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Recent Cases

CIVIL CONSPIRACY IN MISSOURI

Stephan v. World Wide Sports, Inc.1

In August of 1965, defendant Roger Scherck arranged for two boxers to meet with the plaintiff in California. In California, the boxers signed contracts for three and seven years, respectively, with the plaintiff who agreed to manage them in return for a promised percentage of their earnings. The contract provided that no other persons would share in the ring earnings of the boxers. The plaintiff, however, had difficulty managing the fighters and they returned to St. Louis in October of that year. In May of 1966, the defendant World Wide Sports, Inc. contracted with one of the boxers to be his exclusive manager for 10 years and subsequently set up fights for both boxers. Defendant Scherck, who was apparently a director of World Wide Sports, participated in these proceedings. The plaintiff sued these defendants and John Healy, the vice-president of the defendant corporation, seeking $100,000 actual damages and $150,000 punitive damages for conspiracy to cause a breach of contract. After directing a verdict for the defendants, the circuit court sustained plaintiff's motion for a new trial finding that it had erred in granting defendant’s motion for directed verdict. Holding that the evidence was sufficient to make a submissible case and that the plaintiff's contracts with the fighters were not nullities, the Missouri Supreme Court affirmed as to defendants Scherck and World Wide Sports, Inc. The suit was dismissed as to defendant Healy, however, since there was insufficient evidence to show that he knew the terms of the fighters’ previous contract.2

As stated in Rosen v. Alsiede, Inc.,3 “a combination for the purpose of causing a breach of contract has been held to be an unlawful conspiracy. A person who by conspiring with another or by collusive agreement with him assists him to violate his contract with a third person and to obtain the benefit of that contract for himself commits an actionable wrong.”4 Since no damages would accrue unless a contract breach was induced, however, the conspiracy rule followed in Stephan and Rosen seems to be merely an extension of the action for “malicious procurement of the breach of a contract” which is recognized independently as a tort in Missouri.5 The “inten-

1. 502 S.W.2d 264 (Mo. 1973).
2. Id. at 268. By deposition, the defendant Healy admitted that he knew there was a contract between the fighters and the plaintiff. The court held that it could not be inferred from this that the defendant Healy knew that the subsequent contract with the fighters was an actual violation of the plaintiff's contract. See text accompanying note 10 infra.
3. 248 S.W.2d 638 (Mo. 1952).
4. Id. at 643. That there is also a damage action for breach of contract against the contract breacher is no defense in a tort action against the inducer of the breach. Annot., 26 A.L.R.2d 1227, 1257 (1952).
5. See Clark-Lami, Inc. v. Cord, 440 S.W.2d 737 (Mo. 1969).
tional interference with the contractual relation" without just cause so as to effect a breach of the contract is a "wrong for which the wrongdoer may be held accountable" in damages. To recover, the plaintiff must show that the inducement of the breach was done maliciously. This does not require that actual malice or ill will be shown. An intentional act without justification suffices; the use of coercion is not essential to recovery. It seems, however, that both the person who procured the breach and the person charged as co-conspirator must have full and actual knowledge of the previous contract with the plaintiff. The plaintiff must also have a valid contract to have a cause of action.

The malicious procurement of breach of contract and the conspiracy theories complement each other in that once the inducement of the breach is proven, if a conspiracy has also been shown, persons other than the party actually inducing the breach may be held liable. However, if the plaintiff fails to prove the conspiracy, he may yet recover against those defendants shown to have been guilty of the underlying wrong—the intentional interference with the contract. Conversely, if there was no breach induced, recovery will be denied completely even though a conspiracy is shown.

A civil conspiracy may be based upon torts other than malicious procurement of breach of contract. Conspiracy alone, however, does not create a substantive cause of action in itself; it merely allows the plaintiff to extend the liability of the wrongdoer to others. Generally, a civil conspiracy is "an agreement or understanding between two or more persons to

6. Downey v. United Weather Proofing, 253 S.W.2d 976, 980 (Mo. 1953). The court also stated that while an existing contract may be entitled to greater protection, some protection is appropriate against unjustified interference with reasonable commercial expectations even where an existing contract is lacking. See W. Prosser, The Law of Torts § 129, at 948 (4th ed. 1971). See also Restatement of Torts § 766 (1939).

7. Downey v. United Weather Proofing, 253 S.W.2d 976, 980 (Mo. 1953).


9. Downey v. United Weather Proofing, 253 S.W.2d 976, 981 (Mo. 1953).

10. Some courts hold that it is sufficient to show that the defendant had knowledge of facts which, if followed by a reasonable inquiry, would have disclosed the existence of the plaintiff's contract. See, e.g., Continental Research, Inc. v. Cruttenden, Podesta & Miller, 222 F. Supp. 190 (D. Minn. 1963). Most courts, however, require actual knowledge by the defendant of the prior contract. Missouri requires even more than this. Cases generally hold that the defendant is not liable unless he has full knowledge of the situation or of the restrictive covenant if one has been breached. See Coonis v. Rogers, 429 S.W.2d 709, 713 (Mo. 1968); Contour Chair Lounge Co. v. Aljean Furniture Mfg. Co., 403 S.W.2d 922, 930 (St. L. Mo. App. 1966).


13. See, e.g., Kansas City v. Rathford, 353 Mo. 1180, 186 S.W.2d 570 (1945) (conspiracy to defraud); Dano v. Sharpe, 236 Mo. App. 113, 152 S.W.2d 693 (K.C. Ct. App. 1941) (conspiracy to fraudulently impair plaintiff's judgment lien) (dictum).

do an unlawful act or to use unlawful means to do an act which is lawful.”

The elements are: (1) combination, 15 (2) object, 17 (3) means, 18 (4) overt act, 19 and (5) damage caused. 20 Thus, an alleged “conspiracy does not give rise to a civil action unless something is done pursuant to it which, absent the conspiracy, would create a right of action against one of the defendants if sued alone.” 21 Since the gist of the action is not the conspiracy but the unlawful injury, the charge of conspiracy need not be proved to support the action, but may be considered mere surplusage. 22 It has been stated that “the only purpose served” by establishment of conspiracy is to make the defendants liable for each other's acts. 23 Conspirators are liable as joint tortfeasors. 24 Because the act of each conspirator in carrying out the conspiracy is the act of all, 25 the usefulness in charging conspiracy lies chiefly in allowing the plaintiff to have a complete cause of action against a co-conspirator even though he did not actually participate in the underlying unlawful act.

As pointed out in Stephan, the plaintiff must prove his cause of action by clear and convincing evidence. 26 However, the conspiracy may be proven by circumstantial evidence 27 and may be inferred from proof of

15. Rosen v. Alside, Inc., 248 S.W.2d 638, 643 (Mo. 1952). See also Kansas City v. Rathford, 353 Mo. 1130, 1140, 186 S.W.2d 570, 574 (1945); Shaltupsky v. Brown Shoe Co., 350 Mo. 831, 832, 168 S.W.2d 1083, 1084 (1943). The allegation of an agreement or common design is essential to support a charge of conspiracy. Gruenewaelder v. Wintermann, 360 S.W.2d 678, 688 (Mo. 1962).
16. There can be no independent tort of conspiracy except in the unusual case where mere force of numbers acting in unison may constitute a wrong. See Shaltupsky v. Brown Shoe Co., 350 Mo. 831, 168 S.W.2d 1083 (1943).
17. Acts agreed upon must be unlawful either in their nature and purpose or in manner of their performance. See Baucke v. Adams & Hawkeye Cas. Co., 239 Mo. App. 64, 188 S.W.2d 355 (K.C. Ct. App. 1945).
18. Unlawfulness may be found in the means used or the end sought. See Adams Dairy, Inc. v. Burke, 293 S.W.2d 281 (Mo. 1956), cert. denied, 352 U.S. 969 (1957).
20. To sustain an action for conspiracy damage must have been done. See Harelost v. Tyler, 231 Mo. 383, 219 S.W. 908 (1920).
21. Mills v. Murray, 473 S.W.2d 6, 13 (K.C. Mo. App. 1971). Most other jurisdictions take a different view and hold that although an act by an individual may not give rise to civil liability, the same act by a conspiracy may constitute an actionable wrong. See 15A C.J.S. Conspiracy § 8 (1967).
22. Medich v. Stippec, 335 Mo. 796, 802, 73 S.W.2d 998, 1001 (1943).
26. 509 S.W.2d at 266; Contour Chair Lounge Co. v. Aljian Furniture Mfg. Co., 403 S.W.2d 922, 927 (St. L. Mo. App. 1966).
27. 502 S.W.2d at 266; Rosen v. Alside, Inc., 248 S.W.2d 638, 644 (Mo. 1952).
concerted action.\textsuperscript{28} Furthermore, the plaintiff's evidence is viewed in the most favorable light and he is given the benefit of every reasonable inference on appeal.\textsuperscript{29}

The primary holding in Stephan, that a person who by conspiring with another assists him to violate his contract and obtain the benefit of it "for himself commits an actionable wrong,"\textsuperscript{30} has been extended in Missouri to hold a contracting party liable for conspiring to breach his own contract.\textsuperscript{31} Some jurisdictions, though, refuse to permit this.\textsuperscript{32} Since the liability of civil conspirators is joint and several,\textsuperscript{33} the other contracting party need not be joined as a defendant—as in Stephan where the fighters who breached the contract with the plaintiff were not joined. The conspiracy action may even be maintained against only one defendant.\textsuperscript{34}

One advantage of alleging conspiracy is that it permits recovery of punitive damages against the breaching contracting party. While the general rule is that damages for breach of contract are limited to pecuniary loss sustained,\textsuperscript{35} since a civil conspiracy sounds in tort\textsuperscript{36} it may carry with it the assessment of punitive damages if done with malice or wantonness.\textsuperscript{37} Inasmuch as an intentional interference with a contract is malicious at law\textsuperscript{38}—and that the malice to be shown is the same as that required for showing the tortious act of inducing the breach—it would seem that exemplary damages may always ensue. The judgment for actual damages resulting from the conspiracy must be in one amount and against all the defendants, but "the rule is otherwise as to punitive damages which may be properly determined against" the joint tortfeasors in differing amounts.\textsuperscript{39} One factor to be considered is the degree of culpability of each, but it has also been stated that

\textsuperscript{28} Sackett v. Hall, 478 S.W.2d 381, 385 (Mo. 1972). The evidence must do more than merely raise a suspicion. If the proof is equally consistent with honesty as with fraudulent purpose, it will be referred to the better motive. National Rejectors, Inc. v. Trieman, 409 S.W.2d 1, 50 (Mo. En Banc 1966). Evidence of similar or collateral acts is admissible when conspiracy is charged to show unlawful intent or purpose. Hawley v. Merritt, 452 S.W.2d 604, 611 (Spr. Mo. App. 1970).

\textsuperscript{29} Adkison v. Hannah, 475 S.W.2d 39, 42 (Mo. 1972); Buxton v. Horn, 452 S.W.2d 250, 251 (St. L. Mo. App. 1972).

\textsuperscript{30} 502 S.W.2d at 266.

\textsuperscript{31} Mills v. Murray, 472 S.W.2d 6, 13 (K.C. Mo. App. 1971).

\textsuperscript{32} In New York, a party cannot be held liable for conspiring to breach his own agreement since to do so would be the equivalent of allowing recovery of punitive damages in a contract action, which is not permitted under New York law. Canister Co. v. National Can Corp., 96 F. Supp. 273 (D. Del. 1951); Bereswill v. Yablok, 6 N.Y.2d 301, 189 N.Y.S.2d 661, 160 N.E.2d 531 (Ct. App. 1959).

\textsuperscript{33} Wooldridge v. Scott County Mill Co., 102 S.W.2d 958, 964 (Spr. Mo. App. 1937).

\textsuperscript{34} Grubbs v. Curry, 72 S.W.2d 863, 864 (St. L. Mo. App. 1934).


\textsuperscript{36} Rosen v. Alside, Inc., 248 S.W.2d 638, 643 (Mo. 1952).

\textsuperscript{37} Mills v. Murray, 472 S.W.2d 6, 17 (K.C. Mo. App. 1971).

\textsuperscript{38} Id. at 18.

\textsuperscript{39} Id. at 14.
the punitive damages must necessarily be viewed in the light of the actual damage sustained.40

Finally, it was held in *Stephan* that there could be a conspiracy between the defendant World Wide Sports, Inc. and its director, the defendant Scherck, since Scherck's knowledge of the plaintiff's contract with the fighters was imputed to the corporation.41 The court relied on *Contour Chair Lounge Co. v. Aljean Furniture Manufacturing Co.*42 where a conspiracy to breach a covenant not to compete was found between a corporation and its president, who formed the competing corporation immediately after leaving the plaintiff's employment. As was stated in *Mills v. Murray*43 on facts similar to those in *Contour Chair*, the "alter ego" theory will not be applied to defeat the plaintiff's charge of conspiracy where the corporation's active participation is essential to the conspiracy scheme and it has committed a "direct tort" by ostensibly insulating its officers from liability.44 Nonetheless, these Missouri cases seem to be directly in conflict with the general rule that there can be no conspiracy between an individual and a corporation unless the persons and entities are separate.45

In summary, it would seem that an action for civil conspiracy may be established whenever a contract has been breached and a third party has induced the breach. In Missouri, the contract breacher may be joined as a defendant in the conspiracy action. As a result, the plaintiff may recover punitive damages from the other party to the contract, which would not otherwise be available in an action against him solely for breach of contract.

W. Dudley McCarter

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40. Adkison v. Hannah, 475 S.W.2d 39, 44 (Mo. 1972); Beggs v. Universal C.I.T. Credit Corp., 409 S.W.2d 719, 724 (Mo. 1966) (punitive damages must bear some relation to the injury inflicted).
41. 502 S.W.2d at 268.
42. 408 S.W.2d 922 (St. L. Mo. App. 1966).
43. 472 S.W.2d 6 (K.C. Mo. App. 1971).
44. *Id.* at 13-14n.2. The court stated that under the alter ego rule the corporate form will be disregarded where the corporation is so dominated by a person that it is merely an instrument of that person. However, the court stated that application of this rule would be neither equitable nor congenial to the plaintiff's theory of recovery since the corporation and individual would be without distinct individuality and without capacity for conspiring with each other.
In 1963 Keebler Company purchased Meadors, Inc., a candy manufacturer. At the time of the purchase, Meadors was in serious financial trouble and its debentures had a book value of less than one-half of their principal amount. Keebler operated Meadors profitably and by 1968, Meadors had total assets of over $580,000, including cash of over $321,000.\(^2\) In 1968 Keebler decided to withdraw from the manufacture of candy, but not from its sale and distribution. During final negotiations with Flora Mir Candy Corporation for the sale of Meadors, Keebler learned that Atlantic Services, Inc. might be interested in purchasing Meadors and arranged a meeting with Atlantic on February 14, five days after Atlantic expressed interest in purchasing Meadors. At the meeting between Keebler and Atlantic, Keebler's representatives questioned the individuals representing Atlantic about the corporation's financial structure and financial history. Keebler was told that Atlantic was a prospering, small holding company which wanted to diversify by expanding into the candy business, and was given unaudited financial statements showing Atlantic's net worth of $997,000 as of December 31, 1967, and net income of $153,588 for the calendar year.\(^3\) At the negotiating session and at least one other time prior to closing Atlantic inquired about the possibility of using Meadors' money to finance the purchase, and Keebler's representative replied to the effect that Meadors' money could not be used.\(^4\) At the February 14 meeting, Keebler and Atlantic negotiated an agreement for the sale of Meadors' stock and the agreement was executed that day or the next.\(^5\) On February 19, the date of closing, Atlantic, apparently without Keebler's knowledge, made a one day borrowing of $235,000 from a bank where Meadors had its account; the loan proceeds were deposited in an account in Atlantic's name; a $230,000 banker's check in favor of Keebler was purchased; and, after the closing, $310,000 was transferred from the Meadors' account to Atlantic's account and the loan was repaid. The transfer of funds was shown on Meadors' books as a loan to Atlantic, and on Atlantic's books as a loan from Meadors. Atlantic retained ownership of Meadors for approximately four months and then sold Meadors to Flora Mir Distributing. Flora Mir followed the pattern of payment established by Atlantic, using Meadors' assets to finance the sale. Soon Flora Mir and its parent company went into bankruptcy, as did Meadors.\(^6\) The net effect of the two sales was that Meadors' cash,

1. 480 F.2d 573 (4th Cir. 1973).
2. Id. at 575.
3. Id.
5. 480 F.2d at 576.
6. Id. at 576-77.
which made up more than half of its assets, had become an uncollectible account receivable.7

Atlantic had "looted" Meadors—it used the control it had purchased to divert Meadors' assets to itself for the purpose of financing the very sale by which it acquired Meadors. Plaintiffs, holders of Meadors' convertible debentures, brought suit against Keebler to obtain payment of the debentures or damage equal to the amounts unpaid.8 In light of all the circumstances the district court found that Keebler was in a position to forsee the likelihood of fraud on Meadors, and consequently had an obligation "to conduct such investigation of the purchaser as would convince a reasonable man that the sale was legitimate, or to refrain from making the sale."9 The district court held that, in failing to investigate, Keebler breached its fiduciary duty to the Meadors' creditors and was therefore liable to plaintiffs.10 The Fourth Circuit Court of Appeals reversed, holding that the circumstances surrounding Keebler's sale of Meadors were not sufficient to suggest to Keebler that Atlantic intended to loot Meadors.11

Where there is a sale of controlling stock, the law must balance two conflicting concepts. On the one hand, owners of shares of stock like other property owners should be allowed to sell to anyone they choose at any price.12 Thus it is the general rule that a noncontrolling shareholder may dispose of his shares as he sees fit and is not a fiduciary merely by owning stock.13 On the other hand, because a controlling or dominant shareholder14 is in a position to influence and control the affairs of the corporation, courts have consistently held that he has a fiduciary duty, not only toward the corporation but also to its creditors and minority stockholders, to exercise his influence in a manner not detrimental to the corporation, its creditors,

8. Plaintiffs also named Meadors, Atlantic, Flora Mir Distributing, and Flora Mir Candy Corporation as defendants. 480 F.2d at 574.
9. 480 F.2d at 574-75.
10. The district court also rendered judgment against Atlantic, Flora Mir Distributing and Flora Mir Candy Corporation. However, since all defendants except Keebler were the subject of bankruptcy proceedings, only Keebler appealed. 480 F.2d 573.
11. 480 F.2d at 580.
14. Control may rest upon the ownership of all or a majority of the voting stock or, as is the case in most public companies, substantially less than a majority. The basis of control may be a block of stock constituting working control or it may be derived from incumbency and be accompanied by only nominal stock ownership. Schwartz, The Sale of Control and the 1934 Act: New Directions for Federal Corporation Law, 15 N.Y.L. For. 674, 677 (1969).
or minority stockholders.\footnote{15} Courts have held that this fiduciary obligation extends to the dominant shareholder's transfer of his control;\footnote{16} he must exercise good faith and reasonable diligence\footnote{17} to assure that the resulting sale will be inherently fair to the corporation and those interested therein.\footnote{18} A controlling shareholder has a fiduciary duty to protect his corporation from looters.\footnote{19} A looter buys a controlling block of stock with the expectation that he or his nominees are to be elected directors or officers. Then the looter utilizes his new place of power to steal from the corporation, many times by selling assets—particularly liquid assets—and converting the proceeds to his personal use.\footnote{20}

Where a dominant shareholder sells his control to one who subsequently loots the corporation, there are three possible tests to determine whether the seller has breached his fiduciary duty to the corporation, its creditors, and minority shareholders. Under the approach taken in \textit{Levy v. American Beverage Corp.},\footnote{21} a seller of control is liable only if he actually knows the purchaser intends to loot the corporate treasury. A seller is not required to act on the assumption that a prospective buyer will commit a fraudulent or criminal act if given the opportunity to do so. "Quite the contrary may be assumed, in the absence of actual notice."\footnote{22}

The most widely accepted approach requires a transferor of control to make a reasonable\footnote{23} investigation of the buyer if the circumstances surrounding the proposed transfer are such as to awaken suspicion and put

\footnotesize

\begin{enumerate}
\item See note 12 supra.
\item Pepper v. Litton, 308 U.S. 295 (1939). Speaking for the Court, Justice Douglas stated:
\begin{quote}
He who is in such a fiduciary position cannot serve himself first and his cestuis second . . . . He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters . . . . He cannot use his power for his personal advantage and to the detriment of stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements.
\end{quote}
\textit{Id.} at 311.
\textit{See also} Note, 70 Colum. L. Rev. 1069 (1970).
\item See, \textit{e.g.}, Insuranshares Corp. v. Northern Fiscal Corp., 35 F. Supp. 22 (E.D. Pa. 1940).
\item Id. Many times looting cases involve the sale of an investment company. Undoubtedly this is because the liquid assets of the investment company can be disposed of easily. \textit{See}, Insuranshares Corp. v. Northern Fiscal Corp., 35 F. Supp. 22 (E.D. Pa. 1940).
\item Id. at 219, 38 N.Y.S.2d at 527.
\item A reasonable investigation is one which "discloses such facts as would convince a reasonable person that no fraud is intended or likely to result." Insuranshares Corp. v. Northern Fiscal Corp., 35 F. Supp. 22, 25 (E.D. Pa. 1940).
\end{enumerate}
a prudent man on his guard. In *Insuranshares Corp. v. Northern Fiscal Corp.* 24 controlling shareholders were held liable for their failure to make a reasonable investigation prior to their sale to buyers who later looted the corporation. 25 The court found the following suspicious circumstances: an agreement to have a large part of the corporation's assets converted into cash and available as such at the time of the sale; the defendants were warned by the corporation's counsel of the danger of dealing with little-known parties; the same corporation had been looted by another group five years before; the presence of a director whose questionable ethical standard was well-known; and the inflated sale price. 26

Whether the seller has reason to suspect that the buyer will defraud the corporation is a factual question. Thus a controlling shareholder's duty to investigate under the *Insuranshares* test depends upon the circumstances present in the case. For example, a duty to investigate is more likely to be imposed if the corporation's assets are liquid, 27 since liquid assets are more easily adapted to a looter's purposes. However, since a looter can use fixed assets for his own purposes as well, this factor would not seem to be essential to imposing liability on the seller if other facts are present which should arouse the seller's suspicions. 28 Another important factor is whether the shares were sold at a price in excess of market value. 29 Even though a controlling block of shares can usually be sold at a higher price per share than other shares on the theory that the element of control makes the block of shares more valuable, that the buyer is willing to pay an excessive price for the shares may nevertheless be enough to require the seller to take the steps needed to be reasonably certain that the buyer is paying only for lawful advantages. 30 Another factor is whether the buyer desires immediate access to the corporation's assets upon purchase of the shares. 31 Although this alone would not seem to be enough to put the seller on notice of the buyer's possible wrongful intentions, when coupled with the other factors, it may arouse reasonable suspicions in the seller. 32 Finally, a buyer's insistence upon secrecy in the consummation of the transaction has been a factor in determining whether the transferee had a duty to investigate. 33 In each case, the factors must be weighed and balanced in order to determine if the transferor has a duty to investigate.

25. Id. at 23.
26. Id. at 25–26. See also 8 U. CHI. L. REV. 335n.1 (1941).
In Keebler, the court recognized that controlling shareholders are fiduciaries and adopted the Insuranshares requirement of a reasonable investigation when there are suspicious circumstances. The court expressly rejected the Levy approach which conditions the transferor's liability on his actual knowledge of the transferee's intent to loot the corporation. According to the court, to require actual knowledge of the intended looting places a premium on the "head in the sand" approach to corporate sales. On the facts of the case, however, the court held that the circumstances surrounding the transfer of control of Meadors were not sufficient to necessitate an investigation of Atlantic by Keebler.

In view of the possible dangers to the corporation in every transfer of control, a third approach to a controlling shareholder’s fiduciary duty may be desirable. The dominant shareholder could be required to make a reasonable investigation of the purchaser before control is transferred—

34. 480 F.2d at 577. See also Insuranshares Corp. v. Northern Fiscal Corp., 35 F. Supp. 22 (E.D. Pa. 1940).
35. Case cited notes 21-22 supra and accompanying text.
36. 480 F.2d at 577n.6.
37. The district court had found that circumstances surrounding the transaction known to Keebler at the time of the sale might have indicated that Atlantic (the purchaser) intended to loot Meadors. Those circumstances were: (1) no one from Atlantic had any experience in the candy business; (2) at the time of the execution of the contract no one from Atlantic had inspected Meadors' operation; (3) at the time of closing, only Atlantic's accountant had examined Meadors to any appreciable extent and he was interested primarily in the books and inventory; (4) Meadors had no market of its own and the profit as shown could not have been accepted at face value by an outsider; (5) prior to the closing, the purchaser had conducted no negotiations with key employees then operating Meadors relative to the continuation of the business; (6) the sale was consummated with dispatch; and (7) the inquiries by the purchaser as to the availability of Meadors' funds for payment of the purchase price. According to the district court these circumstances, considered together, were sufficient to impose upon Keebler a duty to make a reasonable investigation of Atlantic and its motives for the purchase. 329 F. Supp. at 220. Had Keebler conducted such an investigation and reasonably concluded that there was no danger of looting, then it would have been absolved of liability. 329 F. Supp. at 224. With respect to the circumstances relied on by the district court the court of appeals found: (1) that it is not unusual for any corporation to venture into a new business field and therefore that Atlantic lacked experience in the candy business was not sufficient to arouse Keebler's suspicion; (2) that Atlantic had inspected Meadors and this was not indicative of an intention not to operate, much less to loot. The court noted that Atlantic's accountant had made the inspection and, furthermore, that Keebler warranted as true and correct its representations including the Meadors balance sheet; (3) that while Meadors' past profit history may have been questionable, Keebler's agreement to purchase candy provided Meadors with a substantial initial market; (4) that Keebler had contracted to use its best efforts to retain key employees of Meadors and Atlantic did retain them after it took over. Thus there was no reason for Keebler to be suspicious because Atlantic did not negotiate with Meadors' key employee, concerning the continuation of the business; (5) that there being no reason to delay the transaction, the dispatch with which it was consummated was not a suspicious circumstance; (6) that since Keebler made it clear that Atlantic must consummate the purchase with its own funds, that Atlantic had inquired about financing the sale with Meadors funds was not a suspicious circumstance. 480 F.2d at 578-80.
irrespective of the existence of "suspicious" circumstances. This rule would avoid the present uncertainty and inconsistency as to whether a transferor must investigate. Its application would not be impractical. For example, it would have been no great burden for Keebler to make a reasonable investigation of Atlantic, its history, and possible motives for the desired purchase. Such an investigation may have revealed that Meadors' money was being utilized for payment of the purchase price or that Atlantic Services, Inc. had been involved in past looting incidents. Considering Keebler's fiduciary duty as controlling shareholder and the danger to the community of interests in Meadors, this would not have placed an undue hardship on Keebler or unnecessarily restricted the transferability of the Meadors stock.

Furthermore, it is at least arguable that the rationale of the looting cases should be extended to impose liability for a sale to palpably incompetent buyers, if the buyers' lack of managerial talent was foreseeable. While it may be rather difficult to establish that the purchasers' lack of managerial ability was foreseeable, the damage to the corporation may be just as great when control is transferred to incompetent managers as when the purchaser loots the corporation. Thus, if the controlling shareholder is negligent in transferring his control he should be liable to those who are damaged as a result of this negligence. The controlling shareholder's fiduciary obligation should require him to make reasonable efforts to prevent harm to the corporation, whether the harm is caused by looters or the mismanagement of the new owners of control.

The Keebler case is a good example of the situation encountered by a controlling or dominant shareholder who attempts to transfer control of the corporation. Under the majority rule, if he closes his eyes to possible wrongdoing by the purchaser, the seller may be liable for his failure to investigate. If he does investigate and discovers that the buyer may intend to loot the corporation, the dominant or controlling shareholder is faced with two rather unattractive alternatives. He may forego the sale of control or he may sell and face liability to the corporation, its minority shareholders and creditors. However, considering the extensive injury that can be caused by irresponsible transfers of control, it is not unreasonable to impose a more rigorous standard that mere good faith upon the seller of controlling shares who is conveying control of the corporate assets.

STEVEN C. PARRISH

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38. See note 23 supra.
CRIMINAL PROCEDURE—MENTAL ILLNESS AND COMMITMENT

Ex parte Kent

At trial in circuit court, defendant pleaded not guilty to a felony charge of first degree robbery by means of a dangerous and deadly weapon. His appointed counsel moved for psychiatric evaluation of defendant pursuant to Missouri's statutes controlling criminal proceedings involving mental illness, Chapter 552, RSMo 1969. Defendant was committed to the Missouri State Mental Hospital at Fulton on May 27, 1971, for pre-trial evaluation. The resulting psychiatric report indicated that defendant had a mental disease or defect which excluded his responsibility at the time of the crime and made him incompetent to stand trial. Defense counsel asked for leave to withdraw the not guilty plea so that defendant might enter a "dual" plea of not guilty and not guilty, by reason of mental disease or defect, and this was denied. The trial court said it would consider the defense of not guilty by reason of mental disease or defect if defendant wished to interpose it; however, the defendant declined to do so. The State then stipulated as to the accuracy of the psychiatric report, and "accepted" a defense of not guilty by reason of mental disease or defect. The trial court sustained this defense, acquitted defendant on that ground, and ordered him committed indefinitely for care and treatment in a state mental hospital. Defendant challenged his commitment by habeas corpus in the Missouri Supreme Court. The supreme court invalidated the committing order and remanded to the trial court with directions for further

1. 490 S.W.2d 649 (Mo. En Banc), cert. denied, 414 U.S. 1077 (1973).
2. §§ 560.120, 135, RSMo 1969.
3. § 552.020(3), RSMo 1969; 490 S.W.2d at 650.
4. 490 S.W.2d at 650.
5. Section 552.030(2), RSMo 1969, provides that within ten days after a plea of not guilty, or at a later date if the court permits, the defendant may file a written notice of his purpose to rely on the defense of mental disease or defect, and such notice does not deprive the defendant of other defenses. Therefore the statutory notice has the same effect as defendant's offered plea, which apparently was rejected by the trial court as redundant and improper. See § 546.020, RSMo 1969.
6. Defendant's Petition for Writ of Certiorari to the United States Supreme Court, p. 12.
7. The Missouri Statute concerning criminal responsibility provides that: "The state may accept a defense of mental disease or defect excluding responsibility, whether raised by plea or written notice, if the defendant has no other defenses and files a written notice to that effect." § 552.030(2), RSMo 1969.
8. The court ordered defendant "not to be released therefrom except on order from this Court upon a determination as provided by law." 490 S.W.2d at 650. See § 552.040(2), RSMo 1969.
9. In Jackson v. Indiana, 406 U.S. 715 (1972), the defendant alleged his indefinite commitment to a mental hospital amounted to a life sentence, and subjected him to cruel and unusual punishment in violation of the eighth and fourteenth amendments. The court found it unnecessary to reach this claim in deciding the case on other grounds, 406 U.S. at 789.
10. Defendant claimed that he had been deprived of his liberty without due process of law in violation of the Mo. Const. art. I, § 10.
11. 490 S.W.2d at 651-52.
proceedings, on the grounds that the defendant had been tried while incompetent and his defense of mental disease or defect had been "accepted" despite his assertion of other defenses. The court refused, however, to discharge the defendant. 12

The problem of the mentally incompetent defendant creates special problems for the criminal justice system. In a recent opinion 13 by the Kansas City District of the Court of Appeals, Judge Somerville said,

By dictate of the American conscience, long steeped in the hollowed traditions of basic fair play and justice, judicial and statutory safeguards have been created to balance the adversary proceeding where it appears that an accused is suffering from a mental disease or defect. Chapter 552 RSMo 1969, V.A.M.S. represents Missouri's statutory response to this dictate of conscience. 14

The Kent case illuminates some of the shadows in Missouri's criminal mental responsibility statute, and, at the same time, quietly steps over others. Adopted in 1963, 15 the statute has been patched by amendment and interpretation, yet it continues to be subjected to vigorous attacks such as in Kent.

The area of criminal competency is "fraught with basic procedural problems." 16 When a defendant is committed because he lacks competency to stand trial, how long can he be confined without a trial? To what extent can he attack an obviously invalid criminal charge? Problems also arise regarding the issue of criminal responsibility. 17 Can a prosecutor "accept" a not guilty plea by reason of mental disease or defect and remove an accused from society without the necessity of a trial? Is automatic commitment upon acquittal a trap for defendants resulting in indefinite confinement and treatment in a mental hospital? Can an acquitted defendant be committed without a hearing if he is sane at the time of commitment? Are the different release and commitment standards for civil and criminal proceedings justified? These questions raise constitutional issues of due process and equal protection, some of which the Kent court undertook to resolve.

12. Id. at 653. On remand Kent was found competent to proceed to trial. He was tried on December 10, 1973 and acquitted by reason of mental disease or defect. He was again committed to Fulton and remains there now with a new appeal pending.


14. Id. at 156.


16. Ex parte Briggs v. State, 509 S.W.2d 154, 156 (Mo. App., D.K.C. 1974). Nowhere, perhaps, is there encountered an area so fraught with basic procedural problems as those arising where an accused lacks the requisite mental capacity to knowingly and meaningfully understand the import of the charges leveled against him and to viability consult with counsel and assist in his own defense.

17. See generally §§ 552.030-.040, RSMo 1969.
CRIMINAL COMPETENCY

The concept of criminal competency includes the ability of the accused to understand the nature and purpose of the proceedings against him, ability to participate and assist in his own defense, and ability to understand the nature and purpose of a sentence upon conviction. If a trial court has reasonable cause to believe that a defendant lacks mental fitness to proceed, it must order a psychiatric examination of the defendant. Based on the psychiatric report and other evidence, the court then makes a determination as to whether the defendant is mentally fit to proceed to trial. The Missouri statute commands that if defendant is found not mentally fit to proceed, the trial proceedings are suspended for “so long as the incapacity endures.” In *Jackson v. Indiana*, however, the United States Supreme Court unanimously held that an indefinite commitment of an accused, solely on the basis of his lack of capacity to stand trial, violates due process.

18. The Missouri statute provides:

“No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.” § 552.020(1), RSMo 1973 Supp. To pass this test, a defendant needs only have an awareness of the basic fundamentals of a trial, such as the functions of the judge, jury, and counsel. See Rose, *Criminal Responsibility and Competency as Influenced by Organic Disease*, 35 Mo. L. Rev. 326, 327 (1970). Though the Missouri statutes do not explicitly adopt the terms “criminal responsibility” and “criminal competency,” Rose makes the distinction clear. “Criminal responsibility” is related to the defendant’s mental state at the time of the criminal act and “criminal competency” is related to his mental state from the time period beginning after the commission of the criminal act and ending with sentencing. *Id.* at 327.


20. Section 552.020(6), RSMo 1973 Supp. requires a hearing if the report is contested, but provides the court may hold a hearing if it is not. The trial court’s discretion is limited, however, by the “bona fide doubt” rule of *Pate v. Robinson*, 383 U.S. 375, 385 (1966). In *Ex parte Briggs v. State*, 509 S.W.2d 154, (Mo. App. D.K.C. 1974), an uncontested psychiatric report showed defendant competent to stand trial, but that he had a mental disease or defect excluding responsibility for the offense. The appellate court said these findings were at war with each other and sufficient to raise suspicion and cast a “bona fide doubt” on defendant’s capacity to stand trial. The trial court’s decision was reversed for failure to conduct the requisite hearing on this issue. For cases where the facts did not raise a “bona fide doubt” as to competency, see *State v. Stein*, 504 S.W.2d 1 (Mo. 1974); *Jones v. State*, 471 S.W.2d 223 (Mo. 1971); *McCormick v. State*, 463 S.W.2d 789 (Mo. 1971); *Miller v. State*, 498 S.W.2d 79 (Mo. App., D.K.C. 1973). In the *Miller* case, the court found counsel ineffective in his assistance for failure to voice his doubts about his client’s competency to the trial court.

21. § 552.020(1) RSMo 1973 Supp. Section 552.020(7) adds “or until the charges or proceedings are disposed of according to law.”


23. Powell and Rehnquist, JJ, not participating.
and equal protection. 24 Jackson stated that such a defendant cannot be held more than a reasonable time 25 to ascertain whether there is a substantial probability that he will attain capacity to stand trial in the foreseeable future. If not, he must be civilly committed or released. 26 In Kent, the Missouri Supreme Court applied the Jackson standards to the Missouri statute and remanded the case to the trial court prescribing the proper procedure for all courts to follow. If the trial court has determined that a defendant is incompetent to proceed, it must make a second decision as to whether there is substantial probability that he will recover in the foreseeable future. If not, then the charges must be dismissed and civil commitment proceedings initiated, or the defendant must be released. 27 If it appears that defendant will be capable of standing trial in the foreseeable future, then the trial court should enter necessary orders 28 to assure that the defendant is progressing toward the goal of criminal competency.

The Kent court also fashioned a method by which a defendant, committed for incompetency, may nevertheless test the prima facie criminal case against him. The court recognized the problem of preventing an accused from attacking an invalid criminal charge 29 while he is being detained with the criminally insane. Although the statute does not provide for a hearing on a defense to the charges 30 the Missouri Supreme Court said that Criminal Rule 25.06 31 allows defense counsel to assert "any legal objection to the

24. 406 U.S. at 730-31; U.S. Const., amend. XIV.
25. Although the court declined to set time limits in the Jackson case, it said that a continued commitment must be justified by progress toward defendant's ability to stand trial. It also found that Jackson's three and one-half years of pre-trial confinement was sufficient to establish the lack of a substantial probability that he would ever be able to participate fully in a trial. 406 U.S. at 738. Kent had been confined for over a year when he filed his writ of habeas corpus.
27. 490 S.W.2d at 651-52. See § 552.020(8), RSMo 1973 Supp. (release or civil commitment required if charges are dismissed); §§ 202.783-875, RSMo 1969 (civil commitment); Jackson v. Indiana, 406 U.S. at 738; Ex parte Briggs v. State, 509 S.W.2d 154, 158 (Mo. App., D.K.C. 1974).
28. 490 S.W.2d at 652. The court does not suggest what those orders might be, but presumably periodic progress reports from the hospital to the trial court would suffice.
29. See Foote, A Comment on Pre-Trial Commitment of Criminal Defendants, 108 U. PA. L. Rev. 832 (1960). Professor Foote suggests three situations where a defendant should be allowed to attack his criminal charges, even while he is considered incompetent: 1) where the prosecution is barred by law as, for example, when the statute of limitations has run; 2) where the prosecution's factual case contains an intrinsic defect such as essential evidence based on an unlawful seizure; or 3) where defendant has an affirmative defense that can be established without his participation. Id. at 841.
30. Some other states provide for such a hearing. E.g., Chap. 128, § 17, Mass. G. L. (1972 Supp.) allows a pre-trial hearing at which a defendant committed for incompetency may raise any defense, except insanity, and have it considered by the trial court on the merits.
31. "Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion." Mo. Cwms. R. 25.06(a). Subsection (b) of the rule expressly covers defenses and objections based on defects in the institution of prosecution or in the indictment or information, including failure to show jurisdiction in the court or to charge an offense. Subsection (d) excludes defenses which involve issues of fact to be tried by a jury. Compare note 30 supra.
prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant. The court said that while a defendant could not have a trial on the merits as long as he remains incompetent, the trial judge should satisfy himself that there is substantial evidence available to support a conviction, and if not, the charges should be dismissed.

### Criminal Responsibility

If it is determined that a defendant is mentally fit to stand trial, the criminal proceedings against him resume. An accused can now raise a defense of mental disease or defect excluding criminal responsibility at the time of the alleged criminal act, which is not precluded by a finding of competency to stand trial. Reliance on this defense does not eliminate other defenses and the State can only accept a mental disease or defect

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32. 490 S.W.2d at 653, quoting Model Penal Code § 4.06.
33. 490 S.W.2d at 653.
34. § 552.020(7), RS Mo 1973 Supp. This may be after the threshold competency hearing or after a period of confinement and recovery. Defendant's presence in court is essential to enter a plea, stand trial, or receive a sentence or commitment order. U.S. Const. amend. VI, XIV; Mo. Const. art. I §§ 10, 18(a); §§ 546.030, .560, RSMo 1969; Mo. R. Crim. P. 29.02, 37.86; Schwab v. Berggren, 143 U.S. 442 (1892); State v. Cook, 432 S.W.2d 345 (Mo. 1968). Counsel may have to file a writ of habeas corpus ad testificandum to secure defendant's presence if the court fails to order his release and appearance.

Criminal responsibility has been tested by various insanity definitions in English-American law. See United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); Commonwealth v. Chester, 337 Mass. 702, 150 N.E.2d 814 (1958) ("irresistible impulse" test); and M'Naghten's Case, 8 Eng. Rep. 718 (1843). Missouri employs essentially the Freeman rule:

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

§ 552.030(1), RS Mo 1969. While Missouri courts have rejected defenses of temporary insanity or sudden impulse, the statute seems to provide for one who suffers from an exculpatory disease or defect at the time of the alleged crime, yet later has the mental fitness to stand trial. Clappen, Mental Responsibility and the Criminal Law in Missouri, 35 Mo. L. Rev. 516 (1970). Psychiatric evidence is admissible only after notice to rely on mental disease or defect has been given and only to prove defendant's state of mind. § 552.030(3), RS Mo 1969. In practice, however, notice and psychiatric evidence might be used strategically to influence a jury into compromising on a lower crime or sentence.

37. § 552.030(2), RS Mo 1969. There are, then, a total of four pleas available to a criminal defendant in Missouri: (1) guilty, (2) not guilty, (3) not guilty by reason of mental disease or defect excluding responsibility, (4) not guilty by reason of mental disease or defect excluding responsibility and no other

https://scholarship.law.missouri.edu/mlr/vol39/iss4/6
defense when the defendant files a written notice that he has no other defenses. Failure of the trial court to follow this provision of the statute was another ground on which the decision was invalidated.

**Automatic Commitment**

By remand on the competency issue the court also managed to sidestep for a short time Kent's challenge of the automatic commitment provision as violative of due process and equal protection. In civil commitments, a hearing on present sanity is usually required at the time of commitment. But a criminal defendant is committed automatically in Missouri on acquittal by mental disease or defect. This is a commitment based on a finding of past insanity at the moment of the crime, usually months before the trial and commitment, with no determination of present sanity. A similar provision in the District of Columbia was struck down by the federal district court in *Bolton v. Harris*. This court required that any commitment after acquittal be obtained by civil rules and be predicated upon a new finding of present insanity.

defenses. Other Missouri statutes have not been revised to recognize the mental disease or defect pleas. E.g., § 546.020, RSMo 1969 (plea of not guilty, not formally tendered).

38. Cases involving mental illness raise subtle problems of attorney-client relations. Although a defendant is adjudged capable of participating in his defense, he may still have difficulty understanding the complicated plea options, procedure, and other legal matters which add to counsel's burden. Using his professional skill and judgment, an attorney may decide certain actions amount to futile gestures, or he may do for his client what he could not do for himself. Miller v. State, 498 S.W.2d 79 (Mo. App., D.K.C. 1973). On the other hand, counsel must inform defendant of his constitutional rights, and when a defendant has been found mentally fit to participate in his defense, it is the defendant, and not his counsel, who must make the final choice of what plea to enter. U.S. Const. amend. V, XIV; ABA Standards, The Prosecutor Function and Defense Function, § 5.2(a)(1) (1971).

39. See note 7 supra.

40. 490 S.W.2d at 651.

41. § 552.040(1), RSMo 1969; State v. Nickens, 403 S.W.2d 382, 386 (Mo. 1966); see generally Annot. 50 A.L.R. 3d 144 (1973); 145 A.L.R. 892 (1943).

42. For cases stating that commitment proceedings, whether civil or criminal, are subject to both the equal protection and due process clauses of the fourteenth amendment, see Humphrey v. Cady, 405 U.S. 504 (1972) (post sentence commitment); Specht v. Patterson, 386 U.S. 605 (1967) (sex offender act); Baxtrom v. Herold, 383 U.S. 107 (1966) (post sentence); Lynch v. Overholser, 369 U.S. 705 (1962) (due process, defendant not allowed to plead guilty); Bolten v. Harris, 395 F.2d 642 (D.C. Cir. 1968) (commitment upon acquittal). These issues were raised unsuccessfully in regard to automatic commitment in two other Missouri cases. State v. Kite, 498 S.W.2d 756 (Mo. En Banc 1973); State v. Lindner, 498 S.W.2d 754 (Mo. En Banc 1973) (Both dismissed for failure to file timely motions for new trial).

43. §§ 202.783-.875, RSMo 1969. Sections 202.800-.803 provide for emergency commitment without a hearing.

44. 395 F.2d 642 (D.C. Cir. 1968).
The Missouri Supreme Court recently faced the issue squarely in State v. Kee\(^{46}\) and upheld the automatic commitment provision. The Kee court distinguished Bolton by construing the Missouri statute to allow a prisoner to initiate re-examination proceedings the day he arrives at the state mental hospital.\(^{48}\)

**EQUAL PROTECTION**

Kent also attacked\(^{47}\) the Missouri mental responsibility statute as unconstitutional because it sets more onerous standards for commitment and release of persons acquitted on a defense of mental disease or defect than for persons civilly committed.\(^{48}\) This equal protection argument has prevailed in some other jurisdictions\(^{49}\) but these cases were distinguished by the court.

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45. 510 S.W.2d 477 (Mo. En Banc 1974). The majority found precedent for their decision in Chase v. Kearns, 278 A.2d 132 (Me. 1971) and State ex rel. Schopf v. Schubert, 45 Wis. 2d 644, 173 N.W.2d 673 (1970). See also In re Franklin, 101 Cal. Rptr. 553, 496 P.2d 465 (1972) and Mills v. State, 256 A.2d 755 (Del. 1969). Judge Seiler dissented on the grounds that such a procedure places the burden on the defendant to prove he is sane.

46. § 552.040(4), RSMo 1969. Other applications can be filed at 180 day intervals. Habeas Corpus is also available. Mo. Const. art. I, § 12; Mo. R. Civ. P. 91.

47. Defendant’s Petition for Writ of Certiorari to the United States Supreme Court.

48. CIVIL COMMITMENT: §§ 202.785-875, RSMo 1969. In civil involuntary commitments there must be a written application, doctor’s certification, hearing, and finding by the court of mental illness and need of custody, care, or treatment in a mental facility and the lack of sufficient insight or capacity to make responsible decisions with respect to hospitalization. Mental illness (including alcoholism or other drug abuse) is a state of impaired mental function which requires that a person so afflicted receive care and treatment for his own welfare, or the welfare of others, regardless of whether such person has been adjudicated legally incompetent.

Civil release is by the head of the hospital when he determines that the conditions justifying involuntary hospitalization no longer exist, considering the best interests of the patient, and the safety of the patient and others.

CRIMINAL COMMITMENT: Ch. 552, RSMo 1969. The person must have been charged with a crime, initiate the defense of mental disease or defect, and be acquitted on that defense. There is a right to trial by jury, a psychiatric examination, and a finding that he did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of the law.

Release is by the court on application every 180 days. The defendant will not be released unless it is determined that he does not have, and in the reasonable future is not likely to have, a mental disease or defect rendering him dangerous to the safety of himself or unable to conform his conduct to the requirements of the law.

CRIMINAL SEXUAL PSYCOPATH: §§ 202.700-.770, RSMo 1969. This is a civil commitment proceeding with the right to a jury. Commitment requires findings that the subject is suffering from a mental disorder of at least one year duration, is not insane or feebleminded, has criminal propensities to sex offenses, and is considered dangerous. Release is by the court on application at any time, and upon a finding that it would not be incompatible with the welfare of society.

in Kee.\textsuperscript{50} The Missouri Supreme Court held that differences in the methods of commitment are based on the prior criminal act of the defendant and therefore are reasonable and not a violation of equal protection.\textsuperscript{51}

\section*{Conclusion}

The constitutionality of the Missouri criminal commitment statute has been saved by construction on the part of the Missouri Supreme Court. In Kent it held that a defendant can be committed for incompetency only if there is substantial probability that he will be able to stand trial in the foreseeable future. His counsel may test the criminal charges and require the trial judge to find a prima facie case against him before trial. Further, the state may not accept a defense of mental disease or defect unless the defendant has filed written notice of no other defenses. In a follow-up case, Kee, the court upheld the automatic commitment provision by holding that a defendant may initiate release proceedings the day he is committed. In Kee, the statute was also declared not to be in violation of equal protection and due process. Kent and cases of its kind, while saving the statute as a whole, will hopefully continue to expand and define the safeguards provided in the trial of persons having a mental disease or defect.

\textsc{James J. Gross}

\section*{Estate Planning—Deductibility of Legal Fees}

\textit{Sidney Merians v. Commissioner}\textsuperscript{4}

In 1967, taxpayers, husband and wife, employed a law firm to prepare their estate plan. Counsel performed the following legal services: the preparation of wills, taking into account current requirements for the marital deduction; the establishment of an irrevocable trust for the benefit of the wife and the transfer of certain corporate stock to the trust; the dissolution of a corporation; the creation of a partnership with the trust as a limited partner; preparation of gift tax returns with respect to the transfers of property to the trusts; and creation of an irrevocable life insurance trust for the primary benefit of the wife. For these services, taxpayers received an unitemized bill indicating a fee of $2,144.00 for 42.8 hours of work at a rate of $50.00 per hour. Taxpayers deducted the amount of the fee on their 1967 federal income tax return, but the Commissioner disallowed the deduction. Because there was no evidence providing a reasonable basis for allocation, the Tax Court allowed a deduction of only 20 percent\textsuperscript{2} of the fee.

\textsuperscript{4} This is an application of the rule of Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930), which held that if the taxpayer's records are inadequate to provide a reasonable basis for allocation, then the government can make an allocation "bear[ing] heavily on the taxpayer whose inexactitude is of his own making."

\textsuperscript{50} 510 S.W.2d 477 (Mo. En Banc 1974).
\textsuperscript{51} Id. at 483-84.
\textsuperscript{1} 60 T.C. 187 (1973).
\textsuperscript{2} This is an application of the rule of Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930), which held that if the taxpayer's records are inadequate to provide a reasonable basis for allocation, then the government can make an allocation "bear[ing] heavily on the taxpayer whose inexactitude is of his own making."
as an ordinary and necessary expense incurred in the determination of future tax liabilities. Although the majority of the Tax Court assumed that the Commissioner had conceded some of the legal fees were deductible under section 213(3) of the Internal Revenue Code of 1954 and treated the allocation of fees between the deductible and non-deductible services as the only issue, four concurring and two dissenting opinions addressed the question as to whether attorney’s fees for services rendered in estate planning are deductible. The Commissioner acquiesced in the decision.3

No section of the Internal Revenue Code specifically allows deduction of legal fees. Legal fees may, however, be deductible as ordinary and necessary expenses incurred in a trade or business4 or in profit-seeking activities5 or in connection with the determination, collection, or refund of any tax.6 Generally, expenses incurred for personal, family or living expenses are not deductible.7 Estate planning fees are typically non-business expenses and usually represent non-deductible personal expenses, such as the fee for preparation of a will.8 Their deductibility thus depends on their relation to trade or business, profit-seeking activities, or to tax planning.9

Although the Merians majority treated the question of deductibility of estate planning fees incurred in connection with the determination, collection or refund of any tax10 as conceded by the Commissioner, the dissenting judges questioned the deductibility of fees for that purpose. Section 212(3) was enacted in 1954 to remedy the result of Lykes v. U.S.,11 which held that legal expenses incurred in contesting gift tax liability were not deductible.12 The regulations interpreting Section 212 permit deduction of legal fees incurred for "tax counsel."13 The language of the statute and of the regu-

4. INT. REV. CODE OF 1954, §162.
5. INT. REV. CODE OF 1954, § 212(1)(2).
6. INT. REV. CODE OF 1954, § 212(3).
7. INT. REV. CODE OF 1954, §262.
8. Estate of Helen S. Pennell, 4 B.T.A. 1039 (1926), held that expenses incurred in the preparation of a will are not deductible.
9. INT. REV. CODE OF 1954, §212, states:
   In the case of an individual [taxpayer], there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—
   (1) for the production or collection of income;
   (2) for the management, conservation, or maintenance of property held for the production of income; or
   (3) in connection with the determination, collection, or refund of any tax.
10. See INT. REV. CODE OF 1954, §212(3).
12. At this time only the predecessor §§ 212(1) and (2) were in existence. These provisions were combined in § 23(a) (2) of INT. REV. CODE OF 1939.
13. Treas. Reg. § 1.212-1(a) (1) (i) states:
   Expenses paid or incurred by an individual in connection with the determination, collection, or refund of any tax, . . . whether the tax be income, estate, gift, property or . . . other tax are deductible. Thus, expenses paid or incurred by a taxpayer for tax counsel or expenses paid or incurred in connection with the preparation of his tax returns or in connection with any proceedings involved in determining the extent of his tax liability or in contesting his tax liability are deductible.
lation does not distinguish between tax advice pertaining to closed or open transactions. However, in enacting paragraph 3 of Section 212, the House Ways and Means Committee stated that the deduction was limited to contested tax liability. The American Bar Association thought that the House Report created unintended problems with respect to legal fees incurred for computation and preparation of tax returns. Thus, the Association suggested to the Senate Finance Committee that it clear the matter up. The Finance Committee ignored the suggestion and its report is substantially the same as that of the House.

Generally, taxpayers rely on the language of Treasury Regulation 1.212-1(1) in deducting legal fees incurred for “tax counsel” regarding closed or open transactions. In Carpenter v. U.S., the Court of Claims allowed a Section 212(3) deduction for tax counseling fees incurred incident to a divorce property settlement, even though the advice was applicable to years subsequent to the year in which the advice was given. In so doing, the court drew an analogy between the prospective nature of investment counsel fees, for which deductions are allowed, and those incurred for tax counsel. The Commissioner, on the other hand, took a narrow view of Section 212(3) prior to 1972, contending that legal expenses are deductible for tax advice only to the extent that such advice relates to a completed or closed transaction. There is some judicial support for this view. However, a shift from this position was indicated by the Commissioner’s Revenue Ruling 72-545 which allows deduction of legal fees for tax advice incident to divorce proceedings without regard for whether such advice related to open or closed tax events. The Commissioner’s concession in Merians, that some of the estate planning fees were deductible as relating to tax advice, was consistent with Revenue Ruling

15. 1 Hearing Before Senate Committee on Finance on the Internal Revenue Code of 1954, 83rd Cong., 2d Sess., p. 487 (1954). The ABA suggested that either the word “computation” be added before the words “determination, collection, or refund” in § 212(3) or that the Committee clarify the matter in its report.
17. See note 13 supra.
18. 338 F.2d 366 (Ct. Cl. 1964).
19. Treas. Reg. § 1.212-1(g). See also Elma M. Williams, 3 T.C. 200 (1944), Edward J. Mallinckrodt, 2 T.C. 1128 (1943), aff’d other grounds 146 F.2d 1 (8th Cir.), cert. denied 324 U.S. 71 (1945).
20. 338 F.2d at 369:
   Obviously, a taxpayer does not employ investment counsel after he has made his investments, and he should not be restricted to deductions for expenses for tax counsel solely to discover the tax consequences of what has already transpired or a tax liability already accrued. One of the purposes of a taxpayer in obtaining tax counsel is to avoid tax contests, not to create them, and this also serves the interest of the government in collecting taxes.
21. Kaufman v. U.S. 227 F. Supp. 807, 815 (W.D. Mo.), appeal dismissed 328 F.2d 619 (8th Cir. 1963). This case held that legal fees for tax advice were not deductible to the extent that they relate to future tax liability.
72-545. As long as that ruling remains in effect, the Commissioner will find it difficult to argue that Section 212(3) deductions are limited to closed transactions.

While the Merians majority did not contend that any of the estate planning fee was deductible under Section 212(2),23 the concurring justices in Merians thought that this issue should be considered. In an early decision, Nancy Reynolds Bagley,24 the Tax Court permitted the deduction of estate planning fees as an expense incurred for the management, conservation or maintenance of income-producing assets. Later the Supreme Court in U.S. v. Gilmore25 held that the origin of the claim determined the deductibility of the expense. This limited the Bagley holding, because some estate planning fees fail to pass the "origins test." For example, fees incurred for the creation of an irrevocable trust in which the grantor retains no interest in the income or corpus would not be deductible under Section 212(2). Similarly, fees paid with respect to services which were incurred in developing a plan of distribution of a taxpayer's property at his death are not deductible.26 On the other hand, where trust income is taxable to the taxpayer under a grantor's trust, trustees fees paid by the taxpayer are deductible under 212(2).27 Although the deductibility of estate planning fees under Section 212(2) is still not settled, taxpayers may be somewhat encouraged by the Commissioner's continued acquiescence in the Bagley holding in spite of the Gilmore decision.28

While the issue was not argued by the taxpayers or discussed by the court in Merians, the deductibility of estate planning fees under Section 212(1) should be considered. That section allows individuals to deduct ordinary and necessary expenses incurred in producing or collecting income. Here too, the "origins test" is an obstacle for the taxpayer.29 Estate

24. 8 T.C. 130 (1947). The estate planning services allowed in the Bagley case included creation of inter vivos trusts (with income reserved to the taxpayer), testamentary trusts, and cancellation and purchase of new insurance policies. Regarding these services the Tax Court thought the analogy between investment planning and estate planning too strong to deny deduction of fees paid for estate planning when fees for investment planning are deductible. The court did refuse to allow a deduction for that part of the fee paid for the creation of an inter vivos trust for the benefit of the taxpayer's daughter, because that part of the fee was not incurred as a management expense of property held for the production of income.
26. See note 7, supra.
29. 4A Mertens, Law of Federal Income Taxation §25.04, p. 6. See, Ruth K. Wild, 42 T.C. 706 (1964), in which the tax court allowed a taxpayer to deduct that part of attorney's fees allocable to securing alimony payments in a divorce proceeding as an expense incurred for the production of income. Two motives of the taxpayer are involved: one is to produce income and the other is to secure a divorce, a personal expense. In this case it is questionable whether the origin of the expense was the taxpayer's desire for income rather than her desire for a divorce. In any event, this case is questionable authority for the proposition that estate planning fees are deductible under § 212(1) because the Commissioner did not acquiesce in that decision.
planning fees, to the extent that they relate to the production or collection of income, meet the origin test and thus are deductible under Section 212(1). For example, a taxpayer must pay fees for the creation of a revocable trust or an agency account, the corpus of which is to be managed by a professional trustee who will more skillfully manage the trust property, thereby increasing income.\(^{30}\) It can be argued that the cost of creating the trust, as well as the trustee's fee, is an expense incurred for the production of income. At this point Sections 212(1) and 212(2) may overlap because an expense which increases or produces income often maintains or conserves income-producing property also.\(^{31}\) This overlap could explain why only deductibility under Section 212(2) was discussed in *Merians*.\(^{32}\) Nevertheless, Section 212(1) deductibility is a possibility that should be considered in allocating estate planning fees.

After establishing that legal fees for estate planning are deductible, the taxpayer is entitled to have the court make an allocation between deductible and non-deductible expenses.\(^{33}\) This is known as the *Cohan* Rule.\(^{34}\) For the rule to be applicable, the taxpayer must show some basis for allocation.\(^{35}\) The amount of evidence that a taxpayer must produce in order to establish such a basis appears to be minimal.\(^{36}\) However, if the taxpayer produces no more than this minimal amount, the court in its allocation may bear heavily against the taxpayer, "whose inexactitude is of his own making."\(^{37}\) Thus, in order for the taxpayer to receive the full benefit of a deduction for tax advice, he must establish a reasonable basis for allocation between the deductible and non-deductible fees. In *Merians*, the taxpayers' only evidence was the testimony of their attorney who stated that he considered only the tax implications of the estate plan. Although the court found that this furnished a basis for allocation, it did not furnish a reasonable basis to allocate the whole to deductible tax advice. Consequently, the court bore

\(^{30}\) However, in order for deductions to be allowed in connection with the production of income, the income must not be tax exempt. *Int. Rev. Code* of 1954, § 265.

\(^{31}\) Trustees fees are deductible under § 212(2). Earl Vest, 57 T.C. 128 (1971). While these fees can be viewed as an expense of management, conservation, or maintenance of income-producing property, they are also expended for the production or collection of income.

\(^{32}\) In addition, the *Bagley* case, 8 T.C. 130 (1942), allowed deduction of estate planning fees under § 212(2).


\(^{34}\) Cohan *v.* Commissioner, 39 F.2d 540, 543 (2d Cir. 1930). Although the *Cohan* rule was originally applied in allocating deductible and non-deductible entertainment expenses, the rule has been expanded to apply to almost any situation where deductible expenses are entangled with personal expenses.


\(^{36}\) In *Cohan*, the taxpayer failed to keep records of amounts spent for travel and entertainment expenses, but his estimate of amounts spent for deductible purposes was held to form a basis for allocation by the court. However, the Tax Court seems to require more than this. In George L. Schultz, 50 T.C. 688, allocation was refused a taxpayer who failed to furnish evidence of details of the legal services rendered even though he did present the attorney's bill to the court.

\(^{37}\) 39 F.2d at 549.
heavily against the taxpayer, allowing only 20% of the fee as a deduction.

Therefore, the question of practical importance is what sort of evidence establishes a reasonable basis for allocation? In Merians, the court suggested that a bill itemizing the legal services performed and the time spent on each activity would furnish a reasonable basis for allocation. In Revenue Ruling 72-545, the Commissioner states three situations involving divorce litigation that furnish a reasonable basis for allocation. The ruling states that in these situations an itemized bill, allocating time between activities for which the fees are deductible and activities for which the fees are not deductible, is all that is required. Therefore, the lawyer’s time allocations to tax advice; to management, conservation, or maintenance of income-producing assets; and to production or collection of income will probably stand unless they are unreasonable. Since the lawyer furnishes the evidence, he should apportion his fees with the allocation problem in mind.

Although the Merians court allowed a deduction of estate planning fees relating to both present and prospective tax liability, the deductibility issue is not settled. Some members of the Tax Court do not accept the position expressed in Revenue Ruling 72-545. Consequently, there is some risk until the issue is settled. This risk will be minimized, however, as long as the Commissioner continues his acquiescence in Merians. Thus, for the present, the taxpayer is given an opportunity to offset some estate planning expense by a tax saving. An attorney should insure that the maximum benefits are received by providing adequately itemized billing.

JOHN R. WEISENFELS

EVIDENCE—IMPEACHMENT BY PRIOR INCONSISTENT OPINIONS

State v. Vaughn

Defendant Vaughn was convicted of robbery in the first degree. The victims included Boyd, an off-duty policeman, and four others. At trial, the defendant contended that his presence at the robbery was purely coincidental, that he had not known his companions intended to commit the robbery, and that he had not taken part in the crime. Testifying for the state, Boyd described the defendant’s conduct during the robbery. On cross-examination, defense counsel asked Boyd whether shortly after the robbery he told Carol Vaughn, defendant’s wife, that he thought the defendant did not know what was going on at the time of the robbery. Boyd replied that he did not recall making the statement. On redirect examination, the prosecuting attorney, in an apparent attempt to discredit the anticipated impeaching testimony, asked Boyd directly if he thought the

1. 501 S.W.2d 839 (Mo. En Banc 1973).
defendant knew what was going on at the time of the robbery. Boyd answered affirmatively. The defendant later attempted to contradict Boyd with Mrs. Vaughn's testimony that Boyd actually told her that he did not think that the defendant knew what was going on at the time of the robbery. The State, however, objected to the introduction of this impeaching testimony on the ground that Boyd's statement to Mrs. Vaughn was an inadmissible conclusion. The trial court sustained this objection. The exclusion of Mrs. Vaughn's impeaching testimony was assigned as error on appeal.

The Missouri Supreme Court reversed Vaughn's conviction and remanded for a new trial on the ground that the trial court committed prejudicial error in excluding the impeaching testimony. The court held that, after a proper foundation has been laid, a prior inconsistent opinion is admissible to impeach an opinion given by a witness in court. In addition, the court peripherally considered whether a witness who testifies only as to facts may be impeached by his prior inconsistent opinion. Although it cited the general rule that such impeachment is not proper, the court stated in dictum that the testimony offered in the case was "probably admissible in any event." The dictum implies that a prior inconsistent statement of opinion could be used to impeach a statement of fact.

The problem in Vaughn is an outgrowth of the so-called "Opinion Rule," which has been a subject of controversy in the field of evidence for decades. Accepted principles of nineteenth-century jurisprudence excluded all evidence offered by lay witnesses in opinion form on the ground that such testimony invaded the province of the jury. This rule of exclusion was thought to foster the twin virtues of witness objectivity and judicial integrity. The trend of modern cases, however, both in Missouri and in other jurisdictions, has been to allow the use of opinion testimony. The majority of jurisdictions have severely restricted the scope of the Opinion Rule.

2. Id. at 843.
3. Id. at 842.
4. Id. at 843.
5. Id. at 842.
8. 7 J. Wigmore, Evidence § 1920 (3d ed. 1940).
9. 3 J. Wigmore, Evidence § 1017 (3d ed. 1940).
11. This development has been spurred in part by Professor Wigmore's determined advocacy. See 3 J. Wigmore, Evidence § 1041 (3d ed. 1940).

courts often admit evidence in opinion form if such evidence is not readily available elsewhere or if it concerns a preliminary issue.\textsuperscript{12}

The Opinion Rule should never be applied to out-of-court statements.\textsuperscript{13} Opinions are excluded not because they are \textit{per se} objectionable, but because testimony to basic facts is preferred.\textsuperscript{14} The fact finder must draw its own independent conclusions from the basic facts; once a lay witness testifies to basic facts, his in-court opinion of those basic facts is superfluous and thus can be excluded without any loss of evidence.\textsuperscript{15} If an out-of-court statement is not admitted because of its opinion form, however, evidence is lost.\textsuperscript{16} Unlike in-court testimony, a defect in the form of an out-of-court statement cannot be cured by merely asking the declarant to state the basic facts underlying his opinion. Because out-of-court statements do not arise in situations susceptible to restatement in the preferred form, they must be accepted or rejected in the form in which they occurred.\textsuperscript{17} Even though out-of-court opinions may not be the preferred form of evidence, they are preferable to having no evidence at all and should therefore be admitted for impeachment purposes.

The purpose of the Opinion Rule, to improve the objectivity and reliability of testimonial assertions, is especially inapplicable to prior inconsistent statements.\textsuperscript{18} Impeaching evidence is not offered to prove substantive facts, but to demonstrate that the witness blows hot and cold on a subject.\textsuperscript{19} Emphasis, therefore, should be placed on the prior inconsistency, not on the form of the impeaching statement.\textsuperscript{20} Authorities have recognized that a witness can be effectively impeached with a statement of opinion.\textsuperscript{21} If the substance of the opinion is inconsistent with, and thereby impeaches, the witness' testimony, it has fulfilled its function.\textsuperscript{22}

Missouri courts have vacillated on the admissibility of opinions as impeachment evidence. Since conflicting cases do not cite one another, no definite "Missouri position" can be determined. However, the cases can be grouped in three classes according to their treatment of the admissibility of opinion evidence. The most restrictive group of cases categorically dis-

\begin{enumerate}
\item C. McCormick, \textit{Evidence} § 11 at 24-25 (2d ed. 1972).
\item Id. at § 18.
\item C. McCormick, \textit{Evidence} § 11 (2d ed. 1972); 7 J. Wigmore, \textit{Evidence} § 1918 (3d ed. 1940).
\item 7 J. Wigmore, \textit{Evidence} § 1918 (3d ed. 1940).
\item C. McCormick, \textit{Evidence} § 18 (2d ed. 1972).
\item Id. at § 35.
\item Id. at § 35.
\item Id. at § 34.
\item Professor Wigmore has suggested that the distinction made between fact evidence and opinion evidence is unsound, primarily because the distinction is often impossible to make. He advocates flexibility in the application of the Opinion Rule and predicts its disappearance from American jurisprudence. 7 J. Wigmore, \textit{Evidence} §§ 1919, 1926, 1929 (3d ed. 1940), and 3 J. Wigmore, \textit{Evidence} § 1041 (3d ed. 1940).
\item C. McCormick, \textit{Evidence} § 35 (2d ed. 1972); 3 J. Wigmore, \textit{Evidence} § 1041 (3d ed. 1940).
\item Even if the court errs by admitting an opinion which fails to impeach, such error will not be prejudicial because the opinion's lack of inconsistency will support the in-court testimony of the "impeached" witness.
\end{enumerate}
allows the use of opinion evidence for purposes of impeachment and allows impeachment only by prior inconsistent statements of fact.\textsuperscript{23} The second category is somewhat less restrictive, disallowing the use of opinion testimony only to impeach in-court statements of fact by a lay witness.\textsuperscript{24} \textit{Vaughn} falls within this category of cases, which does allow impeachment by a prior inconsistent opinion where the lay witness testifies in opinion form.\textsuperscript{25} The third position, advocated by Wigmore\textsuperscript{26} and McCormick,\textsuperscript{27} allows evidence of a prior inconsistent opinion to impeach any form of testimony given by any witness.\textsuperscript{28} The supreme court in \textit{Vaughn} was reluctant to adopt this position.

Cases from other jurisdictions can also be classified in the above three categories. A small minority have followed the restrictive approach denying all impeachment by prior inconsistent opinions.\textsuperscript{29} Several other jurisdictions still disallow impeachment by the prior inconsistent opinion of a lay witness or a witness testifying only as to facts.\textsuperscript{30} The vast majority of cases, how-

\begin{footnotesize}
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\item[23.] See State v. Nave, 283 Mo. 35, 222 S.W. 744 (1920) (statements of fact may be used to impeach, but prior opinions may not); Hamburger v. Rinkel, 164 Mo. 398, 64 S.W. 104 (1901); McFadin v. Catron, 120 Mo. 252, 25 S.W. 506 (1894).
\item[24.] See Ford v. Dahl, 860 Mo. 497, 228 S.W.2d 800 (1950) (statement of opinion not admissible to impeach a statement of fact even though the opinion contains a contradictory implied statement of fact); Janis v. Jenkins, 58 S.W.2d 298 (Mo. 1933) (prior inconsistent opinions not admissible to impeach lay witnesses); Bright v. Wheelock, 323 Mo. 840, 20 S.W.2d 684 (1929) (inconsistent opinion admissible to impeach a witness who testifies in opinion form, but not to impeach a witness testifying to facts).
\item[25.] See State v. Revard, 341 Mo. 170, 106 S.W.2d 906 (1937); Bright v. Wheelock, 323 Mo. 840, 20 S.W.2d 684 (1929); State v. Forsha, 190 Mo. 206, 85 S.W. 746 (1905); State ex rel. Highway Comm'n v. Sheets, 483 S.W.2d 783 (Mo. App., D. St. L. 1972).
\item[26.] 3 J. Wigmore, \textit{Evidence} § 1041 (3d ed. 1940).
\item[27.] C. McCORMICK, \textit{Evidence} § 35 (2d ed. 1972).
\item[28.] Missouri courts have followed this position at least once. In State v. Baker, 318 Mo. 542, 300 S.W. 699 (1927), a rape prosecution, defendant's wife stated that the prosecutrix had run around nights and had admitted misconduct with many men. The Missouri Supreme Court held that it was proper on cross-examination to ask the witness whether or not she had said previously that the prosecutrix was a good girl and was not guilty of misconduct with the defendant, since this "tended to impeach the correctness of her statement . . . ." \textit{Id.} at 547, 300 S.W. at 701.
\item[30.] See Dorsten v. Lawrence, 20 Ohio App. 2d 297, 253 N.E.2d 804 (1969) (witness testifying to the facts of a collision could not be impeached by his prior inconsistent opinion as to which driver was at fault); Webb v. City of Seattle, 22
\end{enumerate}
\end{footnotesize}
ever, allow impeachment by a prior inconsistent opinion of a witness who testifies in opinion form.31 Some of the most common applications of this rule occur where the witness expressed his opinion of an item's value,32 the speed of a vehicle,33 or the guilt of a party.34

A growing number of jurisdictions have adopted the third view permitting impeachment of all forms of testimony by prior inconsistent opinions.35 A very well-reasoned exposition in support of this position is found in Atlantic Greyhound Corp. v. Eddins.36 There a witness testified favorably for the defendant as to the facts of an accident. The court then permitted the witness to be impeached by evidence that he had previously stated that the defendant was clearly at fault. After discussing at length the history of this type of evidence, the court adopted Wigmore's test37 that inconsistency is the controlling factor of admissibility. The court held that if a witness testifies to facts and it can be shown that knowing those facts he previously expressed an opinion which was clearly inconsistent with his in-court testimony, then his prior opinion is admissible for impeachment purposes because of its value to the jury in evaluating the credibility of the witness.38

To allow the use of prior inconsistent opinions to impeach any testimony


See Dubinsky Realty Co. v. Lortz, 129 F.2d 669 (8th Cir. 1942) (allowing impeachment of a landowner's valuation of property by showing former valuation he acquiesced to for taxation purposes); Kelly v. Sonny Boy Appaloosas, Ltd., 491 P.2d 67 (Colo. App. 1971) (allowing impeachment of a landowner's valuation of property showing former valuation on insurance policy).

See Delaware, L.&W.R. Co. v. Converse, 139 U.S. 469 (1891) (witness who testified train was going 10 m.p.h. could be impeached by his prior statement that it was going 16 m.p.h.); Wingate v. New Deal Cab Co., 217 So. 2d 612 (Fla. Ct. App. 1969); Stubbs v. Daughtry, 115 Ga. App. 22, 153 S.E.2d 633 (1967).


See Snohomish County v. Great North. Ry., 130 F.2d 996 (9th Cir. 1942) (lay witnesses impeached by prior opinions on scientific matters); F. W. Martin & Co. v. Cobb, 119 F.2d 159 (6th Cir. 1940); Crowley v. Dix, 136 Conn. 97, 68 A.2d 366 (1949); Griffin v. Barrett, 185 Ga. 443, 195 S.E. 746 (1938); State v. Matheson, 130 Iowa 440, 103 N.W. 137 (1905) (allowing impeachment by prior inconsistent opinion of a lay witness who testified to facts); Holder v. State, 119 Tenn. 178, 104 S.W. 225 (1907) (witness testifying to facts supporting criminal defendant's alibi was impeached by his prior statement which implied the defendant was guilty of the crime).

177 F.2d 954 (4th Cir. 1949).

31. See 3 J. WIGMORE, EVIDENCE § 1041 (3d ed. 1940).
32. 177 F.2d at 958.
of a witness seems the better position for the reasons given above, especially in a jurisdiction such as Missouri which does not permit such evidence to be used substantively. Nonetheless, the Missouri court in Vaughn was reluctant to definitively adopt this position when the facts presented did not require a decision on the matter. When a suitable factual situation presents itself, however, the Court should adopt the rule permitting prior opinions to be used to impeach all forms of inconsistent testimony given by any witness.

ARTHUR E. FILLMORE II

JUDICIAL REVIEW OF ADMINISTRATIVE AGENCIES—SCOPE OF REVIEW AND PRIVATE RIGHTS

Hill v. State Department of Public Health and Welfare

The plaintiff had received general relief from the State of Missouri since June, 1965, because of a permanent and total disability. Thereafter, pursuant to section 208.010.2(1)(a) and (b), RSMo 1969, the Jackson County office of the Division of Welfare suspended her aid for approximately five months on the ground that she had transferred an interest in real estate without receiving fair and valuable consideration therefor.

An appeal to the Director of the Department followed, and a hearing was held before a referee. The key evidence presented at that hearing was undisputed. Ada Hill had been the owner by inheritance of an undivided 1/15th interest in 120 acres of farmland in Louisiana. In April of 1965, she joined with four of her brothers and sisters in conveying their respective interests in the property to another brother in return for the latter's oral, unsecured promise to pay each of them $400.00 within a week. The brother defaulted on his promise to pay, leaving the plaintiff with nothing to show for her conveyance. Because of this, the Director decided that the oral, unsecured promise to pay was not "fair and valuable consideration" within the meaning of section 208.010.2(1)(a), RSMo 1969. On appeal, the Circuit Court of Jackson County affirmed the Director's decision. The Missouri Supreme Court reversed.

The circuit court limited the scope of its review to that provided in section 208.100, RSMo 1969. While section 208.100 allows appeals to the

1. 503 S.W.2d 6 (Mo. En Banc 1973).
2. § 208.051, RSMo 1959, not changed in 1969.
3. The hearing was provided for under § 208.080, RSMo 1969.
4. 503 S.W.2d at 7.
5. Id. at 12.
6. Traditionally, appeals from administrative decisions "are strictly creatures of the statute, and this is particularly true of appeals to the courts from the determination of administrative tribunals exercising quasi-judicial functions." Howlett v. Social Security Comm'n, 347 Mo. 784, 788, 149 S.W.2d 806, 809 (En Banc 1941). The power and jurisdiction of a court upon such appeal is limited to that granted by the terms of the statute which creates the right. Maltz v. Jackoway-Katz Cap Co., 336 Mo. 1000, 82 S.W.2d 909 (1934); State ex rel. Missouri Gravel Co. v. Workman's Comp. Comm'n, 234 Mo. App. 232, 113 S.W.2d 1034 (St. L. Ct. App. 1938).
circuit court from determinations by the division of welfare, it permits the court to remand only where the aggrieved party did not receive a fair hearing or if the determination of fact by the Director was arbitrary and unreasonable. The terms "arbitrary and unreasonable" have been interpreted to mean that a reviewing court may not overturn a determination of fact by the Director of Welfare where there is substantial evidence to support the finding. The court can only review the record of the administrative proceeding, it may not hear new evidence or testimony. Furthermore, the court may consider only the competent evidence favorable to the Director's finding and may not hold the Director's decision arbitrary and unreasonable merely because a contrary conclusion could have been reached upon the same evidence. Finding that plaintiff had a fair hearing and that the Director's decision was not arbitrary or unreasonable, the circuit court accordingly affirmed.

7. Section 208.100, RSMo 1969 states:

(1) "Any applicant aggrieved by the action of the director of public health and welfare by the denial of benefits in passing upon the appeal to said director may appeal to the circuit court of the county in which such applicant resides within ninety days from the date of the action and decisions appealed from.

(5) Upon the record so certified by the director of public health and welfare, the circuit court shall determine whether or not a fair hearing has been granted the applicant. If the court shall decide for any reason that a fair hearing and determination of the applicant's eligibility and rights under this law was not granted the individual by said director, or that his decision was arbitrary and unreasonable, the court in such event shall remand the proceedings for redetermination of the issues by said director.

8. Wallin v. State Dep't of Pub. Health & Wel., 422 S.W.2d 345 (Mo. En Banc 1967); Collins v. Division of Wel., 364 Mo. 1032, 270 S.W.2d 817 (En Banc 1954); Dunnegan v. Gallop, 374 S.W.2d 407 (Spr. Mo. App. 1964); Bollinger v. State Dep't of Pub. Health & Wel., 254 S.W.2d 257 (St. L. Mo. App. 1953).


10. Wallin v. State Dep't of Pub. Health & Wel., 422 S.W.2d 345 (Mo. En Banc 1967); Collins v. Division of Wel., 364 Mo. 1032, 270 S.W.2d 817 (En Banc 1954).


12. Under § 208.100, RSMo 1969, the court need only determine that the decision of the Director was not arbitrary or unreasonable to affirm the holding.

On appeal to the Missouri Supreme Court, the plaintiff claimed she had a right of review under article V, section 22 of the Missouri Constitution.\(^\text{13}\) The judicial review afforded by article V, section 22 as embodied by the Missouri Administrative Procedure Act\(^\text{14}\) is arguably much broader and gives the court more latitude to overturn administrative agency decisions. The judicial test used in examining the evidence under the act is called the substantial evidence test. The statute states: "The inquiry may extend to a determination of whether the action of the agency ... (3) Is unsupported by competent and substantial evidence upon the whole record."\(^\text{15}\) Whereas under section 208.100, RSMo 1969, the court may not disturb the decision of the Director unless it is arbitrary and unreasonable,—meaning that the evidence favorable to the agency is not substantial to support its decision\(^\text{16}\) —judicial review under article V, section 22 allows the court to examine the entire record and reverse the agency if the Director's decision was clearly contrary to the overwhelming weight of the evidence.\(^\text{17}\)

The circuit court had refused to allow review under Missouri Constitution, article V, section 22.\(^\text{18}\) The right to constitutional review hinged on whether the plaintiff's welfare payments were "private rights"\(^\text{19}\) within the ambit of the term as it is used in section 22. Relying on Ellis v. State Department of Public Health and Welfare,\(^\text{20}\) the circuit court held that these benefits were not payments to which one is entitled as a matter of right, but rather were gratuities given by the state.\(^\text{21}\) The Missouri Supreme

13. Article V, § 22 provides:
All final decisions, findings, rules and orders of any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.

(emphasis added).

14. Section 536.140, RSMo 1969 is the section of the Missouri Administrative Procedure Act specifying the scope of judicial review.

15. Id.

16. See notes 6-10 and accompanying text supra.


18. 503 S.W.2d at 8.

19. A private right has been defined as "some power or privilege to which one is entitled upon principles of morality, religion, law, or the like. It means a natural right peculiar to an individual." State v. Pankratz, 238 Minn. 517, 57 N.W.2d 635, 647 (1953). See also Savoie v. Town of Bourbonnais, 339 Ill. App. 551, 90 N.E.2d 645 (1950); Board of County Comm'rs v. Good, TP. Harper County, 188 Okla. 151, 107 P.2d 805 (1940). Missouri courts have not specifically defined the term, but have made case by case determinations. State ex rel. State Highway Comm'n v. Weinstein, 322 S.W.2d 778 (Mo. En Banc 1959) (license to lay water lines on a state right of way was a privilege equivalent to a private right); City of St. Louis v. Murphy, 359 Mo. 854, 224 S.W.2d 68 (En Banc 1949) (police retirement fund benefits were a private right); Smith v. Missouri State Highway Comm'n, 488 S.W.2d 230 (Mo. App., D. K.C. 1972) (assistance under Highway Relocation Assistance Act was private right).


21. 503 S.W.2d at 8.
Court, however, specifically overruled Ellis and held that welfare benefits are "private rights" protected by the Missouri Constitution. Employing the substantial evidence test embodied in the Missouri Administrative Procedure Act, the court then held that the evidence was not competent and substantial to support the decision of the Director and reversed the decision of the circuit court and the Director.

In holding that welfare benefits are private rights, the Missouri court adopted the prevailing thinking of both the courts and the writers in the area. Nevertheless, while the court needed to make the constitutional determination in order to take jurisdiction in Hill, the court was not compelled to sink its judicial anchor in the sands of the Missouri Administrative

22. Id. at 10-11.
23. Id. at 12.
   It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that "[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 YALE L.J. 1245, 1255 (1965).
   Id. at 261n.8. See also Reich, The New Property, 73 YALE L.J. 733 (1984).
   A textual discussion of article V, section 22 of the Missouri Constitution, Procedure Before, and Review of Decisions of Missouri Administrative Agencies, 37 V.A.M.S. 145, states:
   It follows that the expression 'private rights' is also used in an extremely broad sense, since some of the matters dealt with by the agencies under consideration are, in a sense, privileges; e.g., the granting of certificates of convenience and necessity by the Public Service Commission.
   37 V.A.M.S at 157.
26. Had the court decided that there was no valid constitutional issue in the case, the Kansas City Court of Appeals would have been the proper forum to review the circuit court.
Procedure Act to put the controversy at rest. The evidence was undisputed that the plaintiff had relinquished her interest in real estate for an oral, unsecured promise to pay.\(^{27}\) The question presented to both the circuit court and the supreme court was: does “fair and valuable consideration” as defined in section 208.010, RSMo 1969, embrace an oral, unsecured promise to pay?\(^{28}\) The issue was one of statutory interpretation, a question of law and not of fact. While a court’s review of administrative fact determinations is limited, an administrative body’s interpretation of a statute does not preclude or restrict an appellate court’s ability to review the issue.\(^{29}\) Clearly, the Missouri Supreme Court could have characterized the issue in the case as one of statutory interpretation\(^{30}\) and remanded the case to the court of appeals for a determination of what constitutes fair and valuable compensation.\(^{31}\) The court could have thereby avoided deciding the issue whether welfare payments are “private rights.”

The supreme court, however, chose to apply article V, section 22 to welfare payments. The overruling of Ellis was probably inevitable in the light of Goldberg v. Kelly\(^{32}\) and subsequent decisions. In overruling Ellis, however, the court may have opened the doors to a series of problems and

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27. 503 S.W.2d at 7.
28. Section 208.010.2(1) (a), RSMo (1973 Supp.) defines “fair and valuable consideration” as:
   
   ... money or real or personal property received at the time of the transaction approximately equal to the value of the property encumbered, assigned, conveyed or transferred, and shall not for the purposes of this statute be construed to include support, services, or other advances made or to be made by a relative to the claimant.

   A payment of a loan to a relative may be recognized and eligibility not affected if the claimant can establish to the satisfaction of the division of welfare that the loan was bona fide and the proceeds of the loan were used by the claimant for his or his dependents’ support or benefit.

29. “An interpretation of a statute by an administrative body does not preclude, restrict, or control the right of a complete review of such issue by the appellate court.” Kroger Co. v. Industrial Comm’n, 314 S.W.2d 250, 254 (St. L. Mo. App. 1958). “[W]here the ruling of the administrative body is clearly an interpretation or application of law such is not binding on us [the court], and in such case it is within our province, and indeed it is our duty to review and correct erroneous administrative decisions.” Smith v. Missouri State Highway Comm’n, 488 S.W.2d 230, 235 (Mo. App. D. K.C. 1972). See also Haynes v. Unemployment Comp. Comm’n, 353 Mo. 540, 188 S.W.2d 77 (1944); Crawford v. Industrial Comm’n, 482 S.W.2d 739 (Mo. App., D. St. L. 1972); Gilmore v. Thompson, 413 S.W.2d 20 (St. L. Mo. App. 1967); Gordon v. Puritan Chem. Co., 406 S.W.2d 822 (Spr. Mo. App. 1966); Horrell v. Chase Hotel, 174 S.W.2d 881 (St. L. Mo. App. 1949).

30. Hill resembles Bradley v. Hill, 457 S.W.2d 212 (Spr. Mo. App. 1970), in which the court interpreted § 208.010, the same statute at issue in Hill. The court in Bradley reversed, holding that the Director’s decision was arbitrary and unreasonable because he employed an improper definition of the statutory term “transfer” used in § 208.010. A court of appeals could have resolved the controversy in Hill by interpreting the term “fair and valuable consideration.”

31. A remand to the court of appeals would have been necessary because, the constitutional issue being moot, the supreme court would have lacked jurisdiction.

32. See note 24 supra.
hidden consequences. Courts have traditionally viewed administrative agencies as having more expertise and a better ability to “fit” statutes to the realities of life. In his treatise on administrative law, Kenneth Culp Davis indicates that while construction of statutes is normally the province of the courts, this situation yields when “the problem is one of working out the agency’s policy.” The Missouri courts have usually taken a hands off approach. The agency in the case at bar was attempting to establish a policy as to what was “fair and valuable consideration” within the meaning of section 208.010.2(1)(a), RSMo 1969. The traditional view has merit here, in that the agency is much closer to the day to day operations of the welfare system than is the court, and the administrative referee probably has a better grasp of the situation and more ability to adequately “fit” the statute and its conditions to the contemporary world.

The Hill decision may also have thrust the Welfare Department into the procedural grasp of the Missouri Administrative Procedure Act. This act establishes procedural and due process requirements for those administrative agencies not expressly covered by other administrative procedure statutes. While the Missouri welfare statutes specify some administrative procedure and due process requirements, they are not as detailed and as stringent as those of the Administrative Procedure Act. The act provides for a complex and elaborate system of administrative hearing and judicial review for

33. “So long as there is warrant in the record for the judgment of the expert body it must stand. . . . The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.” Rochester Tel. Corp. v. United States, 307 U.S. 125, 145-46 (1939).
34. 4 K. Davis, Administrative Law Treatise § 30.09 at 242 (1958). Davis does point out, however that

Certainly an arbitrary agency decision should be struck down, but when a decision is rendered in good faith and on a rational basis, it is at least arguable that the court contravenes legislative intention by substituting its judgment. The basic difficulty in most situations is a lack of any clear guidelines in the court’s choosing in one instance to overrule an agency and in another to uphold its decision.

38. See § 208.080, RSMo 1969, and compare to the requirements of §§ 536.063, .074, .077, and .080. While it is beyond the scope of this note to make a detailed comparison, the sheer volume of the administrative sections in the Missouri Administrative Procedure Act indicates that more detailed and formalized procedures are required at the administrative hearing level by the Administrative Procedure Act.
"contested cases," a contested case being "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing."39 Having determined that welfare payments are private rights, the court has now opened the door for future claimants to argue that they should be afforded the additional procedural safeguards of the Administrative Procedure Act.40 Such a situation would add inevitably to the already burdensome workload of the Division of Welfare. To comply with these new administrative and procedural demands would be difficult with present staff and budget. It seems clear that if the Constitution requires additional procedural safeguards, the state must add to the Division's staff in a commensurate fashion.

In addition, the Missouri Supreme Court may also have added a new weapon to the judicial arsenal of remedies of the welfare recipient who feels that his rights have been denied by the state. Not only does Hill expand judicial review of the administrative decisions and arguably add to the procedural due process requirements, but it may also have made available section 1983 actions in the federal courts. Section 198341 allows for suit in federal court against anyone who "under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges . . . secured by the Constitution and laws . . ." If the due process of the Administrative Procedure Act is constitutionally required, then one aggrieved under that act may file an action for a section 1983 violation of his right to due process under the 14th amendment to the Constitution. One Fifth Circuit case42 allowed a person denied a liquor license to bring a 1983 action. It seems certain that the federal courts in Missouri would find the rights of a welfare recipient more sacrosanct than a liquor license.

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40. A claimant would contend that cases such as Goldberg v. Kelly, 397 U.S. 254 (1970), require additional procedural safeguards embodied in the Missouri Administrative Procedure Act. The counterargument is that the Administrative Procedure Act does not apply where "other provision for judicial review is provided by statute," § 536.100, RSMo 1969, and that the procedural safeguards of Chapter 208, RSMo 1969, are adequate to satisfy due process.
MASTER AND SERVANT—SCOPE OF EMPLOYMENT—USE OF EXCESSIVE VIOLENCE

Wellman v. Pacer Oil Co.2

Plaintiff, Lionel Wellman, went to a service station operated by defendant Pacer Oil Co. to obtain gasoline. Allen Gamble, an employee of Pacer, serviced his car. Plaintiff left the station, but soon thereafter the hood of the car flew up. After returning to the station, plaintiff accused Gamble of "messing up" the hood. In the ensuing argument, Gamble pulled a gun and shot plaintiff. Plaintiff, dazed, got back into his car, but Gamble opened the door and shot plaintiff again, inflicting serious and permanent injury. Wellman sued Gamble, Pacer, and station manager Ben Clarke to recover for his injuries. The jury found against Pacer in the amount of $42,000 actual damages and $18,000 punitive damages.3 A directed verdict was entered for Clarke. Gamble defaulted.

Pacer appealed the verdict contending that Gamble's acts in shooting plaintiff were not within the scope and course of his employment.4 The Missouri Supreme Court reversed the verdict by a 4-3 margin holding that the actions of Gamble were so outrageous and criminal—so excessively violent—as to be totally without reason or responsibility and hence were, as a matter of law, not within the scope of his employment.4

The trial court held Pacer liable under the doctrine of respondeat superior,5 a common law concept6 making the master liable for certain tortious acts of his servant.7 Though there is no unanimity as to what social policies are furthered by this doctrine,8 the general principle is firmly entrenched in the law. The prerequisites for its application are clear. The relationship of master and servant must be shown to exist9 at the time of

1. 504 S.W.2d 55 (Mo. En Banc 1973).
2. Id. at 56.
3. Id. at 57. There was no evidence that Clarke or anyone connected with Pacer had any knowledge that Gamble carried a gun. Pacer's employees were given no instructions concerning the carrying of weapons during business hours. There was also no evidence that Pacer knew or had reason to believe that Gamble had violent tendencies.
4. Id. at 58.
5. Id. at 57. Respondeat superior is the chief theory used to hold a master liable for injuries to third persons proximately caused by acts or omissions of his servants. Stawasz v. Aetna Ins. Co. 99 Ill. App. 2d 131, 240 N.E.2d 702 (1968); Grace v. Smith, 270 S.W.2d 79 (K.C. Ct. App. 1954), aff'd, 365 Mo. 147, 277 S.W.2d 503 (En Banc 1955); 57 C.J.S. Master & Servant § 561 (1948).
8. See Johnson v. Brewer, 266 Ky. 814, 98 S.W.2d 839 (1936); Watkins v. Southerer Baptist Church, 399 S.W.2d 530 (Texas 1966). See also Curtis, Master and Servant—Frolic and Detour, 2 Mo. L. Rev. 351 (1937); Douglas, Vicarious Liability And Administration Of Risk, 38 Yale L.J. 584 (1929); Laski, The Basis of Vicarious Liability, 26 Yale L.J. 105 (1918).
the injury and in respect to the very transaction out of which the injury arose. If these requirements are met, then the master’s liability depends whether the servant’s conduct was within the scope of course of his employment.

Missouri measures whether an act is within the scope of employment not by the time or motive of the act, but whether it was done by virtue of his employment and in furtherance of his master’s business. The generality of this test makes its application difficult and resolution of the scope of employment issue depends upon the particular facts and circumstances of the case. The test, however, limits the ambit of the employer’s liability to situations which bear some relationship to his business.

The test is particularly difficult to apply where the alleged tort is intentional. Early cases refused to hold the master liable on the theory that intentional torts were not authorized by the master, even though the acts were in furtherance of the employer’s interests and committed while performing the duties of employment. The modern approach holds the master liable in such situations if the servant’s acts were connected with the duties of employment.

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334 Mo. 1233, 70 S.W.2d 1085 (1934). A servant is a person employed to perform services for another who, with respect to his physical conduct in the performance of the service, is subject to the other’s control or right to control. Brenner v. Socony Vacuum Oil Co., 236 Mo. App. 524, 158 S.W.2d 171 (K.C. Ct. App. 1942).

12. Linam v. Murphy, 360 Mo. 1140, 232 S.W.2d 987 (1950); Kinard v. Rock City Const. Co., 39 Tenn. App. 547, 236 S.W.2d 352 (1955); Shinn, Master And Servant—Scope Of Employment, 16 Mo. L. Rev. 169 (1951). For a general history of the development of the doctrine of respondeat superior and the scope of employment test see 6 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 2288 (1918).
13. Burks v. Leap, 413 S.W.2d 258 (Mo. 1967); Wolf v. Terminal R. Ass’n, 282 Mo. 559, 222 S.W. 114 (1920); Garretzen v. Duenkel, 50 Mo. 104 (1872).
14. Shinn, Master And Servant—Scope Of Employment, 16 Mo. L. Rev. 169, 171 (1951). See also Mo. APPROVED INSTRA. § 13.05 (1969), which states, “Acts are within the ‘scope of employment’ as that term is used in this instruction if: 1. they were a part of the work (name of servant) was employed to perform; and 2. they were done by (name) to serve the [business] interests of (master).” In practice, this instruction is general enough to permit a jury to find a broad range of conduct within the bounds of scope of employment.
Prior to Wellman, a jury could find a servant's tortious act to be within his scope of employment regardless of the maliciousness or criminality of the servant's conduct. In Haehl v. Wabash R. Co.,\textsuperscript{18} deceased was shot by defendant's bridge watchman as he complied with the watchman's command to leave the bridge. The jury found that the watchman had acted within the scope of his employment, and a judgment was entered against the defendant. In affirming the lower court's decision, the Missouri Supreme Court held that the scope of employment issue had been properly submitted to the jury and that "it was not necessary, to render the defendant liable, that it should have authorized its watchman to kill the deceased, or sanctioned the deed after it was done; and however wanton or malicious it was, the principal is liable if it was done in the course of the servant's employment."\textsuperscript{19} A similar result was reached in Panjwani v. Star Service.\textsuperscript{20} There defendant's employee struck plaintiff in the face with the nozzle of a gasoline pump hose after the plaintiff insisted that the employee check the oil and tires on his car. The court held that the plaintiff made "a submissible case of a vicious, unprovoked assault and battery 'as plaintiff was engaged in trying to settle a controversy concerning a portion of defendant's business, on the premises, during working hours...'."\textsuperscript{21}

Wellman expressly overrules Haehl and Panjwani to the extent they disregard the maliciousness and criminality of the servant's conduct in determining whether the plaintiff's case is submissible.\textsuperscript{22} Wellman adopts an excessive violence rule: a servant's conduct can be so outrageous, criminal, and excessively violent that, as a matter of law, it falls outside the scope of his employment.\textsuperscript{23} Although new in Missouri, this rule is supported by decisions in other jurisdictions.\textsuperscript{24}

In adopting the excessive violence rule, the Wellman majority cited with approval several comments from the Restatement (Second) of Agency.\textsuperscript{25} Section 231, comment a, states that "the master is not responsible for acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result."\textsuperscript{26} This immunity is founded on the assumption that if

\textsuperscript{18} Id. at 395 S.W.2d 129 (Mo. 1965).
\textsuperscript{19} Id. at 380-41, 24 S.W. at 741. (emphasis added).
\textsuperscript{20} Id. at 131-32.
\textsuperscript{21} Id. at 58.
\textsuperscript{22} Id. at 58.
\textsuperscript{24} Id. at 58.
\textsuperscript{25} Restatement (Second) of Agency § 231, comment a (1957).
the act is not appropriate or expected, it can be neither authorized nor incidental to an authorized act. It may be unfair to hold a master liable if he could not anticipate the act of violence; liability for such an act may not be a normal risk of the master's business. Wellman quotes from section 235, which states that a servant's act is not within the scope of his employment unless done with intent to perform it as a part of or incident to his employment. Comment c to section 235 also states that an act done in an outrageous or abnormal manner is evidence that the servant lacked intent to serve his master.

Section 235, comment c, is consistent with prior Missouri law. A few earlier decisions have held, as a matter of law, that a servant's tortious act was not done with an intent to further his master's business. In accordance with section 235, these courts have examined the servant's conduct and the circumstances of the case in order to ascertain the servant's intent. In State ex rel. Gosselin v. Trimble, for example, defendant's employee, a taxicab driver, assaulted the plaintiff after plaintiff's auto bumped the defendant's taxicab. The trial court directed a verdict for the defendant employer. On appeal, the plaintiff contended that the employee's assault was an attempt to abate a trespass to his master's property, and therefore was in the scope and course of his employment. In affirming the trial court, the Supreme Court rejected this argument, holding that the employee's words and actions, together with the surrounding circumstances, demonstrated that the assault was not an attempt on his part to do his master's business.

The adoption of section 231, comment a, on the other hand, has altered Missouri respondeat superior law. Wellman is the first Missouri case to hold a servant's conduct to be so violent that, as a matter of law, no jury could reasonably find that the conduct arose naturally from the performance of the servant's work. Section 231, comment a, states that a master is not responsible for a servant's act which is unforeseeable or inappropriate to the accomplishment of the authorized result. The dissent saw this section as injecting a new and additional requirement of foreseeability into the Missouri doctrine of respondeat superior. An analysis of prior cases, however,

27. Restatement (Second) of Agency §§ 228-29, 235, 245 (1958); Lombardy v. Stees, 290 P.2d 1110 (Colo. 1955) (no testimony to show assault expressly or impliedly authorized); Howard v. Zaney Bar, 369 Pa. 155, 85 A.2d 401 (1952) (use of violence was a gross abuse of all authority).
30. Id. comment c.
31. Porter v. Thompson, 357 Mo. 31, 206 S.W.2d 509 (1947); Milazzo v. Kansas City Gas Co., 180 S.W.2d 1 (Mo. 1944); State ex rel. Gosselin v. Trimble, 328 Mo. 760, 41 S.W.2d 801 (1931); Tockstein v. P.J. Hamill Trans. Co., 291 S.W.2d 624 (St. L. Mo. App. 1955); Rohrmoser v. Household Fin. Corp., 86 S.W.2d 103 (St. L. Mo. App. 1955).
32. 328 Mo. 760, 41 S.W.2d 801 (1931).
33. Id. at 764, 41 S.W.2d 803.
34. Id. at 769, 41 S.W.2d at 805. See also Rohrmoser v. Household Fin. Co., 86 S.W.2d 103 (St. L. Ct. App. 1935) (bill collector held not to be acting within scope of employment when he suggested to plaintiff that men would pay to be with her and then tore plaintiff's dress).
35. Restatement (Second) of Agency § 231, comment a (1958).
36. 504 S.W.2d at 60.
indicates that a foreseeability requirement has always been implicit in Missouri respondeat superior law. Missouri Approved Jury Instruction section 13.02, which is applicable specifically to servants' assaults on third parties, states that a servant's acts are within the scope and course of his employment if (1) done to further the interests of the master and (2) such acts naturally arise from the performance of the servant's work. The second requirement of section 13.02, by its use of the word "naturally," implies that the servant's conduct must be usual, customary, and expected. This amounts to a requirement of foreseeability. The substantive requirements of this instruction are soundly grounded in Missouri case law.

Although foreseeability is not a totally new requirement in Missouri respondeat superior law, Wellman does place a new emphasis on the foreseeability of the servant's conduct. Prior to Wellman, the foreseeability of a servant's conduct was a jury question regardless of how malicious or criminal the conduct was. Wellman appears to hold that, in certain situations, the master may not be held liable for his servant's conduct even if the servant acted in connection with his employment with the intent to further his master's business. Wellman may therefore be interpreted to require a higher degree of foreseeability than previous cases before a master can be held liable for his servant's intentional torts. As yet, Missouri courts have not applied the Restatement foreseeability analysis to cases other than those involving excessively violent conduct. The Supreme Court has "noted" but not adopted section 245 of the Restatement, which would hold the master liable for his servant's violent intentional torts if they were "not unexpected in view of the duties of the servant." It will remain for future cases to determine whether a higher standard of foreseeability will be applied to nonexcessively violent conduct. The problem with the excessive violence test will be in its application. Having the court, instead of the jury, determine if the conduct is so excessively violent as to take it out of the scope of employment is of doubtful value. Where it is possible to draw only one legal inference as to whether certain acts are within the scope of employment, the court should decide the issue. Excessive violence and

38. See Mo. Approved Instr. § 13.02 Committee's Comment (2d ed. 1969).
40. Several cases cited by the majority were decided on the basis that the employee in resorting to excessive violence could not have acted with the intent to further his master's business. Lombardy v. Stees, 290 P.2d 1110 (Colo. 1955); Martin v. Jones, 302 Mich. 355, 4 N.W.2d 686 (1942); Lunn v. Boyd, 403 Pa. 251, 169 A.2d 103 (1961); Adami v. Dobie, 440 S.W.2d 330 (Tex. 1969). The majority expressly refused to consider this theory as determinative in Wellman. 504 S.W.2d at 57-58. Therefore, the majority's citation of these cases is confusing. The majority may be citing these cases only for their reference to excessive violence.
42. Restatement (Second) of Agency § 245 (1957).
outrageous conduct, however, are ambiguous standards. The Restatement distinction between “minor” and “serious” crimes44 is equally ambiguous and offers no meaningful standard for distinguishing between different types of employment and the reasonableness of conduct in a particular situation. It is dubious whether excessive violence alone is sufficient to mandate drawing only one legal inference.45

Whether excessive violence on the part of the employee should take his actions outside the scope of employment should be a matter of public policy.46 The ultimate question is the extent to which the law should hold a master liable for his servant’s actions. Deciding the issue as a matter of law is a practical solution to the tendencies of juries to find the “deeper pocket” employer liable.47 Generally, however, there has been a trend toward expanding the master’s liability with a corresponding broadening of the definition of the term scope of employment.48 Wellman goes against this trend.

Two possible approaches seem to be open to the court in future cases. The court can either examine the basis of the excessive violence rule, i.e., the lack of expectability and necessary purpose, or it can automatically infer these elements from the outrageousness or criminality of the conduct. If the former approach is adopted, the Wellman rule may be narrowly interpreted leaving most cases to be decided by the jury. The latter approach would remove a great many respondeat superior intentional tort cases from the jury. The sweep of Wellman must be clarified by subsequent appellate decisions.

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44. Restatement (Second) of Agency § 231, comment a (1958). “Minor” crimes are considered foreseeable; “serious” crimes are not. See 504 S.W.2d at 61.
45. Judicial determination of scope of employment would also change trial tactics. The plaintiff must introduce evidence and prove the facts which he claims makes the employer liable under respondeat superior. But if he proves facts showing excessive violence, the servant’s acts may not be within the scope of employment; hence, plaintiff loses. A request for punitive damages compounds the problem. Plaintiff must show willful and wanton behavior by the employee, but he must be careful not to show “excessive” violence.
PARTNERSHIPS—SETTLEMENT OF FORMER PARTNER'S ACCOUNT WHEN THE BUSINESS IS CONTINUED AFTER A DISSOLUTION

Schoeller v. Schoeller

The Schoeller family (mother, father and three sons) formed a partnership in 1959 to operate a grocery business in Liberty, Missouri. All the capital was furnished by the parents, but the profits were to be shared equally. The partnership was dissolved in 1962 when one of the sons, Forrest J. became physically unable to perform his tasks, and either left or was eased out by the others. Rather than being wound up, the business was continued, at first without acrimony but later against the backdrop of a family quarrel. There was no winding up and termination until 1971.2

Forrest J. Schoeller sued for an accounting in 1967. In the first appeal of this case,3 the dissolution was confirmed. Plaintiff was held entitled to an accounting and, in addition to the value of his interest in the partnership as of dissolution,4 the option of legal interest on this amount for the time

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2. This case was decided under the Uniform Partnership Act [hereinafter cited as UPA] which is chapter 358, RSMo 1969. Basic terms and meanings as used in this note are:
   Dissolution. Defined by statute as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." §358.290, RSMo 1969 (UPA § 29). This definition can mislead as dissolutions may occur without a partner dropping out. Specific causes of dissolution are set out at §358.310, R.S.Mo 1969 (UPA § 31). See generally, Bromberg, Partnership Dissolution—Causes, Consequences, and Cures, 43 Texas L. Rev. 631 (1965).
   Winding Up. This is "the process of settling partnership affairs after dissolution." Official Comment to UPA § 29, reprinted in 6 Uniform Laws Annotated 365 (master ed. 1969).
   Continuation. Refers to the carrying on of the business as a going concern by the partners remaining after a dissolution. This can occur as a matter of right when there has been a dissolution contrary to the partnership agreement, an expulsion pursuant to a provision of the agreement, or by an express agreement to continue. J. Crane & A. Bromberg, Partnership § 83A (1968). Frequently, however, the business is continued as a matter of fact, if not as a matter of right, without settlement of the accounts. Distinguishing between winding up and continuation is often difficult but the difference may be critical. Facts control. Even so, neither the passage of time nor participation in new transactions is dispositive of whether the business is in a state of winding up or continuation. Hurley v. Hurley, 33 Del. Ch. 231, 91 A.2d 674 (Sussex 1952); McGee v. Russell's Exrs, 150 Va. 155, 142 S.E. 524 (1928).
   Termination. Refers to the point in time at which winding up is completed. § 358.300, RSMo 1969 (UPA § 30).
4. The term "interest in the partnership," as used throughout this note refers to the partner's total monetary claim in the firm on the day of dissolution. This claim is based on all the equitable concepts which govern an accounting. It embraces at least capital or other property contributed to the partnership and undistributed partnership profits. As equity demands, it may also include adjustments for the fair market value of assets and good will. See Sorokach v. Trusewich, 18 N.J. 368, 99 A.2d 790 (1953); 2 S. Rowley, Partnership ch. 47 (2d ed. 1960).
until termination, or the portion of the subsequent profits of the continued business attributable to his interest. The business prospered under the guidance of the brothers and plaintiff opted for his derivative portion of the profits.

The trial court rendered an accounting, but plaintiff, dissatisfied, again appealed to the Kansas City District of the Missouri Court of Appeals, raising several questions concerning the rights of a retired partner when the partnership business is continued. Because of the extraordinary period of time and degree of success involved in the continuation, the court viewed the situation as unique in Missouri appellate history. The dispute centered on the measure of plaintiff's interest at dissolution and the calculation of the subsequent profits of the enterprise. In responding to the questions raised, the court held, inter alia, that (1) plaintiff's ratio of participation in the profits made after dissolution should be based on the amount of his account at dissolution less the capital originally furnished him by his

5. This is based on § 358.420, RSMo 1969 (UPA § 42) which provides in part:

When any partner retires or dies, and the business is continued under any of the conditions set forth in subsections 1, 2, 3, 4, 5, and 6 of section 358.410, or subdivision (2) of subsection 2 of section 358.380 without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, if at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership . . . .

This option is fundamental to the problems presented in Schoeller. The statutory cross-references refer to particular forms of continuation, with emphasis on the status of creditors. It has been debated whether invoking the § 42 option requires taking precisely one of these forms, or if the option is available when the remaining partners otherwise continue. It is a problem particularly if a partner withdraws without giving consent to the continuation under the terms of § 358.410.3 RSMo 1969 (UPA § 41(3)). In the first appeal of Schoeller, such consent was in issue. The court, however, concluded that expulsion (another provision of the statute) comprehended voluntary withdrawal, making consent immaterial. 465 S.W.2d at 654. Other courts have been more exacting. See Blut v. Katz, 13 N.J. 375, 99 A.2d 785 (1953), criticized in Note, Profit Rights and Creditor's Priorities After a Partner's Death or Retirement: Section 42 of the UPA, 63 Yale L.J. 709 (1954). See also Zach v. Schulman, 213 Ark. 122, 210 S.W.2d 124 (1948); Annot., 2 A.L.R.2d 1054 (1948).

The Missouri Supreme Court recently allowed the § 42 option where the business was continued without consent of the former partner and without settlement of accounts, yet failed to discuss the apparent conflict with the literal reading of the statute. Smith v. Kennebeck, 502 S.W.2d 290 (Mo. 1973). Other courts have suggested that this broader application to continuation problems is preferred. See Blut v. Katz, supra at 384-385, 99 A.2d at 790 (dissenting opinion); M. & C. Creditors Corp. v. Pratt, 172 Misc. 695, 17 N.Y.S.2d 240, aff'd mem., 281 N.Y. 504, 24 N.E.2d 482 (1939); J. Crane & A. Bromberg, supra note 2, § 86. Compare UPA § 42 with Partnership Act of 1890, 53 & 54 Vict., c. 39, § 42.

6. 497 S.W.2d at 867.
parents; and (2) reasonable compensation to the continuing partners should be charged as an expense to the partnership for purposes of calculating the profits for the period between dissolution and termination.

In the ordinary case of a winding up of a partnership after dissolution, creditors are paid first. Thereafter, partners who supplied capital are entitled to its return followed by a division of any remaining profits in agreed proportions, or equally absent agreement. This common law approach, now embodied in the Uniform Partnership Act, is recognized in numerous decisions. But in a case like Schoeller, where the business is continued without immediate winding up, there is the additional problem of accounting for profits generated subsequent to dissolution. This problem is governed by section 42 of the Uniform Partnership Act. The retired or excluded partner or a deceased partner's estate becomes a creditor of the firm, entitled to claim an amount equal to the value of his interest in the dissolved partnership and either interest on that share or the profits subsequent to dissolution "attributable to the use of his right in the property of the dissolved partnership."

7. Id. at 868.
8. Id. at 870-71.
11. See statute quoted note 5 supra.
12. There are several confusing aspects to the terminology employed in UPA § 42. First, the base amount on which either legal interest or profit is calculated is described by two different terms: the "value of his interest in" and "his right in the property of" the old firm. The authorities, however, assume that the two terms refer to the same thing. J. CRANE & A. BREMBBERG, supra note 2, § 86(c); 1 S. ROWLEY, supra note 4, § 42.3. Courts often paraphrase the option so as to emphasize but a single concept. In the first appeal of the present case it was said that the former partner could have either interest or profits based on his "interest" in the firm. 465 S.W.2d at 654. See also Nichols v. Elkins, 2 Ariz. App. 272, 278, 408 P.2d 34, 40 (1965) (interest or profits on a partner's "share"); Froess v. Froess, 284 Pa. 369, 374-75, 131 A. 276, 278 (1925) (using term "property" in both branches of option); Sechrest v. Sechrest, 248 Wis. 518, 518, 22 N.W.2d 594, 596 (1946) (choice based on "assets belonging to him").

Further confusion may arise from comparing the terms of § 42 with those found in the property rights sections of the uniform act. These are §§ 358.240-280, RSMo 1969 (UPA §§ 24-29). Specifically, §§ 358.240, RSMo 1969 (UPA § 24) provides: "The property rights of a partner are his rights in specific partnership property, his interest in specific partnership property, his interest in the partnership, and his right to participate in the management." The rights in specific partnership property are the attributes of a special co-tenancy in partnership created and defined by § 358.250, RSMo 1969 (UPA § 25) dealing with a partner's right to use specific property for partnership purposes and limiting his use to those ends. This right is not in the nature of a monetary interest in the firm and should not be confused with the "right in the property" discussed in § 42.

A partner's financial interest in the partnership is defined by § 358.260, RSMo 1969 (UPA § 26) as "his share of profits and surplus, [which] is personal property." This usage appears to comport with the equivalent terms "interest" and "right in the property" of § 42.

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It is thus important to know what to include in measuring this interest or right in the property of the dissolved partnership. If the former partner has no color of claim to contributed capital because he neither contributed to it, had no obligation to do so, nor received a portion of the capital as a gift, then his interest should not include any of this amount for purposes of calculating his section 42 rights. What the former partner has a right to receive could hardly include any capital to which he has no claim, even if it had been allocated on the firm books to his capital account.

However, where one partner's capital is loaned by one or more of the others, further analysis is needed. Such transactions, while related to partnership business, may be treated quite independently of firm affairs. Early partnership law distinguished the relationships of partner to firm on one hand and partner to partner on the other. The rule developed that copartners could not contest at law any matter related to partnership affairs until after an equitable accounting. A basic settling of accounts in the firm was thought first necessary. Exceptions to this rule were recognized where there was a suit on a promissory note given by one partner to another or on an agreement to reimburse for capital advanced. In such cases, however, an obligor traditionally could not set up as a counterclaim his right to profits from the partnership because this introduced a new entity (the partnership) and mutuality of parties failed. When an action for an accounting was brought first, a partner's debt to his firm could be considered. It was thought, however, that any claims in completely personal capacities, should not be charged or credited in the settlement and profits should be divided without regard for one partner's obligation to another for the whole sum of the former's capital.

In modern cases, all matters relating to the partnership may be heard together and personal debt may be charged against a former partner's

17. F. Mechem, supra note 14, § 204.
18. Popovsk v. Grinach, 361 Mo. 1120, 238 S.W.2d 363 (1951); 2 S. Rowley, supra note 4, § 48.15.
19. Eller v. Salathe, 44 Wyo. 369, 12 P.2d 386 (1932); F. Mechem, supra note 14, § 211.
22. 2 S. Rowley, supra note 4 § 47.16.
interest at termination; the final settlement of partnership affairs may conveniently account for what partner A owes partner B in their personal capacities. A suffers no harm unless the debt is set off against his interest at the time of dissolution so that it reduces his recovery from the subsequent profits. Even so, one's interest in the partnership and his personal obligation to another partner are treated separately. Thus in a continuation case where a partner dies or retires while a debtor to another partner, the determination of "value of interest" and "right in the property" should comprehend rights vis-à-vis the firm only, and should not consider any inter-partner debt.

Inter-partner debt was excluded from this determination in *Wikstrom v. Davis.*25 There a partner was wrongfully excluded from the business, working a dissolution. At the inception of the partnership he had given notes to the other partners for 49% of the original capital and he was to have 49% of the profits. At dissolution this debt was largely unpaid, yet his interest was held to be 49% for purposes of sharing in the profits earned when the other partners continued successfully.28

But in *Yeomans v. Lysfjord,*27 a different view prevailed. There, plaintiff had given notes to his copartners for his capital investment, and chose the derived profits when the partnership was continued after dissolution. The court said the right to profits was based on ownership, and without much discussion concluded that the debt should be discharged by deducting it from plaintiff's interest at dissolution.28 This item alone caused more than a 50% reduction in his interest, meaning a corresponding reduction in his share of post-dissolution gains.29

The relationship created between plaintiff Schoeller and his parents in setting up the capital structure of the partnership was unclear. Initially, the original capital was to remain the parent's property.30 Subsequently, however, the plaintiff executed a note in favor of his father in the exact sum of this initial capital.31 The court failed to consider the distinctions suggested here, however, and treated this loan transaction as a sham executed for tax avoidance purposes.32

At dissolution, each of the three son's capital accounts was about 30% of the partnership. However this figure was not used as the factor applied

26. These profits were then set off against the excluded partner's debt to the others. If the debt had been charged against his interest at dissolution, he would have received nothing from the subsequent profits since on that date his debt exceeded 49% of the net worth of the firm.
28. *Id.* at 363, 327 P.2d at 961.
29. This situation may encourage a tardy winding up, since there is less incentive for the continuing partners to settle. Contrast this with the principle expressed in *Wikstrom* that the § 42 option is designed to compel the continuing partners to hasten the winding up. 211 Ore. 254, 278, 315 P.2d 597, 608.
30. 497 S.W.2d at 865.
31. *Id.* at 866. The circumstances surrounding this transaction are explained more fully in the opinion on the first appeal. Schoeller v. Schoeller, 465 S.W.2d 648 (K.C. Mo. App. 1971).
32. 497 S.W.2d at 866.
to the profits of the continued enterprise for purposes of plaintiff's claim under section 42. Instead, the court thought that the proper factor was the ratio between plaintiff's capital account at dissolution less his account when the partnership began, and the total of all the capital accounts at dissolution.\textsuperscript{33} The court offered no authority, but emphasized that none of the sons had ever personally paid the initial capital and yet their capital accounts had trebled from the time the partnership was formed until dissolution.\textsuperscript{34} Apparently the court felt that the plaintiff should not profit from capital which he had neither contributed nor been obligated to pay.

Another issue raised by the case is the allowance of compensation to remaining partners. Generally, absent agreement, there is no right to compensation for work done in the firm's behalf.\textsuperscript{35} A partner's share in the profits is intended to be remuneration for his participation.\textsuperscript{36} A dissolution, however, whether followed by a continuation or a prompt winding up, changes the relationship of the parties.\textsuperscript{37} Some authorities have suggested that even an express agreement for compensation is without effect once a dissolution occurs, and the general rule of no compensation may be applied against those who remain.\textsuperscript{38} More typical are instances where courts have sought to avoid the harshness of the rule against compensation as applied either before or after a dissolution.\textsuperscript{39} These cases frequently have applied the maxim: He who seeks equity must do equity.\textsuperscript{40} A withdrawing partner who demands that profits from his capital be accounted for must give credit for the time, skills and efforts of the continuing partners which have pro-

\begin{itemize}
  \item \textsuperscript{33} Plaintiff's capital accounts at dissolution and at the beginning of the partnership were $30,098 and $11,382 respectively, and the total of all the capital accounts at dissolution was $100,805. Plaintiff's rate of participation in $30,098 - $11,382 the post-dissolution profits was \[ \frac{100,805}{\text{ $30,098 } - \text{ $11,382 } } = 18.566\%. \text{ Id. at 868.} \]
  \item \textsuperscript{34} \textit{Id.} at 868.
  \item \textsuperscript{35} E.g., Gaston v. Kellogg, 91 Mo. 104, 3 S.W. 589 (1887); Koenig v. Huber, 210 N.W.2d 825 (S.D. 1973); Waagen v. Gerde, 36 Wash. 2d 563, 219 P.2d 595 (1950).
  \item \textsuperscript{36} J. CRANE & A. BROMBERG, supra note 2, § 65(e). Section 358.180(6), RSMo 1969 (UPA § 18(f)) provides:
    
    No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs[.]
  \item A preceding part of the statute makes this subject to agreement.
  \item \textsuperscript{37} § 358.290, RSMo 1969 (UPA § 29).
  \item \textsuperscript{38} Murphy v. Marvel, 49 Pa. Super. 576 (1912). It should be clear that a dissolution does not terminate all internal obligations. See J. CRANE & A. BROMBERG, supra note 2, at 445n. 90. In particular, a managing partner's fiduciary duty survives dissolution. Schneider v. Schneider, 347 Mo. 102, 146 S.W.2d 584 (1941); Stein v. Jung, 492 S.W.2d 139 (Mo. App. D. St. L. 1973).
  \item \textsuperscript{40} See e.g., Drummond v. Batson, 162 Ark. 407, 258 S.W. 616 (1924); Annot., 80 A.L.R. 12, 79 (1932).
\end{itemize}
duced the profit. Accordingly, these courts have inquired into the degree to which the profits during continuation are a product of the remaining partner’s skill and efforts as opposed to capital alone.

In Schoeller, plaintiff contended that salaries paid to the continuing partners over the period of continuation should not be charged to the firm as ordinary expenses, but included in the pool of partnership earnings to which his profit sharing ratio applied. Plaintiff buttressed his contention with section 18(f) of the Uniform Partnership Act and the Oregon case of Wikstrom v. Davis. In Wikstrom, as in Schoeller, pre-dissolution salaries had been paid the partners by agreement, express or implied. The court, however, denied the continuing partners credit for these payments and ruled that plaintiff’s share in the aggregate profits should be determined without first deducting the payments to the continuing partners. Both Wikstrom and Schoeller noted that the exception to the no remuneration rule of 18(f) was inapposite because the claims were plainly for a period of continuation and not of winding up. The Oregon court applied the general rule expressed in the statute and denied compensation credits. In Schoeller, however, the court followed the equitable maxim and allowed reasonable salary credits to the remaining partners even though there was no specific agreement. Why the court automatically limited the amounts to the salary schedule in effect at the time of dissolution is unclear. If reasonable credit is to be allowed, then equity should inquire into the real value of the continuing partner’s services, especially where the retiring partner

41. See cases cited in 1 S. ROWLEY, supra note 4, at 815 nn. 70 & 71; Annot., 55 A.L.R.2d 1391, 1423 (1957), supplementing 30 A.L.R. 12 (1932). For a criticism of the erosion of the no-compensation rule, see J. CRANE & A. BROMBERG, supra note 2, § 65(e).

42. Perhaps the most serious encroachment on the §42 option was reached in a case which refused a wrongfully excluded partner any share of profits on continuation because the profits were not produced by her efforts. Laterra v. Laterra, 134 N.J. Eq. 162, 34 A.2d 289 (Ct. Err. & App. 1943).

43. 497 S.W.2d at 869. The business was continued primarily by plaintiff’s brothers. At the time of dissolution, the active partners were drawing $150 per week. The trial court allowed this rate to apply for 1962 through 1965 and for 1971, but allowed $200 per week for 1966 through 1970. On appeal, compensation was limited uniformly to the schedule effective at dissolution. Id. at 869-70.

44. See statute quoted note 36 supra.

45. 211 Ore, 254, 315 P.2d 597 (1957).

46. Id. at 282-83, 315 P.2d at 610.

47. Both courts seem to have missed the point that the § 18(f) exception for a survivor who winds up the affairs refers to one who survives the death of a partner, not merely one who remains in the business after any dissolution. Chazen v. Most, 209 Cal. App. 2d 519, 523, 25 Cal. Rptr. 864, 867 (1962).

48. 211 Ore. at 283, 315 P.2d at 610. The court was influenced, however, by the continuing partners’ wrongdoing.

49. 497 S.W.2d at 869.

50. Pegging the fair salary figure at the pre-dissolution rate has been justified on the theory that this must represent what the parties at one time agreed to be fair. Tucker v. Tucker, 370 Pa. 8, 87 A.2d 650 (1952). In the present case the parents had reserved the power to set salaries, but the court might have viewed plaintiff’s tardiness in seeking a winding up as tacit approval of the way the others were running things. There is some intimation of this, but the court clearly based its allowance of salaries on equitable concepts.
remains silent for a protracted continuation period. The position of allowing reasonable compensation is an enlightened one. But if Schoeller indicates that the court will apply a mechanical standard in determining the amount of compensation, its application in another case could be unfortunate, either by being inadequate to the continuing partners\textsuperscript{51} or by extracting an inequitable amount from the profits due the former partner under the section 42 option.

Schoeller may be the most thorough discussion yet by a Missouri court of the rights of partners after a dissolution. While the decision clarifies some rights, the desirability of comprehensive partnership agreements, covering the contingencies of dissolution, buying out, and continuation is not diminished.\textsuperscript{52} Unfortunately, many partnerships, especially family operations, are formed and conducted with a minimum of formality.\textsuperscript{53} Uncontemplated events may bring about a dissolution with consequences mystifying to the partners who in good faith continue the business. The lesson of Schoeller is one in prevention rather than cure.

\textbf{Lloyd R. Henley}

\textsuperscript{52} Lord Eldon gave appropriate advice in an opinion which discussed some of the same problems found in the present case:
I cannot forbear intimating once more, that commercial men, when entering into partnerships, should \ldots provid[e] by express covenants in what manner the affairs of the partnership are to be wound up. \ldots [A partnership] may not expire for years after the period in which, in one sense of the words, we say it does expire \ldots.

It is, therefore, of the last importance, that all partnerships should subsist, if possible, upon written articles; and that these written articles should lay down a clear rule, in what way the interests of the partners, in the different events that may occur, are to be disposed of.

Crawshay v. Collins, 38 Eng. Rep. 358, 364 (Ch. 1826). Crawshay dealt with whether there should be a right to profits attributable to the unsettled account of a former partner and the effect thereon of certain intra-firm obligations. The case is an important source of some of the rights now codified in UPA § 42. For materials on avoiding post-dissolution problems, see Bromberg, Partnership Dissolution - Causes, Consequences, and Cures, 43 Texas L. Rev. 631 (1965); Note, Partnership Continuation Agreements, 72 Harv. L. Rev. 1302 (1959).

PROCEDURAL DUE PROCESS IN PROBATION AND PAROLE

_Douglas v. Buder_¹

On probation after the suspended imposition of sentence on two manslaughter charges, James Douglas received a traffic citation² for his involvement in a seven-vehicle, chain-reaction accident. At his next scheduled meeting with his probation officer, Douglas reported the citation and subsequently, a single probation revocation hearing was held. Contrary to the recommendation of the prosecutor and the probation officer, the judge held that the delay in reporting the citation violated the terms of Douglas' probation,³ revoked the probation, and sentenced Douglas to two years in prison. Finding procedural due process not to be in issue, the Missouri Supreme Court held that Douglas received substantive due process and accordingly affirmed.⁴ The United States Supreme Court, also ignoring the procedural due process issue, reversed on substantive due process grounds.⁵

A convicted man's freedom granted by probation or parole⁶ has been labeled conditional liberty to emphasize its dependence upon him conforming to the pattern of behavior demanded by the state.⁷ Until recently, conditional liberty was considered a privilege rather than a right,⁸ and subject to revocation without procedural due process. Since probation and parole could only mean less punishment than a convict's original sentence, it was thought that the convict had no rights in regard to probation and parole.

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² Defendant was issued a citation for driving too fast for the weather conditions, 485 S.W.2d at 610.
³ The condition of probation was that all arrests for any reason must be reported without delay. Before a judge exercises his discretion in regard to probation, the probation officer may also exercise his discretion in reporting an alleged violation. For an opinion that a traffic ticket is the sort of minor offense that should not be reported, see Dicerbo, _When Should Probation Be Revoked?_, 30 Fed. Prov. 11 (June 1966).
⁶ In State v. Brantley, 358 S.W.2d 793 (Mo. 1962), the court gave the following explanation of the distinction between these two terms: A principal distinction is that a 'parole' operates prior to the expiration and after the commencement of the service of sentence; and 'probation' is granted prior to the imposition of sentence or prior to the commencement of the service of a sentence imposed.

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revocation\(^9\) and that the application of procedural due process would unnecessarily place heavy administrative burdens upon the probation and parole systems.\(^{10}\) In the past few years, however, procedural due process has been increasingly applied to the revocation of conditional liberty.\(^{11}\)

In a 1967 probation revocation case involving sentencing, \textit{Mempa v. Rhay},\(^{12}\) the Supreme Court held that an individual facing sentencing was entitled to be represented by counsel on the issue of the sentence to be imposed.\(^{13}\) The Court reasoned that sentencing is a critical stage\(^{14}\) of a criminal prosecution and that without the benefit of counsel substantial rights are irretrievably lost.\(^{15}\)

In the 1972 decision of \textit{Morrissey v. Brewer},\(^{16}\) the Supreme Court rejected the right-privilege distinction\(^{17}\) as a test for determining the applicability of procedural due process to a non-judicial parole revocation.\(^{18}\) Instead, the Court found the critical question to be whether the state's interest in disregarding procedural due process outweighs the individual's interest in requiring it.\(^{19}\) Although the Court recognized the state's strong interest in a speedy, uncomplicated reincarceration should the parole fail, the Court also held that the state's interest is mitigated by its financial and societal stake in the success of parole,\(^{20}\) a stake best served by providing procedural safeguards designed to avoid an erroneous revocation.\(^{21}\)

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9. As the Court stated in Escoe \textit{v. Zerbst}, 295 U.S. 490 (1935): [W]e do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose. \textit{Id.} at 492.


13. \textit{Id.} at 137.

14. A "critical stage in the criminal process" for purposes of the sixth amendment is one in which defendant's rights or defenses may be lost, or the outcome of the case may in some other way be substantially affected. State \textit{v. Williams}, 97 N.J. Super. 573, 601, 235 A.2d 684, 698 (1967).


16. 408 U.S. 471 (1972). Morrissey's parole was revoked on the recommendation of his parole officer with no opportunity for a hearing.


19. Morrissey \textit{v. Brewer}, 408 U.S. 471, 482-83 (1972). The Court carefully distinguished this balancing test from a due process rationale which guarantees the accused's rights during criminal prosecution. \textit{Id.} at 489. This suggests that the character of the due process required may depend in part on whether original liberty or only conditional liberty is at stake.


other side of the fulcrum, a mistaken revocation would inflict a "grievous loss" on the parolee and those dependent upon him. It would breach the state's implicit promise that the parolee would have his freedom as long as he met the conditions of his parole.\textsuperscript{22}

After balancing the competing interests, the Court determined that procedural due process is necessary in a parole revocation; a two-stage hearing process with certain procedural safeguards is required.\textsuperscript{23} First, a preliminary hearing must be held to determine whether there is probable cause to believe that a parole violation occurred. Then a final hearing must be held to determine \( a \) whether a violation had in fact occurred and if so, \( b \) the advisability of a revocation. In both stages of this hearing process, the parolee is entitled to: present his case before a neutral hearing body, receive notice of alleged violations, present witnesses and evidence, employ a limited right of cross-examination, and receive a written statement of findings.\textsuperscript{24} The two-step hearing procedure and other requirements of \textit{Morrissey} were applied to probation, revocation proceedings in \textit{Gagnon} v. \textit{Scarpelli}.\textsuperscript{25} In \textit{Gagnon}, a case not involving sentencing, the Court could not perceive any relevant difference between parole and probation revocations.\textsuperscript{26}

\textit{Morrissey} involved a non-judicial revocation of parole; \textit{Gagnon} involved a non-judicial revocation of probation.\textsuperscript{27} In \textit{Douglas} the Missouri Supreme Court distinguished and refused to apply the \textit{Morrissey} test because Douglas' probation was revoked by a judge.\textsuperscript{28} Finding the two-step hearing process

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  \item 22. Id. at 482.
  \item 23. Id. at 485.
  \item 24. Id. at 489. The Court, however, specifically reserved the question whether an indigent parolee is entitled to the assistance of counsel. In the later decision of \textit{Gagnon} v. \textit{Scarpelli}, 411 U.S. 778 (1973), the Court did require that counsel be provided to indigent probationers in complex cases. 411 U.S. at 790.
  \item 25. 411 U.S. 778 (1973). \textit{Gagnon}'s probation was revoked without a hearing by the Wisconsin Department of Public Welfare.
  \item 26. Id. at 782.
  \item 27. See notes 17 and 24 supra.
  \item 28. 485 S.W.2d at 610. \textit{Accord}, State v. Wilhite, 492 S.W.2d 397 (Mo. 1973).
  \item § 549.141, RSMo 1969 provides that probation or parole revocation is not subject to review by any appellate court. § 549.101, RSMo 1969 expressly allows a court to revoke a parole or probation without a hearing, while § 549.265, RSMo 1969 expressly requires a hearing before the state board can revoke a parole. For further details, see 55 J. Crim. L.C.&P.S., supra note 9, at 176-80. This statutory distinction between probation and parole may have influenced the court in \textit{Douglas} to distinguish \textit{Morrissey} as a revocation before a state parole board, not applicable to a judge's revocation. Cf. State v. \textit{Creen}, 494 S.W.2d 356 (Mo. 1973).
  \item The Missouri Supreme Court has recognized that the "spirit" of the \textit{Morrissey} and \textit{Gagnon} decisions requires that a probationer, before judicial revocation, be afforded certain rights, \textit{inter alia}, a preliminary hearing. \textit{Moore} v. \textit{Stamps}, 507 S.W.2d 939, 949-50 (Mo. App., D. St. L. En Banc 1974). The court, however, reaffirmed its position that "one hearing by the court which granted probation will satisfy due process if the hearing is held within a reasonably short period of time after an alleged violation or after an arrest for a violation and the requirements of due process as outlined above for the final hearing are afforded." \textit{Moore} v. \textit{Stamps}, 507 S.W.2d 939, 950 (Mo. App., D. St. L. En Banc 1974). \textit{See also Brandt} v. \textit{Percich}, 507 S.W.2d 951 (Mo. App., D. St. L. En Banc 1974).
  \item \textit{MO. PAOR. Canx. Cole} § 4.060 would give a probationer facing revocation the right to a preliminary hearing.
\end{itemize}
and other procedural requirements of *Morrissey* inapplicable and implying that the *Mempa* requirements had been complied with, the Missouri Supreme Court reviewed the revocation from a substantive due process perspective. Not finding an arbitrary or capricious exercise of power, the court upheld the revocation.  

In considering *Douglas* only one month after its decision in *Gagnon*, the United States Supreme Court had the opportunity to make it clear that the two-step hearing process of *Morrissey* applied to all situations involving the revocation of a parole or a probation, including those involving revocation and sentencing before a judge. Instead, the Supreme Court did not mention *Morrissey* and reversed the revocation of Douglas’ probation on narrow due process grounds—the lack of evidence of a probation violation and a lack of fair notice to Douglas that a traffic citation constituted an arrest and therefore had to be immediately reported to his parole officer.  

Although the Supreme Court failed to impose the *Morrissey* requirement of a preliminary hearing, it did require the existence of at least some evidence to support a factual determination that an actual violation had occurred. A requirement of a *separate* factual determination of a violation—similar to that required at the final hearing in the *Morrissey* procedure—is appropriate even at a single hearing. It would have focused attention on

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29. 485 S.W.2d 609 (Mo. En Banc), rev’d, 412 U.S. 430 (1973). Even the dissenting opinion reviewed *Douglas* from a substantive due process perspective, contending that the evidence was insufficient to show that Douglas had in fact violated a condition of probation and that this violated a substantive due process requirement set forth in *Morrissey*, *Id.* at 611.

30. *Douglas v. Buder*, 412 U.S. 430 (1973). The Supreme Court held that the hearing judge’s finding that Douglas had failed to report “all arrests” was considered “so totally devoid of evidentiary support” as to amount to punishment without evidence of guilt. *Id.* at 432. This devoid-of-evidence theory differs from a sufficiency-of-evidence theory. Only one element of a criminal charge need be devoid of evidentiary support to make a conviction a denial of due process. This seldom used theory is based on a failure to overcome the presumption of innocence. See Annot., 15 L. Ed. 2d 889 (1966); Annot., 80 A.L.R.2d 1362 (1961). For a case attacking a conviction obtained without evidentiary support on thirteenth amendment “involuntary servitude” grounds, see United States *ex rel. Caminito v. Murphy*, 222 F.2d 698 (2d Cir. 1955), cert. denied, 350 U.S. 896 (1955).

31. *Id.* Under this theory, a specific statute unforeseeably construed is even more violative of a “sense of fair warning” than a “vague” statute, which at least arouses suspicion. When a statute is broadened retroactively by court interpretation, it is similar to the *ex post facto* laws prohibited by the United States Constitution article I, § 10, and may violate due process. See *Bouie v. City of Columbia*, 378 U.S. 347, 362 (1964). In *Douglas*, the defendant argued that prior statutory definitions of “arrest” required actual restraint or taking into custody, § 554.180, RSMo 1969, and therefore he had no fair warning that he was required to immediately report the citation to his probation officer. See *Douglas v. Buder*, 412 U.S. 430, 436-32 (1973); State *ex rel. Douglas v. Buder*, 485 S.W.2d 609, 611-12 (1972).

32. 412 U.S. at 432.
the crucial issue of whether a traffic citation constituted an arrest which had to be reported as a condition of probation. But even had the Missouri courts specifically found that a traffic citation constituted an arrest, the Supreme Court's second ground for reversal—an unforeseeable state court construction of a criminal statute without fair warning—would still have been applicable.33

One way to explain the Court's silence in Douglas regarding the preliminary hearing requirement is to interpret Morrissey as requiring a preliminary hearing only when there is an immediate loss of conditional liberty—when the parolee has been arrested. This approach views the Morrissey decision as aimed at preventing the incarceration of a parolee prior to a determination of the existence of probable cause.34 Under this theory, since Douglas was not arrested pending the revocation decision, a preliminary hearing was not required.35

Another possible explanation for the court's failure to impose the Morrissey due process requirements is that the court may have considered that the Mempa requirements—including notice, hearing and an evidentiary record—provided adequate due process protection. Mempa is applicable to Douglas because Douglas also faced sentencing upon the revocation of his probation. This approach avoids unnecessarily expanding the use of Morrissey's two-step hearing process but maintains the distinction between the due process requirements of a revocation hearing and those of a criminal proceeding, particularly regarding the right to counsel.36 It also meets the objection that imposing the Morrissey requirement in a situation involving

33. Id.
34. Morrissey v. Brewer, 408 U.S. 471 (1972). "Such a determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision." Id. at 487.
35. An analogy to the preliminary hearing in an actual criminal trial gives strong support for this view. A preliminary hearing in a criminal trial is not a general constitutional right; in the absence of a state statute or state constitution, it is not required. Lem Woon v. Oregon, 229 U.S. 586 (1913); State ex rel. Ward v. Jeffries, 210 Mo. 302, 109 S.W. 614 (1908). The primary purpose of the preliminary hearing is to ascertain whether there is reasonable ground to believe that a crime has been committed and whether there is just cause to believe the defendant committed it. State v. Solomon, 158 Wis. 146, 147 N.W. 640, reh. den., 158 Wis. 152, 148 N.W. 1095. Since a preliminary hearing is usually not necessary to the filing of an information for a misdemeanor, it is not generally required in cases where there is no arrest. For a recent case suggesting that a preliminary hearing may be a constitutional requirement, see Pugh v. Rainwater, 483 F.2d 778 (1973), cert. denied, 414 U.S. 1062 (1974).
36. While Mempa afforded an indigent probationer an absolute right to counsel when sentencing and revocation occurred at the same hearing, Morrissey did not require counsel. Gagnon, however, stipulated that counsel would be required for indigents during a revocation decision on a case-by-case basis under certain situations demonstrating the need for counsel. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973). The Court in Gagnon clearly distinguished this case-by-case need for counsel from the absolute right to counsel where sentencing, a "critical stage" of a criminal prosecution, is involved in a revocation decision. Id. at 781.
sentencing infringes upon the judge's traditional discretion in that area. As a third possibility, the Court may have simply reached a result-oriented decision—not intended to suggest broader inferences—by adopting the Missouri Supreme Court's dissenting opinion that the finding of a probation violation was unsupported by evidence.

The rights attendant to a criminal proceeding and required by *Mempa* where sentencing occurs at a revocation hearing does not include a preliminary hearing or a separate factual determination that a probation violation occurred. *Mempa*, however, did not consider the extent it was necessary to determine that the defendant had violated the terms of his parole. *Morrissey*, on the other hand, did face that question and required a separate factual determination of a violation prior to parole revocation and a preliminary hearing where there has been an arrest pending the hearing. The *Morrissey* requirements should be extended to a probation revocation hearing involving sentencing regardless of whether the probationer is arrested prior to the hearing. Traditionally, due process has depended in part on whether original liberty, as in the sentencing stage of a criminal proceeding, or only conditional liberty is at stake. Unlike either *Morrissey* or *Gagnon*, *Douglas* was both a sentencing decision (original liberty) and a revocation decision (conditional liberty). On this basis, the preliminary hearing requirement of *Morrissey* seems even more appropriate in *Douglas*. Both the *Mempa* rights and the *Morrissey* requirements should apply to *Douglas*-type situations.

A preliminary hearing provides the accused with notice of alleged violations and discovery of the government's case. Not only may the pre-

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37. However, the fact-finding and statement of decision required by *Morrissey* were designed as a limitation on the revocation decision, not on sentencing. For a wide-ranging discussion of potential questions facing the courts, see Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View From Mempa v. Rhay*, 47 TEXAS L. REV. 1, 42-47 (1968).

38. For an example of cases in which the narrow grounds cited in the Supreme Court opinion have been viewed in a procedural due process context, see Annot., 80 A.L.R.2d 1372-73 (1961).

39. Justice Douglas, in his dissent in *Morrissey*, and Judge Skelly Wright, in his dissent in *Hyster v. Reed*, 318 F.2d 225, 261 (D.C. Cir., 1963), both suggest that a parolee be given a hearing even before he is taken into custody. This view has been criticized on the ground that it fails to maintain the distinction between absolute liberty and conditional liberty. It is argued that a normal citizen can be arrested on probable cause without a preliminary hearing and that a parolee should not have greater rights. See 11 Duquesne L. Rev. 693, 699-700 (1973). This criticism fails to recognize the distinction between probable cause of commission of a crime and probable cause of violation of a condition of parole. Parole conditions often include continued employment, non-association with criminals, and other requirements that serve rehabilitation goals but do not involve obeying or disobeying the law. Where the alleged parole violation does not endanger society, incarceration without a hearing may be unjustified. See 11 Duquesne L. Rev. 693, 699-700 (1973).

40. *Morrissey v. Brewer*, 408 U.S. 471, 497 (1972). While the preliminary hearing is more frequently used in state procedure, normal federal procedure involves indictment by grand jury. The only purpose of a preliminary examination in federal procedure is to determine whether there is sufficient evidence to warrant holding an accused for action by a grand jury. If an accused chooses to
liminary hearing result in a dismissal for lack of probable cause, thus saving the probationer the time and cost of counsel involved in a final hearing.\textsuperscript{41} It also involves more participants in the hearing process thus diminishing the possible effect of a single biased decision-maker.\textsuperscript{42} Furthermore, a preliminary hearing conducted by an independent hearing officer near the scene of the alleged violation affords the probationer an opportunity to challenge the revocation before the probation officer is compelled to play an adversary role, possibly preserving the counseling relationship.\textsuperscript{43} Fundamental fairness also requires separate factual and discretionary determinations at the final hearing. A separate factual determination of a violation prevents a judge intent on revocation from ignoring the need to first establish an actual violation.

Because \textit{Douglas} involved both revocation and sentencing, the Supreme Court had available at least two landmark decisions upon which to justify the imposition of due process requirements, \textit{Mempa} and \textit{Morrissey}. In \textit{Douglas}, however, the Supreme Court avoided deciding whether the \textit{Morrissey} requirements apply where the probationer or parolee is not arrested pending the hearing. Because it provides notice and discovery, guards against the bias of a single decision-maker, and may avoid an adversary role for the probation or parole officer, the \textit{Morrissey} preliminary hearing requirement should apply even in the absence of an arrest pending a hearing. The Supreme Court recognized due process requirements where sentencing was involved\textsuperscript{44} five years prior to recognition of due process requirements in other revocation cases. Since \textit{Douglas} involved sentencing as well as revocation, the argument for requiring a preliminary hearing and a separate, factual finding of a violation is even stronger than in the \textit{Morrissey} and \textit{Gagnon} factual situations.

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LARY W. MOHL
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\textsuperscript{41} Although \textit{Douglas} was on probation from a Missouri court, his accident occurred on an Arkansas highway. 485 S.W.2d 609, 610 (Mo. En Banc); \textit{rev'd}, 412 U.S. 490 (1973). The loss of a work day—and the risk of dismissal absenteeism entails—to travel to a final hearing in Missouri might have been avoided or diminished by a prompt preliminary hearing near the scene of the accident.

\textsuperscript{42} In this respect, the two-step hearing procedure attempts to avoid the need for a case-by-case review on substantive due process grounds. \textit{President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts} 56, n.28 (1967).


\textsuperscript{44} \textit{Mempa v. Rhay}, 389 U.S. 128 (1967).

RIGHT OF PRIVACY—AVAILABILITY OF INJUNCTIVE RELIEF FOR INVASIONS OF PRIVACY

Galella v. Onassis

Ron Galella is a free-lance photographer, a self-proclaimed "paparazzo," specializing in the making and sale of photographs of well-known persons. Frequent objects of his pursuits have been Mrs. Jacqueline Onassis and her two children, John and Caroline, widow and children of the late President Kennedy. On other occasions prior to the incidence of this action, Galella had interrupted Caroline at tennis, invaded the children's private schools, swerved dangerously close in a power boat to Mrs. Onassis swimming, followed her and the children too closely in an automobile, intentionally touched them during attempts to photograph them, and made himself obtrusively present at numerous social affairs attended by Mrs. Onassis and the children.

The incident of greatest concern in the case occurred when Galella was taking pictures of John Kennedy riding his bicycle in Central Park near his home. Galella jumped into John's path, causing him to swerve dangerously as he left the park and was about to enter Fifth Avenue. At that point three Secret Service agents charged with the protection of the Kennedy children apprehended Galella and took him to a police station for questioning; while there they filed state charges against him for interference with them in the discharge of their duties.

After his acquittal in the state courts, Galella filed suit against the agents and Mrs. Onasis for false arrest and malicious prosecution, claiming unlawful interference with his trade. Mrs. Onassis answered denying any role in the arrest, and counter-claimed for damages and injunctive relief, charging, inter alia, that Galella had invaded her privacy and engaged in a campaign of harassment. The United States intervened, requesting injunctive relief against obstruction by Galella of the agents' protective duties.

The district court dismissed the complaint against the Secret Service agents in a summary judgment, and after a six-week trial, dismissed the complaint against Mrs. Onassis; the court also granted injunctive relief as requested by Mrs. Onassis and the intervening United States. The Court

1. 487 F.2d 986 (2d Cir. 1973).
2. Paparazzi are an infamous breed of photographers who "make themselves as visible to the public and obnoxious to their photographic subjects as possible to aid in the advertisement and wide sale of their works." Id. at 992.
3. Id. at 992, 994.
5. 487 F.2d at 992-93.
6. The damage claim was later dropped and a claim added for violation of N.Y. Civ. Rights Law §§ 50, 51 (McKinney 1948). The action was originally brought in state court, but was later removed under 28 U.S.C. § 1442(a) (1970) to federal court. 487 F.2d at 992.
7. Galella v. Onassis, 353 F. Supp. 196 (S.D.N.Y. 1972). The permanent injunction, which was basically the same as the temporary injunction granted earlier against Galella, enjoined him from (1) keeping the defendant and her children under surveillance or following any of them; (2) approaching within
of Appeals for the Second Circuit affirmed on those points, though modifying the terms of the injunction imposed against Galella as to the territorial limitations imposed upon his approaching the family members. The court accepted the findings of the district court that Galella was guilty of tortious

100 yards of the home of defendant or her children, or within 100 yards of either child's school, or within 75 yards of either child or 50 yards of defendant; (3) using the name, portrait or picture of defendant or her children for advertising; (4) attempting to communicate with defendant or her children except through her attorney. 353 F. Supp. at 241.

8. The court rejected Galella's contention that the first amendment gives newsmen an immunity from liability for their conduct while gathering news. "Crimes and torts committed in news gathering are not protected." 487 F.2d at 995. See Branzburg v. Hayes, 408 U.S. 665 (1972), and Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971). Several procedural claims raised by Galella on appeal were also dismissed, as either correctly treated below or as harmless error. 487 F.2d at 996. The court did agree, however, that Galella should be taxed for the costs of only those daily transcripts shown to be necessary; multiple copies of the transcript allowed Mrs. Onassis were not justified. The judgment was modified accordingly. 487 F.2d at 996.

The injunction imposed by the district court was held to be broader than is required to protect Mrs. Onassis from the "paparazzi" attack which distinguishes Galella's behavior from that of other photographers entitled to cover her newsworthy activities. The court modified the order to prohibit only (1) an approach within 25 feet of defendant or any touching of her person; (2) any blocking of her movement in public places and thoroughfares; (3) any act foreseeably or reasonably calculated to place the life and safety of defendant in jeopardy; and (4) any conduct which would reasonably be foreseen to harass, alarm or frighten the defendant. Similarly the injunction granted the government against interference with protective duties of the Secret Service was modified to enjoin Galella from (1) entering the children's schools or play areas; (2) engaging in action calculated or reasonably foreseen to place the children's safety or well being in jeopardy, or which would threaten or create physical injury; (3) taking any action which could reasonably be foreseen to harass, alarm or frighten the children; and (4) from approaching within 30 feet of the children. 487 F.2d at 988-99.

Judge Timbers filed a persuasive dissenting opinion (though apparently not persuasive to a majority of the court) in which he outlined a number of factors mitigating against modification of the injunction by the appellate court. The substance of his objections may be summarized as follows: The majority set aside the lengthy findings of the district court without holding them clearly erroneous, as prescribed by Fed. R. Civ. P. 52(a). The court offered no explanation for its drastic reduction in the distances Galella is required to maintain from Mrs. Onassis and the children. In phrasing its modified injunction in terms of conduct "foreseeably or reasonably calculated" to endanger or harass, alarm or frighten Mrs. Onassis or the children, the majority runs afoul of Fed. R. Civ. P. 65(d), which provides that "[e]very order granting an injunction . . . shall be specific in terms. . . ." The language used seems to invite disputes over compliance with the order; the likelihood of such disputes is reinforced by Galella's past willful violations of restraining orders couched in similar terms. Since Galella raised his objections to the distance requirements for the first time on appeal, the district court never had an opportunity to pass on the question. The district court, possessed of all the relevant information, should be allowed to make such determinations after a hearing, before the court of appeals reaches the matter on appeal. And finally, the net effect of distinguishing between injunctive relief afforded Mrs. Onassis and that given the government is to "strip the children of any protection under the injunction after they reach age 16 when their protection by the Secret Service ceases." 487 F.2d at 1003.

https://scholarship.law.missouri.edu/mlr/vol39/iss4/6
conduct, but suggested that because of peculiarities of New York law, the particular conduct might be actionable as harassment rather than as an invasion of privacy.9

The purpose of this note will be to survey some common patterns of conduct which have been held to be impermissible invasions of the right of privacy, noting where injunctive relief has and has not been previously made available; and to suggest that in the great majority of such invasions, with certain specific exceptions, equitable relief should be granted upon the same considerations10 as for other enforceable rights deserving of protection.

The touchstone for the right of privacy has been a law review article11 by Warren and Brandeis which appeared in 1890, arguing for judicial recognition of an enforceable "right to be let alone." The New York court, in Roberson v. Rochester Folding Box Co.,12 considered the arguments advanced, but refused to adopt a general right of privacy. Adverse public reaction to the decision caused the New York legislature the next year to adopt a limited right of privacy statute13 proscribing commercial use of a person's name or likeness. In 1905 the Georgia Supreme Court rejected the reasoning in Roberson and recognized a right of privacy derived from natural law.14 In the ensuing years a majority of the states have recognized a protectable right of privacy.15

It is useful to think of the tort of invasion of the right of privacy in terms of the manner in which the injury is produced. Dean Prosser's four-part classification system16 has enjoyed wide-spread use among courts and commentators. The system sets apart the following patterns of injury: (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;17 (2) public disclosure of embarrassing private facts about the

9. Although Galella's behavior would be actionable in most jurisdictions as an intrusive invasion of privacy, New York has not yet recognized a common law right of privacy as such. The New York privacy statute, CIVIL RIGHTS LAW § 51 (McKinney 1948), protects a much narrower interest. An actionable invasion of privacy must involve the use of a person's name, portrait or picture for advertising or trade purposes without his consent. Thus, a person may callously intrude into another's sphere of privacy without incurring liability under New York's privacy law, so long as he avoids an advertising or trade purpose for his acts. See Chaplin v. National Broadcasting Co., 15 F.R.D. 134 (S.D.N.Y. 1953).


12. 171 N.Y. 598, 64 N.E. 442 (1902).


plaintiff,\textsuperscript{18} (3) publicity placing the plaintiff in a false light in the public eye;\textsuperscript{19} and (4) appropriation for the defendant's advantage of the plaintiff's name or likeness.\textsuperscript{20} As will be seen, whether injunctive relief against continuing invasions of privacy is available is often dependent, in part, upon how a particular invasion may be categorized.

It must be remembered that before reaching the special problems which the right of privacy presents for the grant of injunctive relief in a given case, the threshold requirements\textsuperscript{21} for equitable jurisdiction must first be met. One must overcome the hesitancy of courts to enjoin the commission of torts\textsuperscript{22} through a showing of inadequacy of the legal remedy, threat of irreparable injury, and the likelihood of continued tortious conduct. In the past, courts have frequently referred to the maxim that equity will protect only property, not personal, rights, as a ground for refusing relief for invasion of privacy.\textsuperscript{23} Today, however, that rule is not an absolute, and courts commonly will give equitable relief to enforce personal rights.\textsuperscript{24}

A plaintiff is more readily accorded injunctive relief if his complaint fits within Prosser's first or fourth categories. The fourth category, appropriation of plaintiff's name or likeness for defendant's advantage, was historically the first to be recognized as an actionable invasion of plaintiff's rights, even before the term "right of privacy" came into use. In \textit{Gee v. Pritchard},\textsuperscript{25} a Chancellor advanced the idea that equity protects only property rights, but enjoined the publication of a letter expressing private sentiments on the theory that there was a property right in the contents of the letter. Many of the early decisions recognizing a general right of privacy involved some unauthorized use of a plaintiff's name or picture in the furtherance of defendant's interests.\textsuperscript{26} It was standard practice for the courts to find a property right in the plaintiff's name or picture, in compliance with equity's requirements of the time. It has since become well established that such invasions through appropriation of name or likeness can be enjoined.\textsuperscript{27}

\begin{itemize}
  \item \textsuperscript{18} \textit{See}, e.g., \textit{Melvin v. Reid}, 112 Cal. App. 285, 297 P. 91 (1931).
  \item \textsuperscript{19} \textit{See}, e.g., \textit{Barber v. Time, Inc.}, 348 Mo. 1199, 159 S.W.2d 291 (1942).
  \item \textsuperscript{21} See note 10 supra.
  \item \textsuperscript{22} 27 Am. Jur. 2d \textit{Equity} § 65 (1966).
  \item \textsuperscript{23} \textit{See} \textit{Chappell v. Stewart}, 82 Md. 323, 33 A. 542 (Cr. App. 1896), \textit{error dismissed}, 169 U.S. 733 (1898).
  \item \textsuperscript{24} \textit{Hague v. CIO}, 307 U.S. 496 (1939); \textit{Kenyon v. City of Chicopee}, 320 Mass. 528, 70 N.E.2d 241 (1946). \textit{See} 62 Am. Jur. 2d \textit{Privacy} § 62 (1972); \textit{De Funiak, Handbook of Modern Equity} § 56 (1956). The rule is not dead, however; in certain sensitive areas, courts are still more willing to grant injunctions under the guise of protecting property. \textit{See} notes 62-65 and accompanying text \textit{infra}.
  \item \textsuperscript{25} 2 Swanst. 402, 19 Eng. Rep. 87 (Ch. 1818).
  \item \textsuperscript{26} \textit{See} \textit{Pavesich v. New England Life Ins. Co.}, 122 Ga. 190, 50 S.E. 68 (1905), and \textit{Munden v. Harris}, 153 Mo. App. 652, 134 S.W. 1076 (K.C. Ct. App. 1911) (both involving photographs of plaintiffs in defendant's advertisements).
\end{itemize}
This is still the general rule today, although the existence of a property right is no longer the decisive factor it once was.28

It is probable that the injury caused by actual intrusions upon one's seclusion or solitude, or into his private affairs, most nearly approaches the layman's concept of an invasion of privacy, a denial of the "right to be let alone." This type of invasion is often the easiest of the four to identify and the hardest to justify, particularly when the physical presence of the defendant is an element of the offense.29 An actionable intrusion can take place in any number of ways, including, but not limited to, the following: actual invasion and take-over of plaintiff's home;30 harassment on the streets and in the home (including use of telephones and the mail);31 objectionable news gathering methods;32 stealing papers and records from a place reasonably expected to be private;33 improper surveillance and


It has been held that under the New York privacy law, once a proposed use of a person's name or image for trade purposes without his consent is established, the right to enjoin such use is absolute. Durgon v. Columbia Broadcasting System Inc., 29 Misc.2d 394, 214 N.Y.S.2d 752 (1961). See also Doe v. Roe, 42 A.D.2d 559, 345 N.Y.S.2d 560 (App. Div. 1973); and Thompson v. G.P. Putnam's Sons, 40 Misc. 2d 608, 243 N.Y.S.2d 652 (1963).

28. See note 24 and accompanying text supra.

29. But actual physical presence of the defendant is not a requirement of this kind of invasion. See cases cited in notes 34 and 35 infra.


33. Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969), cert. denied, 395 U.S. 947 (1969). In Pearson the court distinguished between the tort of intrusion and the tort of improper publication; it found no liability for publication of material in the public interest, even though those who procured it may be liable for an intrusion into owner's privacy.

Although the issue was not raised in Pearson or in any other known decision of record, the case does suggest a problem that must be eventually resolved by the courts: Should an injunction issue against the publication of material admittedly in the public interest when the material was, and could only have been, acquired by the tortious invasion of an individual's privacy by the person who then seeks to publish it? In such a situation it is probable that the most damaging intrusion into the individual's privacy and dignity results from the publication, rather than from the initial acquisition. If any meaningful remedy is to be given the victim of such tactics, it should be available at the stage where the most harm is done. The difficulty lies in resolving the individual's right to be free from physical intrusions into his personal domain and the consequences of such intrusions, and the public interest in a free press and the unfettered dispersal of information. For a more complete discussion of the judicial recognition of the public interest, see notes 44-71 and accompanying text infra.
shadowing; eavesdropping; and wiretapping. The general consensus is that any of these intrusive invasions can be enjoined, after a showing of inadequacy of legal remedy, if continued and threatened in the future. Ron Galella’s conduct—public harassment and constant surveillance—fits into this category, since it was his manifest intent to continue it into the future, the court had no difficulty at all in finding injunctive relief to be proper in this case.

The two remaining types of privacy invasions, public disclosure of embarrassing private facts and publicity placing the plaintiff in a false light in the public eye, share the basic set of characteristics that dominate courts’ decisions on whether to grant or withhold injunctive relief. Cases arising in this area must involve a publication, in the generic sense, of facts or implications to the public. Both in that respect, and in the nature of the resulting injury, these two categories of invasions bear more than a passing resemblance to the tort of defamation. It is that resemblance which is responsible for much of the confusion and occasional injustice that mar the protection of this aspect of the right of privacy.

The general rule of equity in such cases is easily stated: There is a heavy presumption against any enjoining of speech or writing. The reasons normally given for denial of injunctions against invasions of privacy by publication are (1) adequacy of legal remedy, (2) equity’s limitation to the protection of property rights, and (3) fear of violating constitutional


36. See Fowler v. Southern Bell Tel. & Tel. Co., 343 F.2d 150 (5th Cir. 1965); Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973).

37. See 62 Am. Jur. 2d Privacy § 49 (1972); D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES 536 (1973); Note, Invasion of Privacy—Unreasonable Intrusion—A Weapon Against Intrusions Upon Our Shrinking Right of Privacy, 47 Notre Dame Law. 1067 (1972); Sedler, Injunctive Relief and Personal Integrity, 9 St. L. L.J. 147 (1964). Sedler, supra, at 171, suggests that the degree of harassment and interference should determine the need for injunctive relief.

38. 487 F.2d at 998.

rights of freedom of speech and the press and the right to jury trial. It would seem that in most situations the adequacy of a legal remedy is a fact question, with no prescribed resolution; and the property right-personal right distinction no longer carries the weight in courts of equity that it once did. Accordingly, the substantive issue is whether there are constitutional barriers to enjoining publications which interfere with privacy rights.

Two principal constitutional arguments are typically raised in opposition to the use of injunctions as a remedy for invasions of privacy by publication: the traditional prior restraint doctrine, as delineated in Near v. Minnesota; and the special privilege accorded publications about public officials and persons involved in newsworthy events, as developed in New York Times Co. v. Sullivan and its progeny. As a strict rule of law, the greater obstacle to the imposition of equitable relief would appear to be presented by the Near decision, in which the Supreme Court held impermissible an attempt to prohibit future publications by the defendants in a particular vein on the basis of past publications of allegedly defamatory material. There was no explicit language in the opinion which purported to limit its applicability to the protection of only newsworthy or political items. Consequently, Near is frequently cited as an absolute bar to enjoining any publication, regardless of content or purpose.

Alternatively, there is no clear statement of intent to apply the Near doctrine to every situation involving a publication of some sort. It is arguable that the doctrine of prior restraint should be a relevant consideration in the general first amendment area only when there is a threat of a system of governmentally sanctioned censorship, whereby all future communicative publications of a given type are sought to be prohibited or restricted. The Near decision itself grew out of such a factual setting; it was the state's restrictive policy which the Court found constitutionally objectionable. No such danger of suppression of ideas is present when a private effort is made to enjoin future publications of personal or embarassing material not in the public interest. In the private sphere injunctive actions are concerned with specific acts or statements which have been made in the past and which alone would be prevented in the future. Broad censorship of a general type of statement or publication need not be involved.

43. It is questionable whether there can ever be an adequate legal remedy to some injuries to privacy. See State ex rel. Reed v. Harris, 348 Mo. 426, 153 S.W.2d 834, 837 (1941).
44. See note 24 and accompanying text supra.
45. See supra note 24.
46. Cf. New York Times Co. v. United States, 403 U.S. 713 (1971). In the Pentagon Papers case, the Supreme Court held the issuance of an injunction against publication, as sought by the federal government, to be an invalid prior restraint.
47. See generally Bertelsman, note 41 supra, at 331-32.
There has yet been no Supreme Court ruling which conclusively rejects such an argument. In *Organization for a Better Austin v. Keefe*, the Court held unconstitutional an injunction against “passing out pamphlets, leaflets or literature of any kind, and from picketing” by the defendant community organization, which sought to expose and discourage the plaintiff realtor’s “blockbusting” tactics. The plaintiff asserted that past distributions of leaflets had invaded his right of privacy; but the Court emphasized that defendant’s leaflets were informational in nature, concerned with a matter of legitimate public interest. “Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint. He has not met that burden.” The Court did not suggest, however, that the burden would be impossible to meet. In a separate context the Supreme Court has recognized that “the right of every person ‘to be let alone’ must be placed in the scales with the right of others to communicate.” The mere incantation of the ritual words “prior restraint” should not force an immediate denial of injunctive relief in true privacy cases without a realistic appraisal of the probable results in each case.

The second line of cases which limit the availability of injunctive relief in the privacy area begins with *New York Times Co. v. Sullivan*. The Supreme Court in *New York Times* held that a public official could not recover for defamation absent a showing that the defendant made the statement with knowledge that it was false or with reckless disregard of its truth or falseness. Subsequent decisions extended basically the same test to “public figures.” A further extension was made, in *Time, Inc. v. Hill*, an action brought under the New York right of privacy statute, by the application of the “actual malice” test to private individuals temporarily elevated to the status of public figures through their involvement in a newsworthy event of legitimate interest to the public. The Court’s policy decision in these cases was based on the social need, underlying the constitutional right to free speech and a free press, for open, unencumbered exchange of ideas and criticism, free from the “chilling effect” of the fear of possible liability for inadvertent mistakes. The Court in effect applied a balancing test, and found the social interest in maintaining an open forum for speech to outweigh the individual’s interest in always being able to have a cause of action for defamation, where the subject matter of the defamation was in the public eye.

The argument for that approach is less pleasing when it is applied across the board to a privacy action. A factor in the decision to balance

49. 402 U.S. at 419.
53. 385 U.S. 374 (1967). Although ostensibly a privacy action, alleging that plaintiffs were placed in a false light in the public eye, the same issue was involved as in the pure defamation cases: the liability for false statements made in the context of an event or person within the public interest.
against the interests of the defamed person is the idea that the injury to reputation caused by defamatory speech can be cured by more speech; a person's reputation can be restored, in theory, by the opportunity to make a convincing reply to his attacker. But the right of privacy is meant to protect the interest in keeping certain private facts out of the public eye, a completely separate concept from the preservation of reputation. No amount of extra speech can ever restore the solitude and privacy of a person after being exposed as a reformed prostitute or having a detailed account of his private life spread across the pages of a national magazine. But in spite of this "misapplication of first amendment theory to the law of privacy," it has emerged as the backbone of the general rule prohibiting injunctive relief for invasions of privacy by publication.

This is not to say, however, that the rule is an absolute bar to injunctions. There are very real situations in which an individual may be held up to a false light in the public eye, without legitimate reason to be so placed before the public; yet no element of exchange of ideas in the public forum is present. Without the requisite use of speech to pass pertinent information into the public sphere, the doctrine of New York Times should not attach. Given such a situation, once a plaintiff establishes a definite injury to his interest in privacy and the inability of legal remedies to restore him to his former position, courts should, and usually will, grant an injunction to protect his privacy. A common example of a non-constitutionally protected publication which places a person in a false light is the presence of the person's picture in a "rogue's gallery" after his arrest did not terminate in conviction. There is an increasing willingness among courts to enjoin the continued exhibition of pictures of innocent persons to the public, or even to compel the return of photographs or fingerprints if no conviction has resulted. But courts will still commonly refuse an injunction as unnecessary if the public won't in fact see the photographs.

58. See Monard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970); United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967); T.N.G. v. Superior Court, 4 Cal. 3d 767, 484 P.2d 981, 94 Cal. Rptr. 813 (1971); State ex rel. Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946); Itzkovitch v. Whitaker, 117 La. 708, 42 So. 228 (1906); Downs v. Swann, 111 Md. 58, 73 A. 653 (1909); State ex rel. Reed v. Harris, 348 Mo. 426, 153 S.W.2d 834 (1941); McGovern v. Van Ripper, 137 N.J. Eq. 24, 43 A.2d 514 (1945).
Where there actually is a communicative purpose behind a publication which denies a person his previously-enjoyed privacy, the rogue's gallery cases are of little help. The similarity to claims for libel and slander may be fatal to a plaintiff seeking to enjoin the acts which give him unwanted publicity.61 Again, however, courts have found or made exceptions to the law of defamation. It has not been particularly uncommon for courts to enjoin a continuing trade libel, injurious to a business, trade or profession, where the statements were merely part of a larger tortious scheme to destroy business,62 or where accompanied by criminal or tortious elements of conspiracy, intimidation or coercion.63 At least one court has gone so far as to hold that, even absent those outside factors, a pure continuing trade libel may be enjoined.64 Several other courts, in denying injunctions for personal libel, have suggested that a different result might have been reached had plaintiff's property interests been threatened.65

If invasions of privacy by publication were to be accorded the same treatment, with the presence or absence of a property interest to be the decisive factor in granting an injunction, there would indeed be a "triumph of materialism over humanity."66 Fortunately, that result is not mandated by current judicial policy. The Supreme Court in Time, Inc. v. Hill67 expressly did not extend the actual malice test to "[r]evelations . . . so unwarranted in view of the victim's position as to outrage the community's notions of decency."68 Furthermore, that element of Time which extends

66. Bertelsman, note 41 supra, at 326. As the author observes, "[a]n injunction to protect business interests is no more or less a prior restraint on speech than an injunction to protect interests of personality."
the actual malice test of *New York Times* to privacy actions by otherwise private individuals involved in newsworthy events may be questionable as an accurate statement of current judicial policy. In *Gertz v. Robert Welch, Inc.*, the Supreme Court ruled that a private individual may recover compensatory damages for a defamatory publication without meeting the stricter *New York Times* standard of proof, even though the statement may have been made in the context of a news item of legitimate interest to the public. The Court observed that for one to become a public figure, to whom the stricter standard would apply, a voluntary effort must ordinarily be exerted to thrust the person to the forefront of particular controversies. Since truly private individuals have not voluntarily given up any expectation of freedom from mistreatment at the hands of the press, they "are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." 

The same reasoning should apply with equal force to actions by private individuals for invasions of privacy. Just as *Gertz* provides in the context of defamation actions, the states should be free to define the appropriate standard of liability for invasions of privacy of private individuals, subject to the limitation in *Gertz* that no liability be imposed without fault. Where the constitutional considerations implicit in *New York Times* are not present, there is no reason to impose the actual malice test. The argument follows that when those same constitutional considerations are not present, publications which expose an individual to glaring and undeserving attention should be subject to injunction, in the same manner that unwarranted physical intrusions may be enjoined. Courts have, on occasion, enjoined some of the more outrageous excursions into plaintiffs' private lives, on the theory that there can be no legitimate public need to know of such matters. There is nothing in the *Time* and *Gertz* decisions to preclude a similar finding today.

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70. _______ U.S. at _______, 94 S. Ct. at 3009.
71. _______ U.S. at _______, 94 S. Ct. at 3010.
72. Id.
73. See note 37 and accompanying text supra.
75. In Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E.2d 610 (1969), *cert. denied*, 398 U.S. 960 (1970), the court enjoined the showing to general audiences of a film depicting conditions at a state mental institution, on the ground that the privacy of several inmates was invaded by showing them in highly personal and embarrassing situations. It is arguable that the wrong result was reached in this case, since there was a legitimate public interest in the condition of inmates' lives at the institution, and the purpose of the film was to arouse public indignation over those conditions. See Note, *Privacy of Mental Inmates Will Be Protected by an Injunction*, 83 Harv. L. Rev. 1722, 1730-31 (1970).
The conclusion, simply stated, that must be drawn is that invasions of the right of privacy, in whatever manner inflicted, should be subject to injunction. Where real and substantial injury is likely, no public issue is involved, and the injunction is narrowly drawn so not to restrict legitimate activity, there are no sound policy reasons against enjoining publications which place an individual in a false light in the public eye or reveal embarrassing personal facts about him. 76 A judicial system dedicated to the preservation of basic human rights should offer no less.

Dennis Barks

STATE AND LOCAL GOVERNMENT—
CONTROL OF INTERCITY HIGH VOLTAGE TRANSMISSION LINES

Union Electric Co. v. City of Crestwood1

In 1958 the City of Crestwood passed an ordinance granting Union Electric Company a twenty year franchise.2 Since that time Union Electric has supplied electric power within the city. The utility also served the city of St. Louis and numerous St. Louis municipalities, maintaining generating plants interconnected by a grid of high voltage transmission lines.

Pursuant to its long-range expansion plan, Union Electric proposed to construct a new high voltage transmission line on the right-of-way of the Missouri Pacific Railroad. The proposed line would serve several areas and would span seven miles, 1.8 miles of which would be within the city of Crestwood. With minor exceptions, all previous transmission lines within Crestwood had been installed above ground. The Crestwood city council, however, attempted to persuade Union Electric to install this line underground. After the utility rejected the idea as too costly, the council passed Ordinance No. 1119 which prohibited any further aboveground construction and made violation of the ordinance a misdemeanor. Union Electric then sought a declaratory judgment against the ordinance,3 but the trial

76. See Bertelsman, note 41 supra, at 349-50.
1. 499 S.W.2d 480 (Mo. 1973).
2. Id. at 481. The 1958 franchise permitted Union Electric to construct "poles, towers, wires, conduits . . . in, along, across, over and under the streets, roads, alleys, sidewalks . . . and other public places in the City of Crestwood [for the purpose of] transmitting, furnishing and distributing electricity."
3. Against the ordinance, Union Electric Co. contended that:
(1) the ordinance is ultra vires in that it exceeds the authority of the city and invades the field of regulation of utility companies which the state has vested in and reserved to the Public Service Commission;
(2) the additional cost of placing these lines underground would be so much greater that it would prevent UE from performing its statutory duty to render adequate and safe service at a reasonable cost;
(3) the ordinance exceeds the police power of the city in that it does not reasonably relate to the health, safety and welfare of the public; and
(4) the ordinance results in a partial taking of UE's vested property and contract rights as granted to it by the existing 20-year franchise.

Id. at 482.
court upheld its validity. The Supreme Court of Missouri reversed the lower court, holding that the ordinance was invalid because it "invaded" the area of regulation vested in the Public Service Commission by the General Assembly.

The controversy in Union Electric arose as a result of the overlapping regulatory powers of the Missouri Public Service Commission and the city of Crestwood. Municipalities in Missouri which do not have a constitutional charter have only those powers granted by statute. These include expressly granted powers, powers implied from or incident to express powers and those powers essential to the declared objects and purposes of the municipal corporation. One express grant of power used to control utilities is the franchise statute. This statute purports to confer an absolute power to grant or withhold municipal consent to a utility's use of public streets, sidewalks and other public ways. The awarding of a franchise has been held a condition precedent to the granting of a certificate of convenience and necessity by

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4. The trial court relied on three statutes. §§ 71.520, 79.410 and 393.010, RSMo 1969. Section 71.520 provides:

Any city, town or village in this state may by ordinance, authorize any person, or any company organized for the purpose of supplying light . . . to set and maintain its poles . . . and necessary equipment . . . and to maintain and operate the same along, across or under any of the public roads, streets, alleys, or public places within such city, town, or village, for a period of twenty years or less, subject to such rules, regulations and conditions as shall be expressed in such ordinance.

Section 79.410 provides: "The board of aldermen may prohibit and prevent all encroachments into and upon sidewalks, streets, avenues, alleys and other public places of the city . . . [and] they may also regulate the . . . erecting of . . . electric light poles . . . ."

Section 393.010 states:

Any corporation formed under or subject to chapter 351, RSMo 1949 or heretofore organized under the laws of Missouri for the purpose of supplying any town, city or village with gas, electricity . . . shall have the power to lay conductors for conveying gas, electricity or water through the streets, alleys and squares of any city, town or village with the consent of the municipal authorities thereof under such reasonable regulations as such authorities may prescribe, and such companies are authorized to set their poles . . . along, across or under any of the public roads, streets and waters of this state in such manner as not to incommode the public in the use of such roads, streets and waters.

5. 499 S.W.2d 480, 488-84 (Mo. 1973).
5a. Ex parte Williams, 189 S.W.2d 483 (Mo. 1940).
6. Id.
7. § 71.520, RSMo 1969, quoted note 4 supra.
8. Holland Realty & Power Co. v. City of St. Louis, 282 Mo. 180, 221 S.W. 51 (1920).
9. § 393.170, RSMo 1969 states:

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary . . . .

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the Public Service Commission. The area included in the certificate granted cannot exceed the franchise granted.

Another source of power for Missouri municipalities is the police power—the power to legislate to promote the public health, safety and welfare. This police power has been held to support some municipal utility regulation. In State ex rel. Chaney v. West Missouri Power Co., the court stated that under its police power a city could require a franchised utility to bring a high tension transmission line into the city "in such manner and under such safeguards as will effectually protect the citizens from the apprehended dangers." 

The Missouri Public Service Commission is a statutory agency which can only exercise expressly conferred powers and those implied powers necessary and proper to carry out its delegated duties. Its jurisdiction is generally defined in section 386.250; specific authority is granted in subsequent sections. The enabling statutes, based on the state's police power,

13. 313 Mo. 283, 281 S.W. 709 (1926).
14. Id. at 301, 281 S.W. at 714 (1926).
15. The Missouri Public Service Commission was created by a statute, Mo. Laws 1913, at 556-661, S.B.L., now contained in Chapter 386, RSMo 1969.
17. See statute quoted note 18 infra; cases cited note 16 supra.
18. § 386.250, RSMo 1969.
The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter . . .

(5) To the manner, sales or distribution of . . . electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, and operating or controlling the same . . .

(10) To all public utility corporations and persons whatsoever subject to the provisions of this chapter as herein defined; and
(11) To such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly.
20. State ex rel. Chicago, R.I. & P. RR. v. Public Serv. Comm'n, 312 S.W.2d 791 (Mo. En Banc 1958). See also cases note 21 infra.
have been held remedial and therefore are to be liberally construed.\textsuperscript{21} The courts have also held that the Public Service Commission Law was not intended to repeal existing law but rather to supplement it unless in direct conflict.\textsuperscript{22}

Earlier cases have resolved overlaps of regulatory power in certain specific areas. For example, under the franchise statute, municipalities may impose reasonable conditions upon the grant of their franchise.\textsuperscript{23} The Commission, however, has power to set and change rates even where those rates were conditions upon the grant of the franchise.\textsuperscript{24} Likewise, where a municipal franchise required a railroad to maintain a shop for repairs in the municipality, the Commission was empowered to rule such condition unnecessary and excuse the railroad from continued compliance.\textsuperscript{25} If the utility is municipally owned, on the other hand, the Public Service Commission has no power over it.\textsuperscript{26}

In \textit{Union Electric}, the court resolved the conflict between the Public Service Commission and the municipality through the doctrine of preemption, a doctrine which flows from the concept of intergovernmental supremacy.\textsuperscript{27} Obviously, a state statute will control over a conflicting municipal ordinance.\textsuperscript{28} Where there has been a conflict between a local ordinance and

\begin{verbatim}
21. State \textit{ex rel.} City of Sedalia v. Public Serv. Comm'n, 275 Mo. 201, 204
S.W. 497 (1918); State \textit{ex rel.} Kansas City v. Kansas City Gas Co., 254 Mo. 515,
163 S.W. 854 (1913).
22. Clark v. Mississippi River & B.T.Ry., 324 Mo. 406, 23 S.W.2d 174
(1929); Patterson v. Thompson, 277 S.W.2d 314 (Spr. Mo. App. 1955).
642, 85 S.W.2d 613 (En Banc 1935). See Holland Realty & Power Co. v. City
of St. Louis, 282 Mo. 180, 221 S.W. 51 (1920). There the court held that, where
the terms of the franchise required municipal consent for the laying of utility lines,
the city could cut lines previously laid without the city's consent under a public
road even though the utility had permission of the owners of the fee. \textit{See also}
§ 393.010, RSMo 1969, quoted note 4 \textit{supra}; Union Elec. v. City of Crestwood,
499 S.W.2d 480, 485 (Mo. 1973); City of Cape Girardeau v. St. Louis-S.F. Ry.,
305 Mo. 590, 267 S.W. 601 (En Banc 1924).
24. State \textit{ex rel.} City of Sedalia v. Public Serv. Comm'n, 275 Mo. 201, 204
S.W. 497 (1918). The constitutional provision forbidding impairment of con-
tracts (Mo. Const. art. II, § 15) is inapplicable because a state or an agency of
the state may not contract away its police power. \textit{See} Mo. Const. art. XI, § 3;
State \textit{ex rel.} City of Kirkwood v. Public Serv. Comm'n, 330 Mo. 507, 50 S.W.2d
114 (1932); City of Cape Girardeau v. St. Louis-S.F. Ry., 305 Mo. 590, 267
S.W. 601 (En Banc 1924); State \textit{ex rel.} City of Sedalia v. Public Serv. Comm'n,
275 Mo. 201, 204 S.W. 497 (1918). Rate setting has specifically been found to
be part of the state police power.
25. City of Cape Girardeau v. St. Louis-S.F. Ry., 305 Mo. 590, 267 S.W.
601 (En Banc 1924).
26. Lightfoot v. City of Springfield, 361 Mo. 659, 236 S.W.2d 948 (1951);
State \textit{ex rel.} City of Sikeston v. Public Serv. Comm'n, 336 Mo. 985, 82 S.W.2d
105 (1935).
A.2d 535 (1954) (dictum); State \textit{ex rel.} Knese v. Kinsey, 314 Mo. 80, 282 S.W.
497 (En Banc 1926). In Shartel v. Missouri Util. Co., 53 S.W.2d 394, 395 (Mo. En
Banc 1932), the court stated: "It is unnecessary for us to determine in this case
the effect of possible conflict between the franchise requirements imposed by a
municipality and conditions imposed by a Public Service Commission in granting
a certificate of convenience and necessity, because no such situation is presented.
\end{verbatim}
the Public Service Commission, Missouri courts have not hesitated to sustain the Public Service Commission.\textsuperscript{29} The court in Union Electric did not, however, find a conflict of purpose between the local ordinance and any regulation by the Public Service Commission.\textsuperscript{30} Yet even absent such a direct conflict, the municipality must nevertheless bow to its creating government unit if the court finds that the area of activity has been preempted by the superior governmental unit or its agencies.\textsuperscript{31}

Courts have found preemption in three situations: (1) express statutory preemption where the legislature states that control will remain in the legislature or a designated agency and municipalities may no longer control; (2) implied preemption from a broad grant of power to a state agency making it appear that the legislature did not intend any other political division to have authority in the area;\textsuperscript{32} and (3) occupation of the field where either the legislature or a designated state agency has made so many regulations in a certain area that it seems unlikely that any regulation by another governmental group was to be allowed.\textsuperscript{33} Some authorities suggest that preemption is a preferred ground of judicial decision because it allows the court to avoid the onus of invalidating local government action by throwing the blame to the legislature or agency.\textsuperscript{34}

Decisions from other states indicate that a grant of broad power to a public service commission by a state legislature precludes regulation by a municipality\textsuperscript{35} unless regulatory power has specifically been reserved to the municipality by statute.\textsuperscript{36} The same rule has been held applicable even

\textsuperscript{29} 499 S.W.2d 480, 485 (Mo. 1973).
\textsuperscript{30} In fact, the court took judicial notice of a study being conducted by the Public Service Commission on the feasibility of underground electric lines for the state, 499 S.W.2d at 483n.3, which had resulted in a recent Commission order requiring all electric lines in new subdivisions to be placed underground. While at some later date the Public Service Commission might rule that underground placement of intercity transmission lines like those involved in Union Electric was infeasible, Crestwood's desire for underground lines currently appears more in harmony than in conflict with the Public Service Commission.
\textsuperscript{35} Jennings v. Connecticut Light & Power Co. 140 Conn. 650, 103 A.2d 535 (1954); (building of steam plant held properly submitted to local zoning commission subject, however, to an appeal to the Public Utilities Commission); \textit{In re Public Serv. Elec. & Gas Co.}, 35 N.J. 358, 173 A.2d 233 (1961); Geneseo v. Illinois Northern Util. Co., 363 Ill. 89, I N.E.2d 392 (1936) (utility's franchise had expired; \textit{held}, city's only power was to control original installation or construction; thereafter power in the commission); 64 Am. Jur. 2d \textit{Public Utilities} § 233, at 749 (1972).
\textsuperscript{36} See Benzinger v. Union Light, Heat & Power Co., 293 Ky. 747, 170 S.W.2d 58 (1943) (state constitution specifically reserved to the city the power to force power lines to be buried).
where broad home rule powers are involved. In deciding that regulatory power rests solely in the state agency, the courts have spoken in terms of and limited their decisions to matters requiring state-wide uniformity.

Where wires are to cross public streets and to carry high voltage, however, at least one case has held it a reasonable exercise of the municipal police power to require wires to be put underground.

In Union Electric, the court found that the grant of power to the Commission was "sweeping," then cited a New Jersey case which ruled that statutes relative to that state's public service commission were legislative recognition that utility regulation transcends municipal boundaries and that the subject requires uniform state regulation. Even though the court did not completely foreclose the possibility of future municipal regulation of utilities, the court did fail to provide any guidelines as to the boundaries of the area of permissible municipal activity. The problem thus becomes identification of those areas of regulatory authority reserved to each governmental unit. On this issue, the language of the opinion is less than precise.

Earlier cases upheld ordinances requiring all cables to be placed underground where such was a condition in the original franchise accepted by the utility. Union Electric distinguished these cases noting that Crestwood had

The same rule has been applied even where broad municipal home rule powers were involved. See People ex rel. Public Util. Comm'n v. Mountain States Tel. & Tel. Co., 125 Colo. 167, 243 P.2d 397 (1952) (nature of activity and impact on areas beyond the municipality are factors in determining proper scope of municipal concern); Cleveland Elec. Illum. Co. v. Painesville, 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968).


38. Cases cited note 32 supra; In re Public Serv. Elec. & Gas Co., 35 N.J. 358, 173 A.2d 233 (1961). For a decision limiting the municipal control to original installation or construction on streets and not to supervision, regulation or control after installation, see Genesco v. Illinois North Util. Co., 363 Ill. 89, 1 N.E.2d 392 (1936). In Jennings v. Connecticut Light & Power Co., 140 Conn. 650, 103 A.2d 535 (1954), local authorities were allowed to make regulatory decisions subject to an appeal to the Public Service Commission.


40. 499 S.W.2d 480, 482 (Mo. 1973).

41. In re Public Serv. Elec. & Gas Co., 35 N.J. 358, 173 A.2d 233 (1961). A New Jersey borough attempted to force the utility company to run underground a high voltage cable on the private right-of-way of the Staten Island Railroad. The borough first tried a zoning ordinance requiring a permit but the Public Service Board held the permit unnecessary. The borough then enacted an ordinance exercising its police power. The Supreme Court of New Jersey held that the ordinance exceeded the police power of the borough and that the Public Service Board's finding granting relief from the zoning ordinance was not subject to attack. The municipality's control was limited to public streets used by local residents.

42. State ex rel. McAllister v. Cupples Station Light, Heat & Power Co., 283 Mo. 115, 223 S.W. 75 (En Banc 1920); Missouri Valley Realty Co. v. Cupples Station Light, Heat & Power Co., 199 S.W. 151 (Mo. 1917); Frlichstein v. Cupples Station Light, Heat & Power Co., 201 Mo. App. 162, 210 S.W. 90 (St. L. Ct. App. 1919). These cases dealt with the Keyes ordinance in St. Louis which provided for underground wires in a special district.
sought to eliminate rights granted in a franchise previously given. Thus, it appears still permissible for a municipality to require underground transmission lines as a condition to a grant of an original franchise, but impermissible to make such a requirement subsequent to the original franchise. This distinction, however, is inconsistent with the rationale of state-wide uniformity; the need for uniformity remains the same before and after the franchise has been given.

The court also distinguished as "inapplicable" section 393.010, RSMo 1969, which gives a municipal corporation the power to regulate utility conductors laid through streets, alleys and squares. The court failed, however, to expressly state why the section was inapplicable or give guidelines as to what power was reserved to the municipality under the section. Presumably by a literal reading of this section and section 79.410, which permits municipal regulation of the erection of electric light poles, the court limited them to public ways rather than the private right-of-way which Union Electric planned to use. The court, however, did not indicate that a limitation of the ordinance to public ways would have given a different result.

Union Electric indicates that Missouri municipalities are preempted from a substantial area of utility regulation by implication from the "sweeping" powers granted to the Public Service Commission. Apparently, the Public Service Commission has sole authority to regulate where an intercity transmission line is being placed on a private right-of-way under a previously granted franchise. Beyond the facts of Union Electric, however, it is difficult to precisely know the extent public utility regulation has been preempted by the Public Service Commission. It appears that the municipality will be able to impose reasonable conditions in the original franchise. However, due to the "sweeping" control by the Public Service Commission, it may no longer be reasonable to allow each municipality to control whether cables within its boundaries are above or below ground. This result would be consistent with the need for uniformity. Union Electric thus requires that municipal regulatory statutes be carefully drawn to be sustained. The vagueness of the holding, however, makes drafting standards unclear.

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43. 499 S.W.2d 480, 484 (Mo. 1973).
44. The court also failed to mention the intriguing problem of whether, upon the expiration (or termination) of an existing franchise which did not contain a requirement that lines be buried, a renewal could include such a condition.
45. 499 S.W.2d 480, 484 (Mo. 1973).
46. See statute quoted note 4 supra.
47. § 79.410, RSMo 1969, quoted note 4 supra.
WRONGFUL DEATH—RECOVERY FOR DEATH OF A VIABLE UNBORN CHILD

Chrisafogeorgis v. Brandenberg1

I. CHRISAFOGEORGIS

On September 1, 1966, Mrs. Chrisafogeorgis was struck by an automobile while crossing a Chicago street. After emergency surgery it was determined that her unborn son had died from injuries received in the accident. Her husband, the administrator of the estate, filed suit against the driver of the automobile and its owner for wrongful death of the child. Defendants moved for summary judgment on grounds that there could be no cause of action unless the fetus was born alive. The Cook County circuit court granted the motion for dismissal.2 The appellate court affirmed.3 The Illinois Supreme Court reversed and remanded,4 holding that the Illinois Wrongful Death Act5 allowed recovery for wrongful death of a viable fetus. Thus, Illinois became the most recent state to allow such recovery.

The Illinois decision raises a question that remains unanswered in Missouri. Will Missouri allow recovery in a similar case?

II. MISSOURI LAW

Missouri’s Wrongful Death Act is Sections 537.080-.100, RSMo 1969. Based on Lord Campbell’s Act,6 it has been construed as creating a new cause of action distinct from any previous action for injuries by the decedent.7 Two Missouri decisions have a direct bearing on the question of recovery.

In Steggall v. Morris,8 on May 2, 1952, a viable infant en ventre sa mere9 was injured in an automobile accident. He was born alive but died as a result of his injuries approximately two weeks later. The trial court dismissed plaintiff’s petition for wrongful death damages of $15,000, finding that no cause of action was stated. The Missouri Supreme Court reversed and remanded, stating that a viable child, born alive, could maintain an action for injuries suffered while en ventre sa mere and holding that a

1. 55 Ill.2d 368, 304 N.E.2d 88 (1973).
2. Id. at 369, 304 N.E.2d at 89.
4. 55 Ill. 2d at 375, 304 N.E.2d at 92.
5. ILL. REV. STAT. ch. 70, §§ 1, 2 (1969).
6. Sufficiently developed for survival outside the mother’s womb. Normally a fetus of seven months or older. T. STEDMAN, MEDICAL DICTIONARY 1234 (16th ed. 1946).
7. 9 & 10 Vict., ch. 93 (1846).
9. 363 Mo. 1224, 258 S.W.2d 577 (En Banc 1953).
wrongful death action would lie as a result of death, after birth, from said injuries.11 The court in Steggall stated "[i]t is not in accordance with the truth to say the law indulges in a fiction when it attributes a legal personality to an unborn child."12

Acton v. Shields13 was an action under the wrongful death statute for the death of a child en ventre sa mere. The Missouri Supreme Court affirmed the trial court's dismissal for failure to state a cause of action. The court based its ruling upon the lack of pecuniary loss suffered by the plaintiffs (deceased's collateral beneficiaries).14 The court specifically reserved judgment upon the sufficiency of an action brought by the decedent's father, however.16

III. Recovery—Pro and Con

The statute refers to the death "of a person"16 by a wrongful act such that if death had not ensued would have entitled the injured party to maintain an action and recover damages.17 Recovery, then, is conditioned upon (1) the existence of a person who (2) could have maintained an injury had he lived.18

A. Is A Viable Child A Person?

The characterization of a viable fetus as a person has sometimes been called the biological approach.19 Thirteen jurisdictions have expressly held that a viable child is a person.20 These states take the approach that a

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12. Id. at 1229, 258 S.W.2d at 579.
13. 386 S.W.2d 363 (Mo. 1965).
14. See text accompanying note 67 infra.
15. 386 S.W.2d at 367. Acton is also distinguishable because the fetus was not alleged to be viable. For a thorough analysis of Missouri law prior to both Steggall and Acton see Cason & Collins, May Parents Maintain An Action For The Wrongful Death Of An Unborn Child In Missouri?, 15 Mo. L. Rev. 211 (1950).
16. Section 537.080, RSMo 1969, provides:
   Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then . . . the person who . . . would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured . . . .
17. Id.
viable child must be considered a separate entity from its mother because by definition it is fully capable of an independent existence apart from her.\textsuperscript{21} “Biologically speaking, such a person is, in fact, a presently existing person, a living human being.”\textsuperscript{22}

Other courts have rejected viability as a standard for establishing the existence of a person.\textsuperscript{23} Viability is much more difficult to determine than live birth.\textsuperscript{24} Any dividing line makes arbitrary distinctions, but a live birth test is better suited to judicial determination\textsuperscript{25} because regardless of medical definitions, a child is a physical part of its mother until birth. The viability standard has been rejected in most suits that have considered the matter for purposes of prenatal personal injuries.\textsuperscript{26}

At common law, a viable unborn child was recognized as a separate entity entitled to the recognition and protection of the courts for many purposes.\textsuperscript{27} For example, property law has long treated unborn children as persons in some instances.\textsuperscript{28} These property rights, however, are contingent upon the child’s being born alive.\textsuperscript{29} A stillborn fetus is considered as never having been born or conceived.\textsuperscript{30} Furthermore, an unborn child is normally considered \textit{en esce} only for purposes to his benefit, and a wrongful death recovery does not benefit the deceased infant.\textsuperscript{31} Property law also does not support the viability distinction as in some instances property law doesn’t even require conception.\textsuperscript{32}

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30. Marsellis v. Thalhimer, 2 Paige Ch. 35 (N.Y. 1830).


32. Polk v. Hughes, 100 S.C. 220, 84 S.E. 713 (1915) (beneficiary of a future interest unborn at time of devise).
Similarly, courts allowing recovery have noted that the criminal law recognizes the rights of the unborn. Under Missouri law, the willful killing of an unborn child is manslaughter. If the law recognizes the separate existence of the child sufficiently to make its killing a crime why should it not also recognize it as a tort? On the other hand it can be argued that whatever criminal penalties are associated with the killing of a fetus (generally abortion or manslaughter) are due solely to society's interest in the potential life involved. Criminal statutes do not treat the viable fetus exactly like a living person; no state has a law which makes the killing of an unborn child murder.

Even if an unborn viable child is deemed a person in 1974, it can be argued that no such result was intended by the legislature at the time of passage of the Wrongful Death Act (1855). Section 537.080, RSMo 1969, must be interpreted with due regard for legislative intent. Statutes in derogation of the common law are ordinarily strictly construed. Wrongful death statutes, however, are remedial in nature and thus should be liberally construed. As the United States Supreme Court stated:

Death statutes have their roots in dissatisfaction with the archaisms of the law . . . . It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied.

It can be argued that abortions were much freer at the time of passage of the original act and the legislature likely could not have intended "persons" to include the unborn. However it is doubtful that the legislature intended to provide an action only for persons as the law existed in 1855. In all probability, the legislature never really thought about the question. Other statutes show the legislature's present concern for the life of the unborn. The abortion statute enacted by the Missouri legislature prohibits abortion unless necessary to preserve the life of the mother "or that of an unborn child."

33. The killing of an unborn child was manslaughter or homicide at common law. W. Blackstone, Commentaries 70 (Gavit's ed. 1941). When a pregnant woman was condemned to death, at common law, a stay of execution was granted until she delivered.
34. § 559.090, RSMo 1969.
44. § 559.100, RSMo 1969.
Nor does the recent Supreme Court decision in Roe v. Wade necessarily bar recovery for the wrongful death of a viable unborn child. Roe held that the unborn were not "persons" for purposes of the fourteenth amendment. The word "person" can have different meanings in different statutes. There would be nothing invalid with an interpretation of the Wrongful Death Act to include the viable unborn, even if for due process purposes they are not "persons." In his opinion, Justice Blackmun specifically stated that wrongful death recoveries for stillborn fetuses vindicate the parents' rights, not the infant's, and could still be allowed consistently with Roe. The decision expressly approved of the viability distinction by asserting that in the last trimester (viable stage) the state could even proscribe abortion, except when necessary to preserve the life or health of the mother.

B. Could the Viable Child Have Maintained An Injury Action Had He Lived

Assuming that the viable unborn infant is a person for purposes of the Wrongful Death Act, does he meet the second requirement of the act, that he could have been able to maintain an injury action had he survived the injury? Immediately after the injury, there is no independent life able to institute such a suit. The statute conditions recovery upon the existence of a cause of action for injuries. The infant could not have brought suit while en ventre sa mere and had he died of natural causes before birth, he would never have had the cause of action for injuries required by the statute. Barring subsequent death due to other causes, however, Steggall v. Morris would allow the infant to sue for its injuries suffered while en ventre sa mere. Whether a cause of action for injuries contingent on live birth is sufficient to satisfy the requirements of section 537.080, RSMo 1969, has not been determined. It would appear that the statutory language could be reasonably interpreted in either manner.

45. 410 U.S. 113 (1973).
46. Id. at 158.
47. Although the same reason that convinced the Supreme Court that an unborn child is not a "person" could probably be applied here.
51. See note 16 supra.
54. 563 Mo. 1224, 258 S.W.2d 577 (En Banc 1953).
55. Id. at 1233, 258 S.W.2d at 581.
C. Possible Bars to Recovery

1. Proof of Causation

Some courts have denied recovery due to the difficulty in proof of causation. At one time this may have been a serious problem, but physicians today have advanced in their knowledge of causation and the difficulty has diminished considerably. In any event, "[t]he difficulty of obtaining proof of the wrong should prompt greater leniency in affording the remedy, rather than a denial of plain justice."66 Fears of fraudulent claims have also been voiced. Fraud, however, is not new to our judicial system and can be dealt with just as in other cases.67

2. Proof of Damages

A possible bar to recovery in Missouri is the pecuniary damage rule. Pecuniary damages generally are computed by subtracting the parents' expense of support and maintenance for the child from the value of his services to the parents.68 Some courts have held that pecuniary damages for the death of a stillborn child are too speculative to be awarded.69 Awarding damages in such a case is thought to be punitive rather than compensatory.70 Thus a few courts have rejected recovery on the basis of their pecuniary damage rules.71

The Missouri Supreme Court in Acton v. Shields62 denied recovery to the decedent's collateral heirs due to the lack of pecuniary damage, but expressly left the question open with regard to parents.63 In Acton the court referred64 to Graf v. Taggart65 which denied parents of a fetus killed en ventre sa mere recovery on a pecuniary damage basis. The New Jersey Supreme Court in Graf stated:

On the death of a very young child... at least some facts can be shown to aid in estimating damages as, for example, its mental and physical condition.

But not even these scant proofs can be offered when the child is stillborn.76

The validity of Acton is open to question, however, in light of the 1973 amendment to section 537.090, RSMo 1969. As amended, the section reads:

[T]he trier of the facts may give to the party or parties entitled

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58. Marx v. Parks, 38 S.W.2d 570, 575 (St. L. Mo. App. 1931).
62. 386 S.W.2d 363 (Mo. 1965).
63. Id. at 367.
64. Id. at 367 n.1.
65. 43 N.J. 303, 204 A.2d 140 (1964).
66. Id. at 310, 204 A.2d at 144.
thereto such damages as will fairly and justly compensate such party or parties for any damages he or they have sustained and are reasonably certain to sustain in the future as a direct result of such death.\textsuperscript{67}

This amendment may supersede Missouri's court-made pecuniary damage restriction on wrongful death recovery. If so, plaintiffs could recover non-pecuniary damages that have previously been barred, \textit{e.g.}, parental mental distress. To date, however, the question has not been resolved.

Many courts have recognized the inequities present in allowing recovery for prenatal injuries but denying it for wrongful death. Of the jurisdictions which have ruled on the issue, a majority now allow recovery whereas as recently as 1949, none did.\textsuperscript{68} A large minority, however, remain unconvinced by the arguments in favor of recovery.\textsuperscript{69} Two unique policy arguments have been made in an attempt to justify denial of wrongful death recovery while allowing recovery for injuries. If the fetus is born alive, but injured, it has become a "person" with at least the theoretical possibility of enduring the consequences of its injury throughout life. A stillborn child incurs no such risk.\textsuperscript{70} Secondly, where the child is born alive "[t]he responsibility of the parents is immeasurably extended and broadened, or the child may necessarily become a charge upon the community."\textsuperscript{71}

Others have maintained that denial of an action creates serious injustices. If no recovery is allowed, a wrong is inflicted without a remedy.\textsuperscript{72} The child's mother cannot recover for the loss in her own action for personal injuries.\textsuperscript{73} In the case of an intentional tort, a tortfeasor could foreclose his

\textsuperscript{67} Emphasis added.


\textsuperscript{73} Vitale v. Biando, 52 S.W.2d 24, 28 (St. L. Mo. App. 1932); \textit{appeal quashed sub nom.}, State ex rel. Biando v. Haid, 60 S.W.2d 38 (Mo. 1933).
own liability by killing the child rather than merely injuring it\textsuperscript{74} in a manner which would allow live birth. It also seems anomalous to deny recovery for injuries serious enough to cause death before birth, while permitting recovery for less serious injuries that cause death after birth.\textsuperscript{75} Most cases arise out of automobile accidents and these type accidents seldom injure the infant without killing it.\textsuperscript{76} Recovery advocates ask why an arbitrary line should be drawn between a live birth surviving only a few seconds and the unborn.\textsuperscript{77}

There would appear to be no valid reason to recognize a cause of action for infants who survive birth but a few days\textsuperscript{78} while denying it to infants who may have come within hours of birth before their injuries brought about death. The damages are no more speculative in the stillbirth cases and problems of proof are similar. There may be a presumption of pecuniary loss to the parents,\textsuperscript{79} or nominal damages might be appropriate.\textsuperscript{80} In any case the difficulty in proving damages should not bar the cause of action.\textsuperscript{81}

D. Common Law Recovery

Recovery could possibly be based on the common law, rather than statute. Although most courts have followed the rule of Baker v. Bolton\textsuperscript{82} that there is no common law action,\textsuperscript{83} Massachusetts\textsuperscript{84} and Hawaii\textsuperscript{85} currently recognize a common law right of recovery for wrongful death. Maritime law also recognizes the cause of action.\textsuperscript{86} Civil actions were available in colonial times.\textsuperscript{87} In at least one case prior to the passage of the Wrongful Death Act, the Missouri Supreme Court allowed recovery for loss of services

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76. Gross mechanical injury rarely leads to malformation. If the force is strong enough to penetrate to the child, abortion will usually occur. Gruenwald, Mechanisms of Abnormal Development, 44 Arch. Path. 398, 415 (1947).
78. E.g., Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (En Banc 1953) (death occurred 18 days after birth).
82. 170 Eng. Rep. 1033 (K.B. 1808).
83. Knorp v. Thompson, 352 Mo. 44, 175 S.W.2d 889 (1943). "A cause of action for wrongful death was not generally cognizable at common law." Id. at 53, 175 S.W.2d at 895.
85. United States v. Hayashi, 282 F.2d 599 (9th Cir. 1960).
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of a deceased child. The common law cause of action would, however, have to be expanded to include viable unborns.

IV. Conclusion

There is logical support for both sides of the controversy. Several commentators have expressed belief that Missouri would allow recovery for the wrongful death of a viable unborn child. This author agrees. In light of Steggall, why should recovery be allowed if the infant dies soon after birth, but denied in the case of a more serious injury that causes death immediately before birth? Justice should not turn on such items of chance. The result in Chrisafogeorgis should be followed in Missouri.

Richard D. Woods

88. James v. Christy, 18 Mo. 162 (1853).
89. E.g., S. Speiser, Recovery for Wrongful Death § 4 at 31 n.16 (1966); Stubbs, Wrongful Death Action for Injury to an Unborn Child, 19 Mo. L. Rev. 81, 82-83 (1954). These views were expressed prior to the recent amendment to § 537.090, RSMo 1969.