the duty of care owed by a bailee was determined by whether the bailment could be characterized as "gratuitous," "mutual," or for the "sole benefit" of the bailor. The landmark case in this area is *Peet v. Roth Hotel Co.*, in which the Minnesota Court stated that until a better standard can be devised that of "ordinary care should be followed in every case...."

The Michigan judiciary has shown some recognition of the dangers of

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25. 70 Cal. Rptr. 97, 443 P.2d 561 (1968).
26. 443 P.2d 568.
27. The dissent in *Rowland* was concerned about the failure of the majority to account for the need for predictability and stability in the law and the possibility that the new decision would result in unlimited liability to landowners. The two dissenting justices also felt that major changes in the common law should be carried out by the legislature. *Id.* at 105, 443 P.2d at 569.
32. 191 Minn. 151, 253 N.W. 546 (1934).
33. 253 N.W. at 548.
fixed standards and the right of juries to make the ultimate finding on the negligence issue. In Emery v. Chesapeake & O. Ry., 34 the Michigan Supreme Court stated that the common law duty of railroads to use “ordinary care and prudence commensurate with all the circumstances” 35 should be applied without hindrance by “the analysis-crippling semantics of ‘special conditions’ and the like . . .” 36

The familiar rule that it is always negligence to drive at a speed that makes it impossible to stop within the range of vision 37 is another example of a standard that has been under attack in recent years. The standard seems reasonable enough, but it proves to be unworkable in the face of unusual fact situations. 38 Accordingly, some courts have concluded that it can now be afforded status merely as evidence for a jury. 39 The same problems have arisen with respect to the so-called ordinary traffic “rules of the road” 40 that a pedestrian must look before crossing a street, 41 that a passenger must

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36. Id.


38. In the case of DeVoto v. United Auto Transp. Co., 128 Wash. 604, 223 P. 1050 (1924), the court pointed out that fog on the road was so thick that the defendant-motorist would have had to come to a complete halt if he obeyed the “range of vision” rule. Such action would have increased the danger that he would be hit from the rear, unless every motorist adhered to the rule, in which case traffic would have been completely halted. The court felt the better rule to be that in driving through a fog bank, each driver must do so in a careful and prudent manner with due regard for the safety of others, and what is careful and prudent under the particular circumstances is a question for the jury. See also Watson v. Southern Bus Lines, 186 F.2d 981 (6th Cir. 1951); Rabenold v. Hutt, 226 Iowa 321, 283 N.W. 865 (1939); Langill v. First Nat’l Stores, Inc., 298 Mass. 559, 11 N.E.2d 593 (1937); Marek v. City of Alpena, 258 Mich. 637, 246 N.W. 793 (1932); Johnson v. Lee Way Motor Freight, Inc., 261 S.W.2d 95 (Mo. 1953); Schassen v. Columbia Gorge Motor Coach Sys., 126 Ore. 363, 270 P. 530 (1928); Morehouse v. City of Everett, 141 Wash. 399, 252 P. 157 (1926); and Ryan v. Cameron, 270 Wis. 325, 71 N.W.2d 408 (1955).


40. Carlin v. Haas, 124 Conn. 259, 199 A. 480 (1938), strictly applied the rule, while the following decisions afforded it mere evidentiary status: Kimball v. Bauckman, 131 Me. 14, 158 A. 694 (1932); Primock v. Goldenberg, 161 Minn. 160, 200 N.W. 920 (1924); George Ast Candy Co. v. Kling, 121 Ohio St. 362, 169 N.E. 292 (1929); Richards v. Warner Co., 311 Pa. 50, 166 A. 496 (1933).

41. Plaintiff-pedestrian’s failure to look before crossing the street barred his recovery in Knapp v. Barrett, 216 N.Y. 226, 110 N.E. 428 (1915). The following
never board or leave a train while it is moving,\textsuperscript{42} and that a driver is negligent if he takes his eyes off the road.\textsuperscript{43}

As a general proposition, when the law sets specific standards, the role of a jury is limited and liability is less expansive.\textsuperscript{44} Conversely, when liability is determined by the ordinary principles of negligence, the jury has a more dominant and persuasive position and recovery may be more readily allowed.\textsuperscript{45} The merits of the jury have often been extolled.\textsuperscript{46} Because jurors are members of the community, they reflect current thought. Arguably, their verdicts will be more in harmony with modern trends than might be a decision based on a fixed, antiquated standard of care developed in a bygone day. Perhaps even more important is the ability of a jury to adapt and temper a verdict where the black letter law may demand an unjust result.\textsuperscript{47} Ultimately, in questions dealing with the liability of one man for another man's injury, it must be asked whether it can be said with any sort of certainty that a judge is better equipped than a jury to make a decision, and whether one judge or a panel of appellate justices actually has a better notion of the conduct of a reasonable man than the twelve men of a jury.

In at least one area of the law the United States Supreme Court does not believe so. Although it required an intensive effort, the Court did much to establish the right of a jury to decide issues of negligence arising under the Federal Employers' Liability Act.\textsuperscript{48} By constantly granting writs of certiorari, the Court was able to free this limited area of railroad law from suffocating common law doctrines which lower courts were continually invoking to deny recovery to plaintiffs.\textsuperscript{49} From the very first, contributory negligence was

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never allowed as a defense. However, it was suggested that the courts then substituted for this defense by allowing the defense of assumption of the risk. When Congress amended the act to bar assumption of the risk as a defense, the courts again were equal to the challenge. Subsequently, plaintiffs were denied recovery as a matter of law by the use of the defense of no evidence of any negligence on the part of the defendant, and the defense that the defendant’s actions were not the proximate cause of the plaintiff’s misfortune. Some may argue that the very nature of the Federal Employers’ Liability Act makes the jury’s power greater than under other tort actions. Professor Green rejects this notion and notes that the fact that such an argument could be made is proof of the degree to which courts have usurped the jury’s right to decide questions of negligence.

Ironically, the standing train cases have been singled out as an area of railroad law where courts have been particularly unreceptive to recognition of the desirability of ordinary negligence tests—and the logical aftermath of a wider role for juries. However, there is evidence that in recent cases


54. Green, supra note 6, at 490 n.17. Professor Green is a sharp critic of what he characterizes as the appellate courts’ assault on the jury’s right to decide questions of fact. He points to the action of the Supreme Court in FELA cases as evidence of the tremendous effort needed to convince courts of review that they do not have the right to determine questions of fact on appeal. Because he has little faith in the higher courts’ ability or desire to give up what amounts to a retrial of negligence cases on appeal, Green proposes a five point “realignment of the judicial process.” The most important part stresses the need to reinstate the authority and upgrade the quality of the trial judge, and that the jury and the trial judge should be the center of the judicial process. He further suggests that within a few days of the conclusion of a trial, a local hearing by a group of judges be held, with their only purpose being to determine whether, as a whole, justice has been done. As to the role of the appellate court, he would restrict their power to that of reviewing questions involving statutory and constitutional interpretation, questions of jurisprudential policy, matters of due process, and finding ways to make the administration of justice more successful and efficient at the trial court level. Id. at 488.

55. L. GREEN, supra note 20, at 49. The author makes an interesting and critical generalization about such cases:

In cases of collision with the side of a standing or moving train, the courts have generally held that the victim is contributorily negligent as a matter of law. ‘The train,’ they say, ‘gives notice of its presence.’ The logic of the cliché is that the victim is bent on suicide. It but illustrates how compulsive a cliché can become in controlling the thought of the most intelligent minds.
the standing train doctrine is not being applied in its strict traditional sense. Instead, the findings of juries are being upheld and legal arguments that a minimum standard of care precludes recovery are being rejected on appeal. Unfortunately, as *Houghton* clearly shows, Missouri has not followed this trend. The standing train doctrine appears to be a fixture of the law in this state. For reasons already stated, it should be rejected. Verdicts in negligence actions, where the only basis of appeal is the verdict itself, should enjoy a higher degree of respect. Appellate courts should resist the impulse to re-try cases in which a jury has already made its position known. It is submitted that if fixed standards of care are abandoned, the temptation to do so will be considerably lessened.

**Richard B. Scherrer**

**ADMISSION OF EVIDENCE CONCERNING CHANGES IN CONDITION AFTER THE ACCIDENT**

*Grothe v. St. Louis-San Francisco Ry.*

On December 21, 1967, Clifford Grothe's automobile was struck by defendant's train at the intersection of Old State Road and defendant's tracks in Imperial, Missouri. Grothe was killed. It was a windy, rainy day and the train was running five and one-half hours behind schedule. At the time of the accident, there was a crossarm warning signal and a bell signal at the intersection. However, the bell could not be heard inside an automobile if the windows were closed, and was difficult to hear on a windy day even with the windows open. The engineer did not see the car until the engine was seventy-five feet from the crossing, and it was not clear whether he blew the train's whistle before the accident.

Grothe's wife and children brought an action for wrongful death against the railroad. During the course of the trial, plaintiff called Garland Lowry, a surveyor, who testified about the physical layout of the crossing.

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56. See *Finn v. Spokane P. & S. Ry.*, 189 Ore. 126, 134, 214 P.2d 354, 357, aff'd on rehearing, 189 Ore. 143, 218 P.2d 720 (1950), where the majority notes that courts differ in their application of the standing train doctrine, depending upon whether "horse and buggy" rules are used to deny liability in any situation, or whether railroads have been practically made insurers against injury. In Atlantic Coast Line R.R. v. Kammerer, 239 F.2d 115, 117-18 (5th Cir. 1955), the court warns that the "standing train" doctrine cases to be common sense if applied "with ritualistic absolutism. . ." and emphasizes that questions of fact are rightly within the power of the jury under seventh amendment considerations.

57. See *Gross v. Southern Ry.*, 414 F.2d 292 (5th Cir. 1969); *Arrasmith v. Pennsylvania R.R.*, 410 F.2d 1311 (6th Cir. 1969); *Golfinos v. Southern Pac. R.R.*, 86 Ariz. 315, 345 P.2d 780 (1959); and *Van v. Union Pac. R.R.*, 83 Idaho 539, 366 P.2d 897 (Idaho 1961). Early annotations under the standing train doctrine show that a submissible case for the jury was held to have been made in only a few cases. See Annots. cited note 19 supra. The latest annotation indicates that in almost one-half of the cases decided after 1946 the courts have ruled that the plaintiff made a submissible case for the jury. See Annot., 84 A.L.R.2d 813, 823 (1962).

1. 460 S.W.2d 711 (Mo. 1970).
2. Brief for Appellant at 6.
made repeated reference to plaintiffs' exhibits 5, 6, and 7. The purpose of exhibit 7 was to show the view an engineer would have of the crossing in question at a distance of 260 feet from the crossing. This exhibit, a photograph, was taken after the installation of flashing lights at the intersection. While explaining the picture to the jury, Lowry was permitted to testify that "defendant installed flasher lights subsequent to the collision in question."

The case was submitted to the jury on the "theory of failing to sound a warning signal under the humanitarian doctrine." The jury returned a verdict of $50,000 in favor of plaintiffs. Defendants appealed, contending, inter alia, that the admission of Lowry's testimony regarding the installation of flasher lights was error. The Missouri Supreme Court ruled that admission of this testimony was not error.

The rule that evidence of subsequent changes in condition is inadmissible to prove negligence is well imbedded in the law. Not only is this type of evidence inadmissible on the issue of negligence, but, unless it is admissible on certain other issues in the case, it "should be rigorously excluded" and its admission into evidence is reversible error.

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3. Exhibit 5 was a plat of the crossing and sight distance. 460 S.W.2d at 718. Exhibit 6 was an aerial photograph of the crossing, and exhibit 7 was a ground level photograph. Brief for Appellant at 6.
5. 460 S.W.2d at 718.
6. Id. at 714. The opinion discusses the application of the humanitarian doctrine to the facts in this case, but the discussion is beyond the scope of this note.
7. Id. at 717-18. Defendant also asserted "that the wrongful death act, Sections 537.080 through 537.100, Laws 1967, is unconstitutional." Id. at 718. The court said that defendant did not have standing to make this challenge. Id. at 713-14.
8. Id. at 718.
9. McCormick includes in this category
   Repairs, changes in construction, installation of new safety devices such as lights, gates, or guards, changes in rules and regulations, changes in the practice of the business, or the discharge of an employee charged with the injury.
11. In Alcorn v. Chicago & A.R.R., 108 Mo. 81, 90, 18 S.W. 188, 189 (1891), the court said that changes cannot be construed as a "tacit admission of prior negligence."
13. Bailey v. Kansas City, 189 Mo. 503, 512, 87 S.W. 1182, 1185 (1905). But see Moore v. Quality Dairy Co., 425 S.W.2d 261, 267 (St. L. Mo. App. 1968), where the court said the "change was secondary or ancillary to the main charge of negligence . . . ." and was therefore harmless error.
Several reasons have been advanced for the rule excluding evidence of changes in condition made after the accident. It has been said that this evidence confuses the issues,¹³ is misleading,¹⁴ brings in irrelevant and collateral matters,¹⁵ and is prejudicial against the defendant.¹⁶ One of the strongest arguments against its admissibility is that it has no legitimate tendency to prove negligence.¹⁷ In Mitchell v. City of Plattsburg¹⁸ the court said: "The question of negligence should be determined by what was known, or reasonably should have been known, before the accident."¹⁹ The most important reason for the rule of exclusion has nothing to do with finding truth in the trial of the case, but establishes the rule as one of privilege.²⁰ The fear is that this kind of evidence will be construed as an admission of prior negligence and that an individual faced with such a possibility will not make needed changes and repairs after the dangerous condition has been discovered.²¹

This policy of exclusion presupposes that negligence is an issue in the case. When it is not, the danger of prejudice to the defendant is not present. Even when negligence is an issue, the evidence is sometimes admissible. For example, if plaintiff has alleged that the defendant should have maintained safer premises, evidence that the suggested changes were in fact made after the accident is admissible to prove the practicability of the repairs when the defendant has responded that plaintiff's suggestions are impossible²² or impracticable to carry out.²³ Similarly, when the defendant has denied his relationship to the premises the fact that defendant made repairs is admissible to show that the defendant had a duty to repair the premises,²⁴ owned the premises,²⁵ or that the premises were under the defendant's management or control.²⁶ Also, while evidence of repairs is not admissible to show the

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¹⁷. Id. McCormick contends, however, that in view of the standards normally applied to admissions by conduct, evidence of subsequent changes "seems relevant (though rebuttable, of course) as a circumstance tending to show consciousness of the situation called for additional safety-precautions." C. McCormick, supra note 9, § 77, at 159.
¹⁹. Id. at 560.
²⁰. C. McCormick, supra note 9, § 77, at 159.
²². Hickey v. Kansas City S. Ry., 290 S.W.2d 58 (Mo. 1956).
existence of defects at the time of the accident,27 a plaintiff will be allowed to introduce evidence of repairs to prove location when a defendant's witness puts the location of an acknowledged defect into dispute.28 Evidence of changes cannot be used to impeach a defendant's witness unless it is admissible on other grounds.29 The same seems to be true when the evidence is used for rebuttal of one of defendant's contentions.30 However, in Orr v. Shell Oil Co.,31 the plaintiff was injured by a chemical, and was allowed to introduce evidence of protective measures taken after the accident when defendant denied that the chemical was dangerous.

It is also possible for defendant to waive the privilege of exclusion. In Ernst v. Union Depot Bridge & Terminal Ry.,32 defendant objected to the introduction of evidence that span wires had been replaced after the accident. On cross examination of plaintiff's witness, defendant raised a doubt as to whether or not new span wires had been installed. The court said that since this was the same line of questioning that plaintiff had followed, defendant waived his prior objection.

In general, the admissibility of evidence of repairs is determined by some action or inaction on the part of the defendant. The defendant, by controlling the issues and making proper objections,33 can prevent the admission of the evidence if he so desires. If the evidence is admitted, the defendant is entitled to a limiting instruction.34

It is not submitted that the court erred by admitting Lowry's testimony concerning the flasher lights. The problem is that the Missouri Supreme Court's language may suggest to the reader that it is permissible for a plaintiff to introduce into evidence an otherwise accurate and relevant photo-

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28. Crockett v. City of Mexico, 336 Mo. 145, 156, 77 S.W.2d 464, 468 (1944).
29. Frechin v. Thornton, 326 S.W.2d 122 (Mo. 1959).
30. Some cases do not fit into specific categories like denial of duty to repair or denial of ownership. See, e.g., Tetherow v. St. Joseph & D.M. Ry., 98 Mo. 74, 11 S.W. 310 (1889). In this case, when defendant claimed that no other accident had ever occurred at the place in question, plaintiff was allowed to show that the place had been repaired after the accident.
31. 352 Mo. 283, 295, 177 S.W.2d 605, 613 (1943).
32. 256 S.W. 222, 225 (Mo. En Banc 1929). See also Derrington v. Southern Ry., 328 Mo. 283, 291, 40 S.W.2d 1069, 1072, cert. denied, 294 U.S. 662 (1931), where defendant's witness, on cross examination by plaintiff, volunteered evidence that a change had been made since the accident. The court's position in admitting the evidence was strengthened by the fact that defendant did not object until an answer to the question had been given.
33. Where the evidence is wholly inadmissible, a general objection is sufficient. Alcorn v. Chicago & A.R.R., 108 Mo. 81, 18 S.W. 188 (1891). Where the evidence is admissible on some issue, e.g., control, a special objection is required. Brennan v. St. Louis, 92 Mo. 482, 2 S.W. 481 (1886).
graph which also contains evidence of repairs, and to point out the repairs in order to clarify the picture for the jury. Such a rule would defeat the purpose of the subsequent repairs doctrine.

In regard to defendant's contention in the Grote case that the court erred in admitting Lowry's reference to the flasher lights, the court said:

The testimony with respect to installation of flashing light warnings at the crossing subsequent to the collision came from witness Garland Lowry, a surveyor. He had made a plat, Exhibit 5, of the crossing and sight distance and was relating it to a ground level photograph, Exhibit 7, of the crossing. The photograph had been made subsequent to installation of the flashing lights and the testimony was received to explain how the pictured scene differed from the scene at the time of the collision, and admission for that purpose was proper.\(^{35}\)

In support of this statement the court cited four cases:\(^{36}\) Henwood v. Chaney;\(^{37}\) State ex rel. State Highway Commission v. Eilers;\(^{38}\) Brock v. Gulf, Mobile & Ohio R.R.;\(^{39}\) and Reed v. Coleman.\(^{40}\) In Henwood, the defendant sought to introduce a photograph of the scene of the accident. The alleged negligence was that oil and mud had caused plaintiff to slip and fall when he stepped from defendant's railroad car. After questions by plaintiff aimed at challenging the accuracy of the photograph, the witness testified that since the accident, and before the picture was taken, the defendant had changed to diesel engines which did not leak oil. The testimony was admitted "to establish that conditions were different at the time of the accident than they were at the time of the taking of the photograph which defendant proposed to exhibit to the jury."\(^{41}\) In Eilers, a condemnation case, negligence was not an issue. Thus, during a challenge to the accuracy of the photograph, there was no danger in allowing testimony that changes had been made. The defendant in Brock, challenging the accuracy of a photograph introduced by the plaintiff, introduced evidence that "someone had placed boards around there at the bottom of the pipes . . . which boards were not there at the time of the accident."\(^{42}\) Reed v. Coleman was an automobile collision case in which defendant objected to the introduction of pictures of the intersection because the shrubs and trees were different at the time of the accident. Negligence was an issue in Reed, but there was no allegation that the defendant had made any changes at the intersection. The evidence was admitted.\(^{43}\)

The problem with the language in the Grote opinion is that the cir-

\(^{35}\) 460 S.W.2d at 718. This quotation contains all that was said by the court about this testimony and exhibit 7.
\(^{36}\) Id.
\(^{37}\) 156 F.2d 392 (8th Cir.), cert. denied, 329 U.S. 760 (1946).
\(^{38}\) 406 S.W.2d 567 (Mo. 1966).
\(^{39}\) 270 S.W.2d 827 (Mo. 1954).
\(^{40}\) 167 S.W.2d 125 (K.C. Mo. App. 1942).
\(^{41}\) Henwood v. Chaney, 156 F.2d 392, 396 (8th Cir.), cert. denied, 329 U.S. 760 (1946) (emphasis added).
\(^{43}\) Reed v. Coleman, 167 S.W.2d 125, 133 (K.C. Mo. App. 1942).
cumstances surrounding the admission of exhibit 7 are not set forth. It is not clear from the opinion who called Lowry as a witness or who asked him the questions that prompted the testimony about the flasher lights. Nor is it clear who introduced exhibit 7. Even assuming that Lowry was plaintiff's witness and exhibit 7 was plaintiff's exhibit, the court does not indicate how the defendant reacted to the introduction of either exhibit 7 or Lowry's testimony. Resort to the respondent's brief discloses that the first objections made to the admission of Lowry's testimony came only after several questions and answers concerning the flasher lights, and the transcript discloses that plaintiff's exhibit 7 was admitted without objection by the defendant. Absent these facts, the court's opinion may suggest to the reader that even if defendant had made the proper objection, exhibit 7 and Lowry's reference to the flasher lights would have been admissible. Such a holding would be directly contrary to the accepted rule excluding evidence of subsequent repairs and there is no indication that the court intended such a result.

None of the cases cited by the court in Grothe support the proposition that, when the alleged negligence concerns the condition of the premises, plaintiff, without waiver of objection by defendant, can introduce a picture of the scene containing changes made by defendant and then point out these changes to the jury in establishing the accuracy of the photograph. The cases cover only three situations: (1) When negligence is not an issue in the case; (2) when the defendant introduces the contaminated photograph or in some way waives his right to object; and (3) when defendant's only objection to plaintiff's photograph is on grounds of accuracy. In any of these situations, changes may be pointed out to the jury in order to make the photographs admissible as long as the photograph portrays the scene substantially the same as it was at the time of the occurrence in question.

44. Brief for Respondent at 26.
45. After the reporter marked exhibits 6 and 7 for identification, the following occurred:
   Plaintiff's Counsel: Mr. Lowry, I'd like to show you this large picture, which has been marked for identification as Plaintiff's Exhibit 6 and this colored photo, which has been marked as Plaintiff's Exhibit 7, and ask if you can identify what these are pictures of?
   Lowry: This is a picture of a vehicle, taken at this—
   Plaintiff's Counsel: Is the color picture a ground level picture of the crossing?
   Lowry: Yes.
   Plaintiff's Counsel: Do they correctly reflect the conditions of the crossing?
   Lowry: Yes.
   Plaintiff's Counsel: I'd like to ask that these pictures be admitted into evidence.
   The Court: Hearing no objection they will be received in evidence.
   Record at 82.
In arguing for strict standards regarding the admission of subsequent repairs evidence, McCormick states:

[The extrinsic policy of encouraging remedial safety measures is the predominant reason for holding evidence of such measures to be privileged. It is apparent that the free admission of such evidence for purposes other than as admissions of negligence is likely to defeat this paramount policy. It is submitted that before admitting the evidence for any of these other purposes, the court should be satisfied that the issue on which it is offered is of substantial importance and is actually, and not merely formally in dispute, that the plaintiff cannot establish the fact to be inferred conveniently by other proof, and consequently that the need for the evidence outweighs the danger of its misuse.]^{50}

This language can be applied to the Grothe case. Without a knowledge of the facts surrounding the admission of exhibit 7, the Grothe opinion seems to say that photographs taken after repairs have been made are not subject to objection on that ground. Such a rationale opens the back door to the admission of evidence of changes in condition made by defendant.\footnote{51} The fact that the defendant in Grothe had installed flasher lights at the intersection after the collision had nothing to do with the line of sight of the engineer. Exhibit 7, although probative on the line of sight issue, also contained evidence that the flasher lights had been installed subsequent to the accident. There was no issue in the suit on which this evidence was probative. Because the alleged negligence in this case was failure to provide a proper warning, the evidence of the installation of the flasher lights was undoubtedly prejudicial. Although exhibit 7 was probably plaintiff’s most illustrative method of proving that the engineer, when 260 feet away, could have seen a car approaching the crossing, this fact could have been established by other evidence, i.e., by oral testimony, by reference to the plat or, if available, by a photograph that did not show subsequent repairs.

It is not submitted that Lowry’s challenged testimony was improperly admitted. When plaintiff introduced exhibit 7, the defendant did not object to its admission into evidence.\footnote{52} Probably the best rationale for allowing Lowry’s testimony is that defendant, by failing to object to the admission of the photograph, waived his right to object to future testimony concerning the flasher lights. It was “then necessary that the changes be eliminated by

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\footnote{50} C. McCormick, supra note 9, § 252, at 545.
\footnote{51} In Gignoux v. St. Louis Pub. Serv. Co., 180 S.W.2d 784 (St. L. Mo. App. 1944), the court found such an attempt. The court noted that the picture could not give a clearer understanding of the physical facts than oral testimony could and said that the picture would only bring confusion into the case. Id. at 786. See also Donovan v. Connecticut Co., 84 Conn. 591, 80 A. 779 (1911). Photographs taken before a new guard rail was installed were admitted, but those taken after the installation of the guard rail were excluded. The court said: “Had the photographs been admitted, the plaintiff would have been permitted to accomplish by indirection what was forbidden to him by direct processes.” Id. at 598, 80 A. at 781.
\footnote{52} See note 45 supra.
explanatory testimony." However, this contention was not made by plaintiff on appeal. The other possible rationale for the admission of Lowry's testimony is that defendant failed to make timely objections. This argument was made by plaintiff. When an answer is directly responsive to a question and there is time to object between the question and answer, the objection "comes too late when not made at the first opportunity." Although the first rationale is preferable to the second, either would have been better than the one used by the court. The reason given in the Grothe opinion, without explanation, is misleading. Had the court added "because defendant waived his right to object" to its statement that the admission was proper for the purpose of explaining how the pictured scene differed from the scene of the collision, the statement would have been unambiguous. However, the actual statement made by the court can only cause confusion.

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53. Brillhart v. Edison Light & Power Co., 368 Pa. 307, 315, 82 A.2d 44, 49 (1951). In this case, several photographs of the scene of the accident, portraying changes made after the accident, were admitted without objection. After admission, plaintiff pointed out the changes to the jury so that they would understand how the scene looked at the time of the accident. Defendant let this testimony come in and did not object until near the close of the witness' examination. The court noted that the logical place for objection would have been at the time the photograph was offered into evidence.

54. The record shows that no such timely objection was made:
Plaintiff's Counsel: Garland, on this ground level picture, were you out there at the time before this ground level picture was taken?
Lowry: Yes.
Plaintiff's Counsel: The time that you were out there before, were these lights here in the picture?
Lowry: No. No, the first time I was out there the lights were not in the picture.
Plaintiff's Counsel: So, they are not out there. Were you out there after December of 1967?
Lowry: Yes.
Plaintiff's Counsel: And at that time the lights were not there?
Lowry: That's right.
Plaintiff's Counsel: They have just recently been added is that right?
Lowry: Yes, sir.
Plaintiff's Counsel: I'll make an X here because they weren't there at the time, originally?
Lowry: No.
Plaintiff's Counsel: It's been replaced?
Lowry: Yes.
Defendant's Counsel: If the court please, I object to any testimony regarding installations at this crossing after the occurrence of this collision and move that all the testimony with reference to that be stricken.
Plaintiff's Counsel: We are just trying to show ... the crossing [as it] existed at the time. We can explain the picture.
The Court: All right, overruled.
Record at 91, 92.