

3-19-2001

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Recommended Citation

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**REINVENTING THE “LEGISLATIVE INTENT, OR RATHER THE
LEGISLATIVE MANDATE” ON DRAM SHOP LIABILITY IN
MISSOURI: A LOOK AT *KILMER V. MUN****

Litigation is easiest when strong facts mesh with firm law, but a good lawyer can make do with either strong facts or firm law. At first blush, [he] had neither. . . . With facts as weak as in [this case], it would have been difficult for most judges to move the doctrine along in the direction that [he] wished. Normally, strong facts drag the doctrine with them. Yet, here again [his] craft shows how much can be done with just a few raw materials.

– Alfred S. Konefsky¹

I. INTRODUCTION

The facts of *Kilmer v. Mun*² read like those of so many other dram shop cases in Missouri legal history.³ Between the hours of 10:00 p.m. and midnight on February 26, 1998, Hui Chan Mun partook of pitchers of beer on his birthday at Stefanina’s Pizzeria and Restaurant in O’Fallon, Missouri.⁴

* This Note, by Michael L. Young, was selected as the Best Student Work to appear in Volume 45 of the *Saint Louis University Law Journal*.

1. The above quote by Alfred S. Konefsky was a comment on the remarkable ability of Justice Benjamin Nathan Cardozo to develop the principle of promissory estoppel in New York state law with little in the way of facts or legal doctrine to support him. See Alfred S. Konefsky, *How to Read, Or at Least Not Misread, Cardozo in the Allegheny College Case*, 36 BUFF. L. REV. 645, 683, 686 (1987); *Allegheny Coll. v. Nat’l Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927).

2. 17 S.W.3d 545 (Mo. 2000).

3. Nearly every Missouri case that discusses dram shop liability involves an individual defendant who patronized a tavern or a cocktail lounge featuring such a sleazy name that the name itself seemed to forewarn of the irresponsible behavior which would follow, such as the Ten Pin Lounge, the Kozy Inn, the End Zone Lounge, the King of Clubs, the Water Wheel Lounge, and the Prospect. The defendant typically drank an excess number of alcoholic beverages, attempted to drive his motor vehicle home, and then recklessly caused an automobile collision with the plaintiff, or with the plaintiff’s deceased family member. See *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. 2000); *Simpson v. Kilcher*, 749 S.W.2d 386 (Mo. 1988); *Carver v. Schafer*, 647 S.W.2d 570 (Mo. Ct. App. 1983); *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo. Ct. App. 1981); *Sampson v. W.F. Enter., Inc.*, 611 S.W.2d 333 (Mo. Ct. App. 1980); *Moore v. Riley*, 487 S.W.2d 555 (Mo. 1972).

4. See *Kilmer*, 17 S.W.3d at 546; Michele Munz, *Woman, 3 Young Daughters Seek Damages in Death of Their Husband and Father: Man Will Face Trial in Fatal Crash*, ST. LOUIS POST-DISPATCH, ST. CHARLES COUNTY POST, Oct. 30, 1998, at 1 [hereinafter Munz, *3 Young*

After leaving the restaurant intoxicated, Mun drove his Jeep Cherokee down the wrong side of Interstate 64, where he collided with a Ford Escort driven by Thomas Kilmer.⁵ Kilmer died at the scene.⁶ Mun was later convicted of involuntary manslaughter.⁷

The Kilmer family, his wife and children, acquired an affidavit from Dr. Mary Case, the pathologist who testified at Mun's criminal trial.⁸ In the affidavit, Dr. Case opined that, before consuming his last drink, Mun's blood alcohol content would have been between 0.136% and 0.142% and, prior to his second to last drink his blood alcohol content would have been between 0.112% and 0.118%.⁹ At these blood alcohol levels, Mun would have "exhibited outward signs of intoxication including diminished judgment, decreased inhibitions, impaired perception, memory and comprehension."¹⁰ Although Kilmer's family asked the local St. Charles County prosecutor to bring a criminal action against Stefanina's, the prosecutor declined to do so.¹¹

Daughters]; Michele Munz, *Second Jury Convicts Man in Hwy. 40 Traffic Death: Involuntary Manslaughter is the Verdict in Crash Last Year that Killed Man*, ST. LOUIS POST-DISPATCH, ST. CHARLES COUNTY POST, Feb. 12, 1999, at 1 [hereinafter Munz, *Second Jury Convicts*].

5. See *Kilmer*, 17 S.W.3d at 546; Michele Munz, *Man Faces Involuntary Manslaughter Charges in Drunk-Driving Case*, ST. LOUIS POST-DISPATCH, ST. CHARLES COUNTY POST, Jun. 9, 1998, at 1. On the date of the collision, Mun was driving on a suspended driver's license, which had been revoked in October 1997 after his refusal to take a breathalyzer test. See Leilani Nisperos, *Man is on Trial for Manslaughter in Hwy. 40 Crash*, ST. LOUIS POST-DISPATCH, ST. CHARLES COUNTY POST, Dec. 1, 1998, at 3.

6. See *Kilmer*, 17 S.W.3d at 546.

7. See *id.* Mun actually faced two criminal trials for involuntary manslaughter. The first one ended with a mistrial as the jury could not reach an unanimous verdict. Mun was convicted at his second trial. See Munz, *Second Jury Convicts*, *supra* note 4, at 1. Mun's defense in his criminal trials was that he was "confused by the road signs" and that the blood samples taken by investigators were inaccurate. See Michele Munz, *Law and Order*, ST. LOUIS POST-DISPATCH, ST. CHARLES COUNTY POST, Feb. 10, 1999, at 3. At his sentencing hearing, Judge Lucy Rauch, after listening to testimony from Kilmer's wife and oldest daughter, sentenced Mun to seven years of incarceration, the maximum amount Rauch could have ordered. See Michele Munz, *Drunk Driver Gets 7-Year Term in 1998 Death of O'Fallon Man*, ST. LOUIS POST-DISPATCH, ST. CHARLES COUNTY POST, Apr. 12, 1999, at 1.

8. See *Kilmer*, 17 S.W.3d at 546.

9. See *id.*

10. *Id.* At Mun's first criminal trial, St. Charles County Ambulance District paramedic Kimberlyn Oehlert testified that Mun told her at the scene of the accident that he drank only three beers that evening. See Leilani Nisperos, *Testimony Focuses on Defendant's Condition in Fatal Crash on Hwy. 40*, ST. LOUIS POST-DISPATCH, ST. CHARLES COUNTY POST, Dec. 2, 1998, at 1. Other testimony indicated that Mun drank three pitchers of beer with two of his friends in an hour and a half period of time. The restaurant owner testified at the second trial that three pitchers of beer contained about eighteen beers. One of Mun's friends claimed at the second trial that they had "slammed" the last one on the way out the door." See Munz, *Second Jury Convicts*, *supra* note 4, at 1.

11. See *Kilmer*, 17 S.W.3d at 546-47.

The Kilmer family filed a wrongful death suit against Stefanina's alleging that Mr. Kilmer's death was the result of Stefanina's serving alcohol to Mun, who was obviously intoxicated.¹² The Circuit Court of St. Charles County granted Stefanina's motion for summary judgment because section 537.053 of the Revised Statutes of Missouri¹³ eliminates dram shop liability except where the tavern or restaurant has received a criminal conviction for its actions under section 311.310 of the Revised Statutes of Missouri.¹⁴ Without a criminal conviction, the Kilmer family had no cause of action against Stefanina's.

12. See *id.* at 547. "Maria Kilmer said she cannot put a price tag on the loss of her husband, Tom Kilmer, but she said she has to think about the future of their three young daughters." Munz, 3 *Young Daughters*, *supra* note 4, at 1.

13. See *Kilmer*, 17 S.W.3d at 547. Section 537.053 of the Revised Statutes of Missouri, passed in 1985, provides as follows:

1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933-34, extra session, page 77), it has been and continues to be the policy of this state to follow the common law of England, as declared in section 1.010, RSMo, to prohibit dram shop liability and to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.

2. The legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Carver v. Schafer*, 647 S.W.2d 570 (Mo. Ct. App. 1983); *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo. Ct. App. 1980); and *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo. Ct. App. 1981) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages, to be the proximate cause of injuries inflicted upon another by an intoxicated person.

3. Notwithstanding subsections 1 and 2 of the section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises who, pursuant to section 311.310, RSMo, has been convicted, or has received a suspended imposition of the sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person if the sale of such intoxicating liquor is the proximate cause of the personal injury or death sustained by such person.

MO. ANN. STAT. § 537.053 (West 2000).

14. See *Kilmer*, 17 S.W.3d at 547. Section 311.310 of the Revised Statutes of Missouri, passed in 1990, provides as follows:

Any licensee under the chapter, or his employee, who shall sell, vend, give away or otherwise supply any intoxicating liquor in any quantity whatsoever to any person under the age of twenty-one years, or to any person intoxicated or appearing to be in a state of intoxication, or to a habitual drunkard, and any person whomsoever except his parent or guardian who shall procure for, sell, give away or otherwise supply intoxicating liquor to any person under the age of twenty-one years, or to any intoxicated person or any person appearing to be in a state of intoxication, or to a habitual drunkard, shall be deemed guilty of a misdemeanor, except that this section shall not apply to the supplying of intoxicating liquor to a person under the age of twenty-one years for medical purposes only, or to the administering of such intoxicating liquor to any person by a duly licensed physician. No person shall be denied a license or renewal of a license under this chapter solely due to a

The Missouri Supreme Court overruled the decision of the trial court, holding that the criminal conviction requirement of section 537.053 violated the “open courts” provision in the Missouri Constitution.¹⁵ The Court held that the criminal conviction requirement erected an “arbitrary” and “unreasonable” barrier to causes of action against taverns and restaurants like those brought by the Kilmer family and that the criminal conviction requirement violated the separation of powers outlined in the Missouri Constitution by delegating legislative and judicial power to local prosecutors.¹⁶ The *Kilmer* majority held that the criminal conviction requirement was severable from the statute and allowed the Kilmers to pursue their claim against Stefanina’s.¹⁷

The Court’s opinion in *Kilmer* did not merely expand dram shop liability in Missouri. Indeed, the opinion capped a high water mark in the struggle between the Missouri state judiciary and legislature over not only the volatile issue of dram shop liability, but also the powers that each branch of government possesses in creating and limiting tort law causes of action.

In order to fully explore the rationale and impact of the *Kilmer* opinion on Missouri law, this Note attempts to accomplish five interrelated goals. First, this Note discusses the history of dram shop liability in Missouri since its inception as a state because the history plays a crucial role in the majority’s analysis in *Kilmer*.¹⁸ Second, this Note analyzes the majority and dissenting opinions in *Kilmer*, critiquing especially: (1) the reasoning the majority employs to analyze the legal forms of the dram shop statute; (2) the majority’s interpretation of the legislative intent with regard to dram shop liability; and (3) how the majority reconciles the differences between its view of constitutional principles and the dram shop statutory language in question. Third, this Note offers insight as to why the majority provides such an extraordinarily activist opinion in this case. Fourth, this Note attempts to show

conviction for unlawful sale or supply to a minor when serving in the capacity as an employee of a licensed establishment.

MO. ANN. STAT. § 311.310 (West 1994).

15. See *Kilmer*, 17 S.W.3d at 552. Article I, section 14 of the Missouri Constitution states: “That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.” MO. CONST. art. I, § 14.

16. See *Kilmer*, 17 S.W.3d at 552-53.

17. See *id.* at 553-54.

18. For the purposes of this Note, the liability of social hosts who provide alcoholic beverages, rather than of commercial sellers of alcohol, will not be discussed. For a discussion of social host liability in Missouri, see Cristhia Lehr Mast, *Social Host Liability in Missouri*, 53 MO. L. REV. 839 (1988); Debra S. O’Neal, *Missouri: Dram Shop and Social Host Liability Rejected*, 56 UMKC L. REV. 423 (1988); David A. Stratmann, *Paying for Letting Friends Drive Drunk: Third Party Liability for the Negligent Acts of Drunken Drivers*, 51 MO. L. REV. 273 (1986); Steven A. Ramirez, *Social Host Liability and Missouri Tort Law*, 29 ST. LOUIS U. L.J. 509 (1985).

how the holding delivered in *Kilmer* could affect other Missouri statutory law, such as Missouri's Nursing Home Act.¹⁹ Finally, this Note suggests a method the Missouri legislature can use to meet its goals in limiting litigation without violating the constitutional barriers created by the *Kilmer* decision.

II. THE EVOLUTION OF DRAM SHOP LIABILITY IN MISSOURI

Traditionally at common law, the act of a tavern owner in selling alcoholic beverages "to a patron did not give rise to a civil cause of action either by the patron himself or by any third person who might suffer injury from acts done by the patron while in an intoxicated condition."²⁰ Common law courts reasoned that taverns and restaurants were not liable for injuries suffered by the patron or a third party because the proximate cause of the injuries was the patron's consumption of alcoholic beverages, and that patron's negligent driving or other behavior, not the tavern or restaurant owner's sale of the beverages.²¹

A. *Skinner v. Hughes*

The earliest Missouri case to address the issue of alcohol providers' liability for the injuries caused by their patrons arose during the pre-civil war era, in an 1850 case styled *Skinner v. Hughes*.²² The plaintiff, Mrs. Hughes, filed suit against the defendant store and mill owners, Skinner and Shephard, for damages she sustained from the death of her slave Willis.²³ According to the opinion, Willis had purchased a quart of whiskey from Skinner and Shephard's clerk, Baker, and consumed the whiskey along with Skinner and Shephard's white mill hands.²⁴ Once Willis "got drunk," he attempted to walk home around sun down.²⁵ Willis was found the next morning "lying on his face in the road not far from the mill speechless, his jaws locked and frozen nearly to death."²⁶ He died eight or nine days later.²⁷ The court in *Skinner*, rather grotesquely by today's standards, compared Baker's selling of alcohol to

19. See MO. REV. STAT. §§ 198.003-198.186 (1979).

20. *Sampson v. W.F. Enter., Inc.*, 611 S.W.2d 333, 335 (Mo. Ct. App. 1980).

21. See *id.*

22. 13 Mo. 440 (1850).

23. See *id.* at 441.

24. See *id.* The clerk and mill owners apparently made a fair profit out of selling alcoholic beverages to slaves whose owners had various business with the mill. Though a permit was required from a slave's owner before the slave could purchase alcohol, the clerk in *Skinner* "was in the habit of selling whiskey to the slaves without the permission of the owners and Shephard [the mill owner] was frequently present when this was done and made no objection." *Id.*

25. *Id.*

26. See *id.*

27. *Id.*

Willis to “placing noxious food within reach of domestic animals.”²⁸ The court, therefore, found that the defendants were liable for the plaintiff’s damages, holding that “we regard the death of the slave as the natural consequence of the act of the defendants in providing him with the means of intoxication.”²⁹ Both Missouri case law in dicta and legal commentators have argued that *Skinner* demonstrates that Missouri never adopted and had, in fact, apparently rejected the traditional common law “proximate cause” rule.³⁰

B. Prohibition and the Dram Shop Liability Act

After the *Skinner* case, Missouri law remained silent on dram shop liability until the passage of the Dram Shop Act in 1919.³¹ A product of the Prohibition

28. *Id.* at 443. Racism against African Americans has also surfaced at other times in the development of American law and social policy with regards to alcohol consumption. For example, the prohibition of alcohol movement in the South in the early twentieth century was fueled in a significant way by the “fear that black men, stimulated by alcohol, would attack white women.” During the debates on whether to pass a prohibitionist amendment to the United States Constitution in the House of Representatives, Congressman Hobson from Alabama explained: “Liquor will actually make a brute out of the Negro, causing him to commit unnatural crimes. The effect is the same on the white man, though the white man being further evolved it takes a longer time to reduce him to the same level.” ANDREW BARR, *DRINK: A SOCIAL HISTORY OF AMERICA* 253 n.12 (1999).

29. *Skinner*, 13 Mo. at 443.

30. See *Kilmer*, 17 S.W.3d at 551; *Carver*, 647 S.W.2d at 573; Ramirez, *supra* note 18, at 521, 526. Such a reading of *Skinner*, however, is far too broad because it glosses over the historical context in which the opinion was written. See discussion *infra* Part IV.B.4.b.

31. See MO. REV. STAT. § 6593 (recodified as § 4487 in 1929, but repealed in 1934) (1919). The Dram Shop Statute provided as follows:

Every wife, husband, child, parent, guardian, or other person in the state of Missouri, who shall be injured in person or property or means of support or otherwise by any intoxicated person by reason of the selling of intoxicating liquors in violation of the provisions of this article, shall have the right of action in his or her name against any person, firm or corporation who shall, by such illegal selling of such liquors, have caused or contributed to the intoxication of said person or persons, or who have caused or contributed to any such injury; and in any action given by this section the plaintiff shall have the right to recover actual and exemplary damages. In case of the death of either party, the action or right of action given by this section shall survive to and against his or her executor or administrator; and in every action by husband, wife, parent, child, the general reputation of the relation of husband, wife, parent, child, shall be *prima facie* evidence of such relation, and the amount so recovered by either wife or child shall be his or her sole and separate property. Such damages, together with the costs of suit, shall be recoverable in an action before any court of competent jurisdiction in this state; and in any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but recovery by one of such parents shall be a bar to any suit brought by the other for such damages; and in any case where two or more children may be entitled to such damages, only one suit therefor may be brought and the separate claims for damages may be united under separate counts in the one action.

MO. REV. STAT. § 6593 (1919).

era,³² the Dram Shop Act was only one piece of a larger legislative scheme to prohibit the sale and consumption of alcoholic beverages in the state of Missouri. Missouri statutes in 1919 made it unlawful for individuals or businesses to “manufacture, sell, give away or transport intoxicating liquors within, import the same into, or export the same from the state of Missouri for beverages purposes.”³³ Those guilty of violating this prohibitionist mandate could face criminal penalties, including fines and imprisonment.³⁴ The Dram Shop Act allowed individuals, including members of the intoxicated person’s family, who suffered injuries (including loss of support) as a result of the conduct of intoxicated persons to bring civil actions against those individuals or businesses who had sold the intoxicated persons their illegal liquor.³⁵ Thus, Missouri statutory law established that selling alcoholic beverages was a criminal offense. Furthermore, the statutory scheme allowed individuals who had been injured by intoxicated persons to bring civil suits for damages against those persons or businesses who had sold the intoxicated person his or her illegal alcoholic beverages.³⁶

C. *Repeal of Prohibition and the Dram Shop Liability Act*

When Prohibition was repealed nationwide in 1934, the Missouri Dram Shop Act, which allowed civil actions against the sellers of alcoholic beverages, was also repealed.³⁷ The Missouri legislature still kept it illegal to sell alcoholic beverages to “habitual drunkards,” a person “under or apparently under the influence of intoxicating liquor” and anyone under the age of twenty-one years.³⁸ However, a direct, statutorily-authorized private right of action against dram shop providers for the negligent acts of their intoxicated patrons was specifically removed in 1934 with the end of Prohibition, even if the alcohol was illegally sold to minors or habitual drunkards.³⁹ The general statutory scheme for regulating alcohol sales and consumption—namely the state regulation of the production and sale of alcoholic beverages, criminal

32. The Dram Shop Act became effective on the same day that prohibition became effective in the United States with the Eighteenth Amendment to the United States Constitution in 1919. The Dram Shop Act was repealed at the same time the Eighteenth Amendment was repealed in 1934. See William F. Ford, Jr., *Alcohol Supplier’s Liability in Missouri*, J. MO. B., Apr.-May 1989, at 193.

33. MO. REV. STAT. § 6588 (1919).

34. See *id.* §§ 6594-6604 (1919).

35. See *id.* § 6593 (1919).

36. Far from limiting a cause of action, the 1919 Act created a new tort cause of action. See discussion *infra* Part IV.B.4.b.

37. See Ford, *supra* note 32, at 193.

38. 1934-34 Mo. Laws (Extra Session) Intoxicating Liquors: Relating to the Regulation, Control, Manufacture, Brewing, Sale, Possession, Transportation and Distribution of Intoxicating Liquor § 9, at 81.

39. *Id.* § 44, at 92.

penalties for bars or restaurants that sold alcoholic beverages to minors, habitual drunkards and the apparently intoxicated and the omission of any direct statutory authorization for civil actions for violations of these criminal offenses—remained largely in place until the 1980s.⁴⁰

D. Abrogation of the Common Law Rule in the 1980s

By the 1980s, the dangers and horrible carnage that drunk driving produced on American roadways rose to the center stage of American politics.⁴¹ During the early part of the 1980s, the Courts of Appeals in Missouri gradually adopted the decision made by over twenty-seven jurisdictions in the United States in abrogating the traditional common law “proximate cause” rule that had prohibited suits against dram shop owners.⁴²

In the 1980 case *Sampson v. W.F. Enterprises, Inc.*,⁴³ the Missouri Court of Appeals began the process of abrogating the traditional common law rule prohibiting civil actions against dram shop owners. In *Sampson*, Earl Anthony Sampson, a twenty-year-old minor, visited two different cocktail lounges, Paul and Jacks cocktail lounge and the Kozy Inn, where he purchased and consumed alcoholic beverages on the premises of both establishments.⁴⁴ Earl subsequently collected his pickup truck from Allen Chevrolet and attempted to travel east on Highway 210.⁴⁵ Earl’s truck veered off the highway and onto the shoulder of the road, turning over in a gully.⁴⁶ Earl died from the accident.⁴⁷

40. To be most accurate, the change in Missouri’s general scheme for regulating alcohol consumption began in dicta in *Moore v. Riley*, 487 S.W.2d 555 (Mo. 1972). See discussion *infra* Part II.D and note 50. Curiously, it appears that no Missouri case after the repeal of the Prohibition-era dram shop liability statute and before the 1980s abrogation cases directly reiterated the traditional common law “proximate cause” rule. See *Moore*, 487 S.W.2d at 558. “No recent Missouri case dealing with violation of liquor control laws as a ground for tort liability has been cited by the parties.” *Id.* See also *Alsup v. Garvin-Wienke, Inc.*, 579 F.2d 461, 463 (8th Cir. 1978). “There are no Missouri cases dealing with the issue of whether a tavern owner who knowingly sells intoxicating liquor to an intoxicated person or to a minor is liable for personal injuries inflicted by that intoxicated person or minor on an innocent third party.” *Id.* Nonetheless, for a discussion of why dram shop liability during this period should have been considered legally nonexistent, see discussion *infra* Part IV.B.4.b.

41. See Richard Smith, *A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation*, 25 J. CORP. L. 553, 556 (2000). By 1982, the Presidential Commission on Drunk Driving estimated that over fifty percent of highway fatalities resulted from motorists driving under the influence of alcohol, causing on average over 25,000 fatalities per year. PRESIDENTIAL COMM’N ON DRUNK DRIVING, AN INTERIM REPORT TO THE NATION (1982). *But see* JAMES B. JACOBS, DRUNK DRIVING: AN AMERICAN DILEMMA 27-41 (1989), for a discussion of the “methodological difficulties” in attributing highway fatalities to drunk driving.

42. See Smith, *supra* note 41, at 556.

43. 611 S.W.2d 333 (Mo. Ct. App. 1980).

44. See *id.* at 334.

45. See *id.*

46. See *id.*

His parents brought a wrongful death action against the owners of the cocktail lounges and the Chevrolet dealership that had allowed Earl to drive away in spite of his intoxicated condition.⁴⁸

In holding that Earl's parents could bring a wrongful death claim against the owners of the cocktail lounges, the court in *Sampson* essentially adopted a line of reasoning that the Missouri Supreme Court had first proposed, but had not yet adopted, in a 1972 case, *Moore v. Riley*.⁴⁹ The *Sampson* court adopted the principle stated in *Moore* that Missouri recognized a cause of action for civil damages "based upon an act which is in violation of a criminal statute or ordinance" if the person injured was "one of the class for whose benefit an ordinance was adopted" and if the ordinance had "been enacted to protect persons or property, conserve public health or promote public safety."⁵⁰ As mentioned earlier, Missouri statutes, specifically section 311.310 of the Revised Statutes of Missouri, forbid the sale of alcoholic beverages to persons under the age of twenty-one.⁵¹ As in *Moore*, the *Sampson* court held that in forbidding alcohol sales to minors, this statute intended to protect "minors against exposure to liquor traffic" and to support the "public policy of excluding minors for their own benefit, from the use of intoxicating liquors."⁵² Since the facts in this case satisfied both parts of the *Moore* test, the court in *Sampson* held that a minor, or his family under the wrongful death statute, could bring a cause of action for injuries that the minor suffered as a result of becoming intoxicated from alcoholic beverages sold to him by a tavern or restaurant.⁵³ With this negligence *per se* argument, the court in *Sampson* found a dram shop owner liable for the first time in Missouri since the repeal of the Dram Shop Act in 1934.

47. *See id.*

48. *See Sampson*, 611 S.W.2d at 334. The court in *Sampson* sustained the Chevrolet dealership's motion to dismiss. The plaintiffs argued that the dealership was liable for damages because the dealership negligently entrusted Earl with the pickup truck. The court held that liability under this theory arises only when the defendant has a right of control over the item entrusted. The court further held that a bailee, which was the role of the dealership in this case, does not hold the "right of control" necessary for liability under negligent entrustment and thus, did not find the dealership liable here. *See id.* at 338-39.

49. *See id.* at 336-38; *see generally* *Moore v. Riley*, 487 S.W.2d 555 (Mo. 1972).

50. *Sampson*, 611 S.W.2d at 336. The court in *Moore* did not officially hand down this negligence *per se* rule because the plaintiff failed to introduce any evidence that the minor defendant had consumed or purchased alcoholic beverages in the defendant's tavern and thus, in violation of Missouri liquor law. *Moore*, 487 S.W.2d at 558-59.

51. *See* MO. REV. STAT. § 311.310 (1990).

52. *Sampson*, 611 S.W.2d at 336.

53. *Id.* at 336-37. The court also noted, however, that the defendants could allege Earl's contributory negligence as an affirmative defense, which, if proven, could have operated as a complete bar to the plaintiff's cause of action. *Id.* at 337. The Missouri Supreme Court would later fully replace the rule of contributory negligence as a complete bar with a system of comparative fault. *See Gustafson v. Benda*, 661 S.W.2d 11, 16 (Mo. 1983).

One year later, in *Nesbitt v. Westport Square, Ltd.*,⁵⁴ the Missouri Court of Appeals faced a slightly different fact pattern. Eighteen-year-old Susan Sperry had been served alcoholic beverages at a bar called The Prospect and was subsequently involved in an automobile accident.⁵⁵ In this case, the defendant again was the dram shop, The Prospect. The plaintiff, however, was not the minor driver Susan, but was instead Julie Nesbitt, a passenger in Susan's automobile.⁵⁶ Because The Prospect had sold alcoholic beverages to Susan in violation of section 311.310 of the Revised Statutes of Missouri, and because third parties injured by intoxicated persons were held to be within the statute's protected class, the court in *Nesbitt* held that the line of reasoning adopted in *Sampson* applied in this case, thereby allowing a third party to bring a cause of action against The Prospect.⁵⁷ By 1981, the Missouri Court of Appeals had abrogated the common law "proximate cause" rule in favor of a negligence *per se* theory to allow either patrons or third parties to bring civil actions against dram shop owners for injuries that they suffered as a result of the patrons' intoxication, so long as those dram shop owners sold alcoholic beverages to their patrons in violation of section 311.310.

In 1983, the Missouri Court of Appeals addressed the issue of dram shop liability in a case styled *Carver v. Schafer*⁵⁸ with facts similar to, yet in ways significantly different from, *Nesbitt*. William M. Schafer was served alcoholic beverages by two Illinois taverns, the Little Dover Inn and The Ten Pin Lounge.⁵⁹ While driving back to Missouri on Interstate Highway 270, the intoxicated Schafer struck and killed James R. Reifschneider, a St. Louis County police officer who was standing on the shoulder of the highway issuing a traffic ticket to another motorist.⁶⁰ Reifschneider's family brought a wrongful death claim against both Schafer and the owners of the Little Dover Inn and The Ten Pin Lounge.⁶¹ Unlike in *Sampson* and *Nesbitt*, the negligence *per se* rule would not entitle the plaintiffs to bring a cause of action against the tavern owners, because section 311.310 only applied to Missouri taverns and restaurants, not to taverns and restaurants located outside the state.⁶² If section 311.310 did not apply to the Little Dover Inn and The Ten Pin Lounge, then these taverns could not violate section 311.310 and thus, the negligence *per se* theory of liability could not apply.

54. 624 S.W.2d 519 (Mo. Ct. App. 1981).

55. *Id.* at 519.

56. *Id.*

57. *Id.* at 520.

58. 647 S.W.2d 570 (Mo. Ct. App. 1983).

59. *Id.* at 572.

60. *Id.*

61. *Id.* at 571.

62. *See* MO. REV. STAT. § 311.310 (1990).

Instead of relying on a negligence *per se* theory, the court in *Carver* found that the plaintiffs *could* bring a civil action against the tavern owners by expanding the duty of care dram shop owners owe to the public when selling alcoholic beverages to their customers.⁶³ *Carver* held that each individual had a duty to exercise ordinary care for the safety of others in every human act, including the “exercise of such precautions as are commensurate with the dangers reasonably to be anticipated under the circumstances.”⁶⁴ After reviewing statistics on drunk drivers and their impact upon traffic accidents and injuries, the court reasoned that it was foreseeable that tavern patrons would drive to and from a tavern; furthermore, it was foreseeable that a drunk driver would be more likely to be involved in an accident than a sober driver.⁶⁵ With this in mind, the court found that the tavern owners had a duty to avoid supplying Schafer with alcoholic beverages once it became apparent that Schafer was intoxicated.⁶⁶ No longer relying on a negligence *per se* theory, the court in *Carver* attached liability to dram shop owners by holding that tavern owners had a duty of care to stop serving alcoholic beverages to intoxicated persons. With this decision in 1983, the Missouri Court of Appeals had completely abrogated the traditional common law rule of “proximate cause” in favor of a new, extended duty of care for dram shop owners.

E. *The Dram Shop Liability Statute of 1985*

With these early 1980s rulings from the Court of Appeals, Missouri joined an increasing number of states that by case law or statute had placed liability upon dram shop owners, who negligently sold alcoholic beverages to minors or apparently intoxicated people, for the injuries that occurred to the intoxicated patron or to third parties injured by the alcohol-induced negligence of the patron.⁶⁷ As a result of these new statutes and court rulings, the amount of litigation nationwide involving restaurants and taverns in drunk driving cases skyrocketed.⁶⁸ Anti-drinking and driving groups, such as Mothers Against

63. *Carver*, 647 S.W.2d at 575.

64. *Id.* at 573. The court stated that “[i]ndeed, one would have to be a hermit to be unaware of the carnage caused by drunken motorists.” *Id.* The court in *Carver* cited with approval a description of the drunk driving problem issued in the 1964 Missouri Court of Appeals case *Crull v. Gleb*:

Our highway safety problems have greatly increased. Death and destruction stalk our roads. The peaceful Sunday afternoon family drive through the hills has been abandoned by many as the result of brushes with near death at the hands of half-baked morons drunkenly weaving in and out of traffic at 80 or 90 miles per hour.

Id. (citing *Crull v. Gleb*, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964)).

65. *Id.*

66. *Id.* at 575.

67. See Smith, *supra* note 41, at 556; *Suits Against Those Who Serve Alcohol Are Increasing*, ST. LOUIS POST-DISPATCH, Aug. 11, 1985, at 11D.

68. *Suits Against Those Who Serve Alcohol Are Increasing*, *supra* note 67.

Drunk Driving (“MADD”), saw this increased litigation as an effective means to curb drunk driving accidents.⁶⁹ According to Anne K. Seymour of MADD, “It is making [tavern and restaurant owners] aware of the fact that they can potentially be held liable for a drunken driving accident.”⁷⁰

Insurance companies doing business in Missouri soon became aware of this potential liability as well. Because of the new possibilities for liability and the relative uncertainty surrounding what circumstances would give rise to this new liability, Missouri restaurants and taverns found it more difficult to obtain affordable insurance plans.⁷¹ Some restaurant industry experts and lobbyists claimed that some establishments could not get any insurance.⁷² As a result, the Missouri legislature responded.

69. *Id.*

70. *Id.*

71. See Jerry Morlock, *Foes of Drunk Driving Challenge 3 Bills: Proposed Legislation Involves Liquor Sales, Tavern Liability*, KANSAS CITY STAR, Apr. 10, 1985, at B1; John A. Dvorak, *Measure Putting Limits on Restaurant Lawsuits Becomes Law*, KANSAS CITY TIMES, June 13, 1985, at B1. Over a decade later, after the court in *Kilmer* held Missouri’s dram statute to be unconstitutional and thus reinstated full dram shop liability, the reaction from the restaurant industry was similar. According to Kansas City restaurant owner Bill Nigro, “[t]he first thing I think is that my liability insurance, which is already high, is going to go up.” Missouri Restaurant Association Vice-President John Pelzer said that the *Kilmer* decision constituted “poor public policy” and that the association would look into “appropriate action and remedies.” Joe Lambe & Eric Palmer, *Bars Exposed to Lawsuits in Missouri; Those Hurt by Drunken Drivers Can Sue*, KANSAS CITY STAR, May 11, 2000, at A1.

72. Dvorak, *supra* note 71, at B1. In their coverage of the passage of the new dram shop liability statute, all of the major St. Louis and Kansas City newspapers remained mysteriously silent on the role that the St. Louis, Missouri, based beer brewer Anheuser-Busch may have played in lobbying for the statute. Certainly, Anheuser-Busch would have held a strong interest in this new bill. If the courts began finding restaurants liable for their negligent sale of alcoholic beverages, some of these restaurants may have decided to sell less or perhaps no alcoholic beverages, such as beer, in order to reduce their liability exposure. Any sort of reduction in beer sales at restaurants would have affected Anheuser-Busch’s bottom-line. Moreover, Anheuser-Busch had proven itself an effective lobbyist with the Missouri legislature, such as in its past efforts to prevent the passage of a bill which would prohibit a driver from having an open alcoholic beverage container in his or her car. Peter Herson and Terry Ganey have written on Anheuser-Busch’s past legislative successes:

In a few states, a minority that has included Missouri, where the company’s largest brewery is located, it was perfectly legal to drink a beer while driving in a car. Year after year state legislators like Chris Kelly introduced bills to stop the practice. And year after year the powerful Anheuser-Busch lobby opposed and helped to defeat them. In one memorable exchange, the company’s lobbyist, John Britton, offered what might be called the peanut butter defense. The real problem, Britton deftly suggested, had nothing to do with driving while drinking an alcoholic beverage that might impair reflexes. The real problem was the fact that the driver’s hand is wrapped around a beer can instead of the steering wheel. In that context, a peanut butter sandwich was just as dangerous as a beer, Britton argued. The Missouri legislature bought the argument.

Senator Henry Panethiere, a Democrat from Kansas City, introduced legislation into the Missouri Senate in February 1985 designed to limit restaurant and tavern liability in these dram shop cases.⁷³ As originally introduced on the Senate floor, Panethiere's proposed legislation, Senate Bill 345,⁷⁴ allowed third parties, but not the actual intoxicated patron injured as a result of his own intoxication, to bring civil actions against restaurants and bars, but limited the damages one could receive to \$25,000.⁷⁵ When Senate Bill 345 resurfaced from the Committee on Banking, Commerce and Tourism, however, it was drastically different.⁷⁶ The committee version of Senate Bill 345 declared that since the repeal of the Missouri dram shop act in 1934, "it has been and continues to be the policy of the State of Missouri to prohibit dram shop liability either by statute or judicial decision."⁷⁷ The committee version removed any injured third party's or patron's cause of action against a person or business which "advertised, sold, or gave" alcoholic beverages to that patron.⁷⁸ This version of Senate Bill 345 would have eliminated dram shop liability altogether, effectively reinstating the traditional common law "proximate cause" rule.

However, competing interests surfaced with the development of this statute. Passing a bill that completely eliminated a tavern's liability to innocent third parties would have been a risky political move to make during a period of time when public consciousness concerning drunken driving had never been higher. The political ramifications of eliminating tavern liability would not have gone unnoticed at the Governor's Mansion either, especially considering then Governor John Ashcroft's much lauded personal and religious beliefs about the evils of alcohol.⁷⁹ As a result of these political pressures and

PETER HERNON & TERRY GANEY, *UNDER THE INFLUENCE: THE UNAUTHORIZED STORY OF THE ANHEUSER-BUSCH DYNASTY 397-398* (1991). A law prohibiting the driver from drinking alcoholic beverages while operating a motor vehicle did not pass until 1991. See MO. REV. STAT. § 577.017 (1991). As of the date of print of this article, the Missouri legislature still has not passed a law prohibiting car passengers from consuming alcoholic beverages while traveling in a moving car. Eric Stern, *Anheuser-Busch Says It Won't Oppose a 0.08 Drunken-Driving Standard*, ST. LOUIS POST-DISPATCH, Jan. 17, 2001, at A1.

73. Morlock, *supra* note 71, at B1; J.S., 1st Reg. Sess., at 303 (Mo. 1985); S.B. 345, 83rd Gen. Assem., 1st Reg. Sess. (Mo. 1985).

74. S.B. 345, 83rd Gen. Assem., 1st Reg. Sess. (Mo. 1985) [hereinafter Senate Bill 345].

75. *Id.*

76. Sen. Comm. Subst. S.B. 345, 83rd Gen. Assem., 1st Reg. Sess. (Mo. 1985); J.S., 1st Reg. Sess., at 638 (Mo. 1985).

77. Sen. Comm. Subst. S.B. 345.

78. *Id.*

79. John M. McGuire, *Ashcroft & Ashcroft: Missouri's New Governor and His Wife, Janet, are Partners in Law and Life*, ST. LOUIS POST-DISPATCH, Jan. 6, 1985, at K9:

Tolerant as he may be of differing views on faith and morals, Ashcroft nevertheless does not hide his zeal for a life without tobacco and alcohol. When each of the three Ashcroft children were born, father John proudly accepted congratulations and passed out bubble-

realities, Senator Panethiere introduced another version of Senate Bill 345, which generally eliminated dram shop liability as the committee version did, but provided for one exception.⁸⁰ A third party would have a private right of action against a restaurant or tavern if that business “had been convicted of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person” under section 311.310 of the Revised Statutes of Missouri, and if the sale of the liquor was the “proximate cause” of those injuries.⁸¹ By allowing a private cause of action if the tavern or restaurant had received a criminal conviction, Panethiere’s new Senate Bill 345 gave those in the legislature and the Governor’s Mansion an opportunity to support the new bill and gain favor with the restaurant industry while “saving face” with their constituents. The strategy appeared to have worked, for Ashcroft’s office, in later supporting the bill, issued a statement assuring the public that “liquor businesses can be found liable for injuries if the qualifications for filing suit are met.”⁸² This new version of Senate Bill 345 was approved by a majority of the Senate.⁸³

After passage of the new dram shop act in the Senate, the Missouri House of Representatives broadened the bill’s narrow liability exception slightly by

gum cigars. And at a reception in his campaign for attorney general, Ashcroft asked one aide why one punch bowl appeared to be disappearing faster than the other. The popular bowl was the one with the bourbon added, he was told. Ashcroft was not pleased.

Id.

80. This version of the bill further declared that since the repeal of the Missouri Dram Shop Act in 1934, Missouri policy has been to follow the common law of England that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons. Panethiere’s new version of the bill also specifically abrogated the holdings of the *Carver v. Schafer*, 647 S.W.2d 570, 573 (Mo. Ct. App. 1983), *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo. Ct. App. 1983), and *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo. Ct. App. 1980) cases in favor of the traditional common law proximate cause rule. Both of these additional statements would remain in the final version of the bill. See Sen. Subst. Sen. Comm. Subst. S.B. 345, 83rd Gen. Assem., 1st Reg. Sess. (Mo. 1985); J.S., 1st Reg. Sess., at 820-23 (Mo. 1985).

81. Sen. Subst. Sen. Comm. Subst. S.B. 345. Legal commentators have noted the contradictory way in which the statute addresses the “proximate cause” issue: “Logically, the statute contradicts itself . . . Basically, the statute declares that furnishing alcohol is not the proximate cause [of injuries inflicted by another intoxicated person], but that violation of the statute which prohibits furnishing may be the proximate cause.” Stratmann, *supra* note 18, at 290. The majority in *Kilmer* saw this contradiction as an encroachment on the judiciary’s authority: “The statute does not define ‘proximate cause,’ which would be an appropriate legislative function, but rather finds that it does not exist in certain cases, which seems to be distinctly a judicial function.” *Kilmer*, 17 S.W.3d at 551 n.19.

82. Dvorak, *supra* note 71, at B1.

83. J.S., 1st Reg. Sess., at 892 (Mo. 1985). Though explicitly eliminated in the first Senate version of the bill, one could also argue that this new version of the bill also allowed the intoxicated patron, injured by his own intoxication, to file suit against a tavern or restaurant. See *Kilmer*, 17 S.W.3d at 553 n.22.

adding a provision to the bill which would allow a third party to bring a suit against the dram shop if the dram shop had “received a suspended imposition of the sentence arising from the conviction.”⁸⁴ The Missouri House passed the bill with this addition,⁸⁵ and a few days later the Senate passed the dram shop bill with the House’s amendment.⁸⁶ When Governor Ashcroft affixed his signature to the much-amended Senate Bill 345, the elimination of dram shop liability, except in the limited case where a criminal conviction of the restaurant or tavern had occurred, became the law of the state of Missouri.⁸⁷ The holdings of *Sampson*, *Nesbitt* and *Carver* had been erased.

Missouri’s new Dram Shop Liability Act, codified as section 537.053 of the Revised Statutes of Missouri, placed the state in a new and unique minority position on the dram shop issue. Even today, only a few states have no dram shop liability whatsoever.⁸⁸ While Missouri remained in the majority of states that had some sort of dram shop liability,⁸⁹ it was just barely a member of that majority. With the passage of the Dram Shop Liability Act in 1985, Missouri became the only state in the Union to enact a law requiring a criminal conviction of a tavern before civil dram shop liability would arise, all at a time when public outcries over the horrors of drunk driving could not have been greater and at a time when the teetotaler Governor had forbidden the service of alcoholic beverages at the Governor’s mansion.⁹⁰

III. A PREVIEW OF THE ISSUES IN *KILMER*—*SIMPSON V. KILCHER*

Before the Missouri Supreme Court considered the constitutionality of the new dram shop liability statute in *Kilmer*, the state’s high court first tackled the constitutional viability of section 537.053 in a 1988 case, *Simpson v. Kilcher*.⁹¹ The main legal issues that the *Kilmer* court would address, such as challenges to the statute based upon the open courts provision in the Missouri constitution and upon separation of powers, as well as the issues of how to deal with the

84. J.H., 1st Reg. Sess., at 1386-87 (Mo. 1985).

85. *Id.* at 1387-88.

86. J.S., 1st Reg. Sess., at 1210-12 (Mo. 1985).

87. The new dram shop statute was later codified as section 537.053 of the Revised Statutes of Missouri. See complete text of statute *supra* note 13.

88. See Smith, *supra* note 41, at 557 n.33. These states include Kansas and Maryland. *Id.*

89. See *id.* at 556.

90. *Id.* at 574. Such was the power of the restaurant lobby, and presumably the alcoholic beverage and distribution lobby, in Missouri. In response to MADD’s charge that less restrictions on taverns and restaurants would result in more drunken drivers, Senator Panethiere, the sponsor of the new dram shop statute, responded, “[i]f you close all the bars and taverns, you still are going to have drunken drivers These people are not mad mothers. They are prohibitionists.” Morlock, *supra* note 71, at B1.

91. 749 S.W.2d 386 (Mo. 1988).

statute if parts of it were unconstitutional, first rose to the surface of Missouri's legal waters in *Simpson*.⁹²

On the early morning of October 6, 1985, not quite four months after the passage of section 537.053, Walter Kilcher drove his car out of a bar parking lot, across three lanes of highway and over a concrete median, striking motorcyclist Richard Simpson.⁹³ The liquoring-up culprits in this case were establishments known as the Water Wheel Lounge and The King of Clubs.⁹⁴ Simpson filed suit against the driver and the owners of the taverns for his injuries.⁹⁵ The owners of the taverns did not receive criminal convictions under section 311.310, and thus Simpson did not have a cause of action under section 537.053.⁹⁶ Nonetheless, Simpson filed his lawsuit, challenging the constitutionality of Missouri's new dram shop statute, and in particular, the provision requiring a criminal conviction of the dram shop.⁹⁷

Simpson argued that section 537.053 violated the due process and equal protection clauses of the Missouri and United States Constitutions, violated the open courts provision in article I, section 14, of the Missouri Constitution, and violated the separation of powers provision in article II, section 1, of the Missouri Constitution.⁹⁸ The Missouri Supreme Court rejected all of these arguments.⁹⁹

The majority opinion in *Simpson*, authored by Justice Higgins and joined by Justices Blackmar, Donnelly, Welliver and Robertson, found that section 537.053 did not violate the open courts provision as outlined in the Missouri Constitution. The Missouri Constitution's open courts provision provides that "the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay."¹⁰⁰ The majority held that this provision did not create rights, but only allowed an individual "claiming . . . rights access to the courts when such a person has a legitimate claim recognized by law."¹⁰¹ Simpson was not denied access to the courts, the majority stated, because the plaintiff did not have a right recognized under the

92. *See id.*

93. *Id.* at 388.

94. *Id.*

95. *Id.*

96. *Simpson*, 749 S.W.2d at 388-89.

97. *Id.*

98. *Id.* at 389.

99. *Id.* Because the *Kilmer* decision only addressed the open courts and separation of powers challenges, only those two challenges in the *Simpson* decision will be discussed extensively in this Note. The due process and equal protection challenges failed because the majority found that the statute held a "rational relationship to a legitimate state interest." *Id.* at 392-93.

100. MO. CONST. art. I, § 14.

101. *Simpson*, 749 S.W.2d at 389.

new section 537.053. The criminal conviction requirement, according to the majority, did not constitute a “precondition to access to the courts” and thus an “obstruction or bar to his right to sue,” but was instead “a condition to the existence of a cause of action,” or more simply, an “element of plaintiff’s right to sue.”¹⁰² Thus, Simpson’s open courts argument failed.

The plaintiff in *Simpson* also argued that section 537.053 violated Missouri’s non-delegation doctrine and separation of powers doctrine.¹⁰³ Simpson’s family argued that the criminal conviction requirement violated the non-delegation doctrine because the requirement delegated discretionary authority over whether a cause of action existed to the executive branch; the court rejected this argument as a “strained construction.”¹⁰⁴ Simpson also argued that section 537.053.2 violated separation of powers because it attempted “retroactive abrogation of existing judicial decisions mentioned in the statute.”¹⁰⁵ The majority relied on case law and found that section 537.053 was “prospective in nature” and did not require retroactive application.¹⁰⁶ Because the statute did not attempt retroactive abrogation of judicial rulings, the majority rejected Simpson’s separation of powers challenge.¹⁰⁷

If the majority had found either part of section 537.053 unconstitutional as Simpson had argued, the interesting question of how the court should have dealt with those constitutional problems would have arisen. Section 1.140 of the Revised Statutes of Missouri, the severability statute, provides as follows:

The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependant upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.¹⁰⁸

102. *Id.*

103. *Id.* at 390.

104. *Id.* at 390-91. The majority in *Kilmer* would later choose not to analyze section 537.053 explicitly within the confines of the non-delegation doctrine. For a discussion of how Missouri has developed a liberal view of the non-delegation doctrine which allows broad grants of authority from the legislature to various agencies, see Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 588-98 (1994).

105. *Id.* As mentioned earlier, section 537.053.2 specifically abrogated the holdings of *Carver*, *Sampson* and *Nesbitt* by name.

106. *Simpson*, 749 S.W.2d at 391-92.

107. *Id.*

108. MO. REV. STAT. § 1.140 (1957).

Had the court found that section 537.053 violated the open courts or separation of powers provisions of the Missouri Constitution, the majority wrote, the severability issue would not have even arisen, for those arguments did not focus on one part of the statute but instead “focus[ed] on the entire statute.”¹⁰⁹ Essentially, the majority found that the criminal conviction requirement was so intertwined with the purpose of the statute—to eliminate dram shop liability except for in this limited criminal conviction situation—the criminal conviction requirement could not have been removed without striking the entire statute.

In the dissenting opinion, Chief Justice Billings, joined by Justice Rendlen, wrote that section 537.053 did in fact violate the open courts provision in the Missouri Constitution.¹¹⁰ The dissent offered a different test for determining whether or not a statute violated the open courts provision. Any legislative alteration of a common law right, according to the dissent, is invalid if the alteration is arbitrary or unreasonable and if the alteration does not provide for an “adequate alternative course of action.”¹¹¹ The alteration could still be valid, however, “if the legislature showed an overpowering public necessity for the abolition or restriction and no alternative method of meeting such public necessity.”¹¹² Applying this test, the dissent held that section 537.053 violated the open courts provision because: (1) it altered a common law right as established in *Carver*; (2) it provided an unreasonable and inadequate alternative because such alternative turned on the discretion of the local prosecuting attorney over whether to prosecute a tavern; and (3) the Court found that the legislature failed to provide any “overpowering public necessity” for the alteration.¹¹³

The dissent also agreed that section 537.053 violated separation of powers, laying the basis for an argument the majority in *Kilmer* would later adopt in part.¹¹⁴ Under section 537.053, whether one had a cause of action against a tavern depended on whether a criminal conviction had been secured against that tavern. The dissent argued that the requirement of a criminal conviction was, in effect, a “delega[tion of] authority to the executive.”¹¹⁵ Since the local prosecuting attorney, a member of the executive branch, had the discretion to decide whether to pursue a criminal action against the tavern and because the criminal conviction was tied to whether a cause of action existed against the

109. *Simpson*, 749 S.W.2d at 393.

110. *Id.* at 395 (Billings, J., dissenting).

111. *Id.* (citing *Strahler v. St. Luke’s Hosp.*, 706 S.W.2d 7, 12 (Mo. 1986) (en banc)).

112. *Id.* (citing *Smith v. Dep’t. of Ins.*, 507 So. 2d 1080, 1088 (Fla. 1987)).

113. *Id.* at 395-96. The majority in *Kilmer* decided not to address whether or not the abolition of a common law or statutory cause of action was subject to scrutiny under the open courts provision of the Missouri Constitution. *Kilmer*, 17 S.W.3d at 552 n.20.

114. *Simpson*, 749 S.W.2d at 396 (Billings, J., dissenting).

115. *Id.*

tavern, the dissent reasoned that the prosecutor had the discretion of determining whether an individual had a cause of action against the tavern.¹¹⁶ Deciding whether a civil action existed, the dissent argued, was power reserved to the legislature or to the judiciary, but not to the executive.¹¹⁷ Thus, the criminal conviction requirement of section 537.053 violated the separation of powers provision in the Missouri Constitution.¹¹⁸

Finding the criminal conviction requirement in subsection 3 of section 537.053 unconstitutional, the dissent then attempted to address how this unconstitutionality should be handled. As stated in the majority opinion, whether or not a statutory provision may be severed depends upon the intent of the legislature.¹¹⁹ The dissent argued that all of subsection 3, the section granting a cause of action if a criminal conviction had been obtained, could not be severed from the statute because to do so would leave only sections 1 and 2, the sections which explicitly eliminated all dram shop liability.¹²⁰ The legislature, the dissent argued, did not intend to “completely immunize” taverns and restaurants because to do so would have contradicted the legislature’s “concern about irresponsible behavior by sellers of liquor”¹²¹

However, it remains unclear how the dissent would have actually handled this severance issue. The dissent eventually argued that section 537.053 could not “withstand constitutional challenge” and that the plaintiffs should be allowed to pursue their cause of action.¹²² The dissent did not provide any specific details, however, of how the plaintiffs could have legally pursued their cause of action. The dissent never said that it would only sever the criminal conviction language from subsection 3 of section 537.053, effectively creating a broad statute of liability for dram shops, or whether it would have found the entire dram shop liability unconstitutional and reverted back to the common law of *Carver*. Justice Billings merely wrote that “I suggest that [the legislature’s] concern about irresponsible behavior by sellers of liquor would have led the legislature to leave the law as it was [under *Carver*] rather than grant complete immunity”¹²³ The specifics as to how this idea would

116. The dissent argued that the criminal conviction requirement was substantive in nature, yet still violated the separation of powers “in effect.” *Id.* The dissent’s view presents one of the few instances in which an opinion, albeit here a dissenting opinion, has found a substantive statutory requirement to fail under a separation of powers or open courts challenge. See discussion *infra* Parts IV.B.1.b and IV.B.2.b.

117. *Simpson*, 749 S.W.2d at 396 (Billings, J., dissenting).

118. *Id.*

119. *Id.* at 397.

120. *Id.*

121. *Id.*

122. *Simpson*, 749 S.W.2d at 397 (Billings, J., dissenting).

123. *Id.*

translate into an actual holding would have to wait twelve years for Justice Wolff's opinion in *Kilmer*.

IV. *KILMER V. MUN*—EXPLANATION AND ANALYSIS OF THE COURT'S REASONING

By the time the Missouri Supreme Court addressed the Dram Shop Liability Act in the *Kilmer* case, none of the original justices sitting on the bench during the *Simpson* decision remained on the court. The widow and children of Thomas Kilmer brought their case to the court with arguments similar to those raised by Richard Simpson and his family twelve years before.¹²⁴ For Thomas Kilmer's family, the change in time and justices made all the difference in the world.

A. *The Dissenting Opinion in Kilmer—Simpson Revisited: Explanation and Analysis*¹²⁵

Justice Limbaugh, joined by Justices Covington and Benton, delivered the dissenting opinion in *Kilmer*, embracing the arguments made twelve years earlier in the *Simpson* majority opinion and criticizing the *Kilmer* majority for not "giving *Simpson* the courtesy of addressing its compelling rationale."¹²⁶ In dismissing the plaintiffs' open courts challenge, the dissent in *Kilmer* reiterated the majority's opinion in *Simpson* that the criminal conviction requirement was an element of the substantive law, not a procedural precondition to a cause of action.¹²⁷ The dissent also rejected the argument that the statute violated separation of powers, finding that the local prosecuting attorney was *not* exercising any discretion over plaintiffs' possible causes of action but was instead simply fulfilling his statutory duty to file charges against individuals for violating the criminal laws of the state.¹²⁸ Finally, the dissent proposed that even if subsection 3 of section 537.053 was unconstitutional, it would sever

124. See discussion of facts of *Kilmer* *supra* Part I.

125. Although it is rather unconventional for a case note to begin its analysis of the principal case by focusing on the dissenting opinion, the similarities and differences between the *Simpson* and *Kilmer* cases seem to dictate such an atypical organization in order to present the main issues addressed more clearly and succinctly. Discussing the dissenting opinion in *Kilmer*, which largely adopts the majority opinion in *Simpson*, after discussing the majority opinion's fascinating analysis in *Kilmer*, would also seem somewhat anticlimactic.

126. "The majority misapplies the open courts provision to afford plaintiffs a cause of action for dram shop liability that the statute does not permit, and in the process overrules *Simpson v. Kilcher*. . . without giving *Simpson* the courtesy of addressing its compelling rationale, much less paying any consideration to the principles of stare decisis." *Kilmer*, 17 S.W.3d at 554 (Limbaugh, J., dissenting).

127. The dissenting justices failed to provide any rationale as to why the criminal conviction requirement was substantive, rather than procedural. See *id.* at 555 (Limbaugh, J., dissenting) and Part IV.B.1.b *infra*.

128. *Id.* at 556 (Limbaugh, J., dissenting).

subsection 3 entirely, not just the criminal conviction language.¹²⁹ To sever only the criminal conviction requirement, the dissent argued, would create full dram shop liability.¹³⁰ This result would completely conflict with the “legislative intent, or rather the legislative mandate” that no dram shop liability exist except in the criminal conviction situation.¹³¹ The dissent, however, fell one vote short of continuing the *Simpson* line of reasoning in *Kilmer*.

B. *The Majority Opinion*

1. The Open Courts Provision in the Missouri Constitution

a. Explanation

The majority opinion in *Kilmer*, authored by Justice Wolff and joined by Justices Price, White and Holstein, focused on two of the issues that dominated the *Simpson* decision, namely an open courts provision challenge and a separation of powers challenge to section 537.053.¹³² In discussing the open courts challenge to the dram shop liability act, the majority acknowledged a criticism, waged by legal commentators, that Missouri courts had produced an inconsistent, and often “irreconcilable” jurisprudence regarding its open courts doctrine.¹³³ Though past cases may have enunciated different standards, the *Kilmer* majority adopted the dissent’s argument from *Wheeler v. Briggs*¹³⁴ that the open courts provision in the Missouri Constitution “prohibits any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury.”¹³⁵ Moreover, the majority argued that while the legislature could modify or even abolish common law or statutory claims, where the law still recognized a cause of action, a meaningful right to a “certain remedy”

129. *Id.* at 557.

130. *Id.*

131. *Id.*

132. *See generally Kilmer*, 17 S.W.3d at 547-53.

133. *See id.* at 548-49 nn.13-14; *see also* Martin M. Loring, *Constitutional Law: Statutorily Required Mediation as a Precondition to Lawsuit Denies Access to the Courts*, 45 MO. L. REV. 316, 319 n.25 (1980). “The Missouri Supreme Court has not enunciated any consistent rules of law in its interpretation of MO. CONST. art I, § 14, although a variety of fact situations have been found to deny or not to deny access to the courts.” *Id.*

134. 941 S.W.2d 512 (Mo. 1992) (en banc).

135. *Kilmer*, 17 S.W.3d at 549 (quoting *Wheeler*, 941 S.W.2d at 515 (alteration in original)).

Despite the inconsistencies [in the open courts provision cases], there is a coherent line of reasoning that can be distilled from various opinions over the years that, if followed in this and subsequent cases, will ensure that article I, section 14 retains its vitality while permitting proper deference to legislative enactments.

Id.

must remain.¹³⁶ With these principles in mind, the majority developed a “new” test for determining if a legislative act violates the open courts provision in the Missouri Constitution: such a legislative act would violate the open courts provision if it “erected” an “arbitrary or unreasonable barrier” before those individuals “seeking a remedy for a recognized injury.”¹³⁷

In applying its “new” open courts test, the majority held that subsection 3 of Missouri’s dram shop liability statute violated the open courts provision as set forth in the Missouri Constitution.¹³⁸ The majority found that the statute recognized a legal injury, because subsection 3 recognized “causes of action . . . by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises. . . [to] an obviously intoxicated person.”¹³⁹ The injured party, however, could only assert an action for a proper remedy, *i.e.*, money damages, where the person licensed to sell alcoholic beverages had been convicted under section 311.310.¹⁴⁰

The majority found that the criminal conviction requirement constituted an “arbitrary, unreasonable barrier.”¹⁴¹ The court wrote that an injured party’s cause of action was subject to two different barriers: (1) a decision by the local prosecutor to file a criminal action under section 311.310, and (2) a conviction of the seller under section 311.310.¹⁴² Only if both of these requirements were met could an injured party pursue a remedy.¹⁴³ The majority held that these two requirements were “arbitrary and unreasonable” for two general reasons.

The first reason for arbitrariness and unreasonableness arose from the reality that whether a person had a cause of action “depend[ed] entirely upon the decision of the elected county prosecuting attorney.”¹⁴⁴ Such decisions by the prosecutor over whether to prosecute could become “vulnerable to inevitable pressures of local politics or other factors unrelated to the merits, yet [remain] wholly immune from review.”¹⁴⁵ The second factor showing arbitrariness and unreasonableness was the inability to bring lawsuits against out-of-state restaurants and bars under the dram shop liability statute. Under

136. *Kilmer*, 17 S.W.3d at 550. This statement seems quite different, as least theoretically, than the dissent’s view in *Simpson*, where the dissent argued that the legislature, in amending the common law, had to keep an “adequate alternative” unless the legislature could demonstrate an “overpowering public necessity” for the alternation. *See Simpson*, 749 S.W.2d at 395 (Billings, J., dissenting).

137. *Kilmer*, 17 S.W.3d at 550.

138. *Id.* at 545.

139. *Id.* at 550 (quoting section 537.053.3).

140. *Id.*

141. *Id.*

142. *Kilmer*, 17 S.W.3d at 551.

143. *Id.* at 551-52.

144. *Id.* at 552.

145. *Id.*

section 311.310, a criminal conviction could only be obtained against a Missouri alcohol licensee. If an individual had been injured by an intoxicated person who had patronized an out-of-state tavern, such as in Illinois, that tavern would escape liability because the dram shop liability statute required a criminal conviction under section 311.310.¹⁴⁶ For both of these reasons, the majority held that the criminal conviction requirement of subsection 3 of section 537.053 was “arbitrary and unreasonable” and violated the open courts provision in the Missouri Constitution.¹⁴⁷

b. Analysis

While the majority in *Kilmer* purported to develop a new test to determine whether or not a statute violated the open courts provision in the Missouri Constitution, the court simply continued to do what legal commentators have suggested past Missouri courts have done with their open courts decisions: essentially using new legal terms in a “descriptive fashion,” rather than to “delineate any precise standards of analysis.”¹⁴⁸

A number of Missouri open courts cases, such as *Kilmer*, have applied open courts constitutional scrutiny to statutes that granted a party a civil cause of action, but made that action subject to some sort of requirement that had to be fulfilled before a party could pursue the cause of action.¹⁴⁹ In fact, a review

146. *Kilmer*, 17 S.W.3d at 552.

147. *Id.* at 553.

148. Loring, *supra* note 133, at 319 n.25.

149. *See generally* State *ex rel.* Cardinal Glennon Memorial Hosp. v. Gaertner, 583 S.W.2d 107, 110 (Mo. 1979) (requiring medical malpractice claims be submitted to review board before filing a cause of action); Schumer v. Perryville, 667 S.W.2d 414, 415 (Mo. 1984) (requiring that individuals, including children, had to provide a city of the fourth class ninety days notice before filing a cause of action); Strahler v. St. Luke’s Hosp., 706 S.W.2d 7, 9-12 (Mo. 1986) (requiring that injured parties, including children over the age of ten, had to file a medical malpractice suit within two years of the alleged injury); Mahoney v. Doerhoff Surgical Serv., Inc., 807 S.W.2d 503, 509-10 (Mo. 1991) (requiring, in a medical malpractice action, the filing of an affidavit after the filing of a cause of action from a health care expert stating the doctor’s negligence); Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 832-33 (Mo. 1991) (requiring that all causes of action against builders or designers of real property be brought within ten years after the improvement on the real property); Goodrum v. Asplundh Tree Expert Co., 824 S.W.2d 6, 9-10 (Mo. 1992) (requiring that all causes of action possibly covered by Missouri Workers’ Compensation law be submitted before a Professional Liability Review Board); Wheeler v. Briggs, 941 S.W.2d 512, 514-15 (Mo. 1997) (requiring that mentally incapacitated persons could not bring a medical malpractice action until their “disability is removed”). Though somewhat different from legislative enactments which require the occurrence of some action before a cause of action may be brought, it is noteworthy that the Missouri Supreme Court has consistently upheld legislative enactments, at least under open courts constitutional challenges, which granted immunity to certain types of parties or provided limits on damages for various traditional common law causes of actions. *See* Harrell v. Total Health Care, Inc., 781 S.W.2d 58, 61-62 (Mo. 1989) (granting immunity from negligence actions for not-for-profit health corporations); Adams v. Children’s

of these decisions on the open courts issue indicates that while the courts employ different tests to analyze the various pre-civil action requirements, the plain reality of these decisions demonstrates that Missouri courts have routinely scrutinized these statutes by a far simpler standard. Moreover, the constitutionality of these statutes has turned essentially on whether the court believes that the pre-cause of action requirement is a procedural impediment to the civil action, or whether it is an essential part, or element, of the substantive law itself.

Of the cases in which the court found a statutory provision in violation of the open courts provision, all the decisions, either explicitly or by clear implication, have found the statutory requirements to be procedural, rather than substantive. In *State ex rel. Cardinal Glennon Memorial Hospital v. Gaertner*,¹⁵⁰ the court found that requiring a party with a medical malpractice claim to send his or her case to a review board before filing suit violated the open courts provision, because the review board requirement caused a “useless and arbitrary delay.”¹⁵¹ The court in *Gaertner* held that the review board requirement “abridg[ed] the right to file suit,” implicitly indicating that the review board requirement was a procedure which served to prevent a person from pursuing their rights, not an actual component of the right to file suit.¹⁵² If an individual cannot prove one of the substantive elements of the cause of action, that missing element does not serve to prevent one from pursuing a right, but demonstrates that the person has no right to pursue. The court used more explicit language in indicating that a pre-cause of action requirement was procedural in the *Schumer v. Perryville*¹⁵³ and *Strahler v. St. Luke’s Hospital*,¹⁵⁴ cases. Once classifying each of these requirements as procedural, the court could then continue with an analysis as to why each requirement was unreasonable, unnecessary, or arbitrary.

On the other hand, in each case where the court labeled the pre-civil action requirement as substantive, or part of the right sued upon or an element of the cause of action, the court has ruled that an open courts violation has not

Mercy Hosp., 832 S.W.2d 898, 905-06 (Mo. 1992) (limiting the amount of damages a party could receive in a medical malpractice action).

150. 583 S.W.2d 107, 110 (Mo. 1979).

151. *Gaertner*, 583 S.W.2d at 110.

152. *Id.*

153. *Schumer*, 667 S.W.2d at 417. “To require such an impossibility of her would, in effect, be a denial of her right to sue at all upon a perfectly valid cause of action.” *Id.* (citing *Randolph v. City of Springfield*, 257 S.W. 449, 451 (Mo. 1923) (alteration in original)).

154. *Strahler*, 706 S.W.2d at 12. “To the extent that it deprives minor medical malpractice claimants the right to assert their claims individually. . . the provisions of § 516.105 are too severe an interference with a minors’ state constitutionally enumerated right of access to the courts.” *Id.*

occurred.¹⁵⁵ For example, in *Blaske v. Smith & Entzeroth, Inc.*,¹⁵⁶ the court found that a difference in the statute of limitations on suits against builders and developers did not violate the open courts provision because Missouri case law did not demonstrate that the open courts provision limited the “legislature’s authority to design the framework of the substantive law.”¹⁵⁷ A requirement that the Labor and Industrial Relations Commission, rather than a circuit court, must determine whether an incident was an “accident” in a workers compensation situation did not violate the open courts provision, the court said in *Goodrum v. Asplundh Tree Expert Co.*,¹⁵⁸ because the requirement was simply part of the “framework for the substantive law.”¹⁵⁹

In *Wheeler v. Briggs*,¹⁶⁰ the court held that a statute that did not allow “mentally incapacitated persons” to bring a medical malpractice action until they no longer had such a disability failed to violate the open courts provision because mentally incapacitated persons “have the right to pursue in the courts any cause of action the substantive law recognizes.”¹⁶¹ The court further argued that it was “their own disability that prevents, as a practical matter, meaningful access to the courts.”¹⁶² The requirement upheld in *Wheeler* was part of the substantive law, not a procedural impediment. Once a pre-cause of action requirement receives a “substantive” label, the court has not found it in violation of the open courts provision.

In these cases, the process by which the court determines whether a requirement is procedural or substantive, although crucial to the final outcome of the case, received little attention. Because most of these pre-cause of action requirements have both procedural and substantive aspects, one could rationally construe most of them as either procedural or substantive. In fact, one may accurately say that the legislature, with these requirements, sought to fulfill substantive law objectives through procedural means. For example, requiring a plaintiff to submit the question of whether an incident in a workers compensation setting was an “accident” to a labor relations board can be

155. The Missouri Supreme Court in *Mahoney* found that a statute’s requirement of a filing of a medical expert affidavit *after* the plaintiff filed suit was found to be substantive in nature, a “redesign” of the “framework of substantive law,” and was also found not to violate the open courts provision. *Mahoney*, 807 S.W.2d at 510 (quoting *Harrel v. Total Health Care Inc.*, 781 S.W.2d 58, 62 (Mo. 1989)). However, one can also distinguish this case from all of the others discussed in this section because the requirement of an affidavit was not a pre-cause of action requirement, for it only required the affidavit to be filed *after* the suit was filed. *Mahoney*, 807 S.W.2d at 510.

156. 821 S.W.2d 822 (Mo. 1991).

157. *Id.* at 833.

158. 824 S.W.2d 6 (Mo. 1992).

159. *Id.* at 10.

160. 941 S.W.2d 512 (Mo. 1997).

161. *Id.* at 515.

162. *Id.*

considered procedural; showing that an incident was not an “accident” can be considered another step before a plaintiff may pursue an intentional tort action in court. On the other hand, the requirement could serve as part of the substantive law as well, because such decisions by the labor relations board serve to limit the types of incidents which escape coverage under the workers compensation umbrella.

While *Kilmer* purports to create a “new” test for analyzing open courts provision challenges to statutes, in reality, the case merely repeats the traditional procedural-versus-substantive-law test. Though the majority describes the criminal conviction requirement as “arbitrary” and “unreasonable,” the main hurdle that the court had to jump was determining that the criminal conviction requirement was a “barrier” to a lawsuit based on the injury recognized in section 537.053, not an element of the lawsuit itself.¹⁶³ As mentioned earlier, the court in *Simpson* held that the criminal conviction requirement was not an “obstruction or bar to [the] right to sue,” but was instead an “element of plaintiff’s right to sue.”¹⁶⁴ Herein lies the main difference between the court’s decision in *Simpson* and that in *Kilmer*: the *Simpson* court found the criminal conviction provision of section 537.053 substantive; the *Kilmer* court found the requirement procedural. Substantive law cannot violate the open courts provision, but procedural impediments can. Though *Kilmer* suggests that it employs a new test for open courts challenges, the threshold issue upon which the open courts decision turns is whether the court finds a pre-cause of action requirement to be procedural or substantive.

Without any clear rules or methods of analysis for distinguishing between procedural and substantive law in open courts cases, making such a distinction could easily, and probably often does, turn on the various judges’ views as to the proper development of the law, views which may or may not coincide with what the legislature views as the proper development of the law. As *Kilmer* and past case law demonstrate, the extraordinarily vague standards for differentiating between procedural and substantive law provides fertile ground for the judges’ personal views as to the proper development of the law to factor into the open courts doctrine.¹⁶⁵

163. *Kilmer*, 17 S.W.3d at 552 n.20.

164. *Simpson*, 749 S.W.2d at 389. See *supra* notes 100-02 and accompanying text.

165. When discussing whether the criminal conviction requirement was a condition precedent to a cause of action (*i.e.* a procedural requirement) or whether it was an element of the cause of action (*i.e.* a substantive requirement) during the oral argument in *Kilmer*, one Missouri Supreme Court justice admitted, “I don’t understand the difference, necessarily.” Audio file: Oral Argument, *Kilmer* (No. SC81853, January 4, 2000), at <http://www.missourinet.com/supremecourt/archive.asp?category=6&title=kilmer>.

2. Separation of Powers

a. Explanation

After holding the dram shop liability statute in violation of the open courts provision in the Missouri Constitution, the majority addressed whether the statute violated separation of powers.¹⁶⁶ Similar to the dissent in *Simpson*, the majority in *Kilmer* held that the criminal conviction requirement of section 537.053.3 violated separation of powers because a “prosecuting attorney, and not the legislative branch” or the “court as a matter of common law” decided whether or not a cause of action exists under section 537.053.3.¹⁶⁷ The majority clearly found that the criminal conviction requirement created a “dependency on the executive branch” in an area where the executive branch should have no role.¹⁶⁸ To illustrate its point, the majority asked a series of hypothetical questions, such as whether a statute could permit the “state supervisor of liquor” to decide which cases were serious enough to warrant a cause of action, or could permit the “tavern operator’s state senator” to make such decisions.¹⁶⁹ Any of these possibilities, the majority argued, “invites arbitrary refusals of the right to pursue a claim.”¹⁷⁰ With its rationale made abundantly clear, the majority held that section 537.053 violated separation of powers.¹⁷¹

b. Analysis

In *Simpson*, the dissent discussed the issue of an open courts violation and the issue of a separation of powers violation as two separate and distinct constitutional challenges to section 537.053.3.¹⁷² In *Kilmer*, it is not altogether clear if the majority found section 537.053.3 unconstitutional because the criminal conviction requirement failed on both an open courts and separation of powers challenge, or because the majority found the separation of powers violation here as an example of the statute being “arbitrary and unreasonable” and therefore in violation of the open courts provision. Such a distinction, however, seems to make little difference to the court’s holding.

The significance of the majority’s separation of powers discussion lies in the disgust that it shows, through its series of hypothetical questions, for the way that the statute takes powers that should belong to the judiciary or the

166. *Kilmer*, 17 S.W.3d at 552-53.

167. *Id.*

168. *Id.* at 553.

169. *Id.* at 553 (“After all, if this function can be delegated to officials of the executive branch, why not to members of the legislative branch?”).

170. *Id.*

171. *Kilmer*, at 552-53.

172. *Simpson*, 749 S.W.2d at 395.

legislature and gives it to the executive branch. This disgust, at least in part, helps to explain the majority's decision on two crucial issues in this case,¹⁷³ namely whether the criminal conviction requirement is procedural or substantive¹⁷⁴ and how the court interprets the legislature's intent under the statute.¹⁷⁵

3. Severance of the Unconstitutional Criminal Conviction Requirement

a. Explanation

After declaring the criminal conviction requirement unconstitutional, the majority began its analysis of how to treat this constitutionally offensive statutory provision. As mentioned earlier, Missouri, by statute, allows courts to sever unconstitutional statutory provisions unless the court determines that the "legislature would not have enacted the valid provisions without the void one."¹⁷⁶ The court clearly found subsection 3, the subsection requiring a criminal conviction, unconstitutional. However, the majority wrote that the "only constitutionally offensive part of section 537.053.3 is that part requiring a criminal prosecution and conviction."¹⁷⁷ Therefore, only the criminal conviction requirement should be removed, the majority argued, leaving subsection 3 to read as follows:

Notwithstanding subsections 1 and 2 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises . . . if the sale of such intoxicating liquor is the proximate cause of the personal injury or death sustained by such person.¹⁷⁸

The effect of such a severance, according to the majority, alters subsection 3 from an exception to a denial of a cause of action, to a grant of a general cause of action. However, the majority found that severing the conviction requirement would be more proper than completely severing subsection 3 from the statute. Removing subsection 3 from section 537.053 in its entirety would have left only subsections 1 and 2, the subsections that eliminated dram shop liability.¹⁷⁹ In order to remove subsection 3, the majority reasoned, the court

173. For a discussion of the court's displeasure with this encroachment upon judicial autonomy, see *infra* Part V.

174. For a discussion of how the vague distinction between procedural and substantive requirements can affect the open courts doctrine, see *supra* Part IV.B.1.b.

175. For a discussion of the majority's curious interpretation of the legislature's intent, see *infra* Part IV.B.3-4.

176. *Kilmer*, 17 S.W.3d at 553.

177. *Id.*

178. *Id.*

179. *Id.*

would have to find that the “legislature intended no dram shop liability.”¹⁸⁰ The majority, however, argued that the legislature “did enact dram shop liability [in subsection 3 of section 537.053], so it would be wrong for [the Court] to assume the legislature intended otherwise.”¹⁸¹ Therefore, the majority decided to remove only the criminal conviction language from subsection 3.

b. Analysis

From a logical standpoint, one can only understand the majority’s analysis on the severance issue by considering this Note’s earlier discussion of the distinction between procedural and substantive law with open courts cases.¹⁸² The majority could only argue that subsection 3 created dram shop liability if it saw the criminal conviction requirement as a procedural impediment to the substantive law civil cause of action, rather than an element of the cause of action. If the criminal conviction requirement was only a procedural barrier, then subsection 3, when read in isolation from subsections 1 and 2, could be read as creating dram shop liability. If subsection 3 was read to create dram shop liability, removing it from the statute would seem to conflict with the legislature’s intent. Only with such a highly technical reading could the majority, as the dissent pointed out, move beyond the plain intent of the legislature to provide only a limited exception for dram shop liability, rather than create full dram shop liability.¹⁸³

180. *Id.*

181. *Kilmer*, 17 S.W.3d at 553-54.

182. See discussion *supra* Part IV.B.1.b.

183. The legislative intent in section 537.053 appears fairly clear. The legislature wanted to eliminate civil dram shop liability except in cases so egregious that a criminal conviction was warranted. Under the severability statute, if a court finds a portion of a statute unconstitutional, then the remaining portions are valid unless the court finds that the “valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.” MO. REV. STAT. § 1.140. Since the majority in *Kilmer* found the criminal conviction requirement unconstitutional, no workable severance of the statute would have complied with the legislative intent. Severing all of subsection 3 would have completely eliminated all dram shop liability, which was not the legislative intent. Eliminating only the criminal conviction requirement, at least in the majority’s view, allowed full-fledged dram shop liability—which was certainly not the legislature’s intent. Because any severance of section 537.053 would have violated the legislature’s intent, the court should have declared the entire statute unconstitutional. Since section 537.053.2 specifically abrogated the *Carver* holding which had allowed dram shop liability, declaring the entire statute unconstitutional would have eliminated this statutory abrogation and would have arguably restored the *Carver* court’s common law decision. Thus, if the court would have declared the entire statute unconstitutional, the court would have accomplished the effect of restoring dram shop liability *and* would have issued an opinion consistent with and in respect of the legislature’s intent.

4. A Statute That Eliminates *and* Creates Dram Shop Liability

a. Explanation

After the majority explained its rationale for severing the criminal conviction requirement from subsection 3, the majority held that the Kilmer could pursue their cause of action.¹⁸⁴ In doing so, the majority failed to address the existence of subsections 1 and 2 of section 537.053, for the majority never expressly severed them from the statute as it did with the criminal conviction requirement.¹⁸⁵ Subsections 1 and 2 of section 537.053 expressly eliminate dram shop liability.¹⁸⁶ Subsection 3, after the majority's severance, now expressly creates dram shop liability.¹⁸⁷ The apparent effect of the majority's severance is that section 537.053 is a statute with an identity crisis—it both eliminates and creates dram shop liability at the same time.

b. Analysis

The majority seemingly treated subsections 1 and 2 as irrelevant. In the course of its open courts provision discussion, the majority wrote that the “legislature purports to eliminate dram shop liability in sections 537.053.1 and 537.053.2, but in actuality it does not.”¹⁸⁸ The majority provided an analysis as to why both subsections 1 and 2 failed to eliminate dram shop liability, even though the legislature thought these subsections would suffice.¹⁸⁹

Subsection 1 of 537.053 declared that “[i]t has been and continues to be the policy of this state to follow the common law of England, as declared in section 1.010, RSMo, to prohibit dram shop liability and to follow the common law” proximate cause rule.¹⁹⁰ The majority noted that section 1.010 of the Revised Statutes of Missouri only includes English common law as it existed in the fourth year of the reign of James the First: the year 1607.¹⁹¹ The concepts of “proximate cause,” or even negligence for that matter, did not evolve until the 19th century. Though subsection 1 attempts to enunciate the policy of Missouri on dram shop liability, the majority pointed to the subsection's historical inaccuracy.

184. *Kilmer*, 17 S.W.3d at 554.

185. The dissent in *Kilmer* seems to make this same interpretive leap as well, writing that the “effect of severing the limitation on the cause of action for dram shop liability is to convert the cause of action to one with essentially the same elements as the court-made action that first appeared in the early 1980s and that the legislature now expressly disallows.” *Id.* at 557.

186. See MO. REV. STAT. § 537.053.1-.2 (1990).

187. See *Kilmer*, 17 S.W.3d at 553-54.

188. *Id.* at 551.

189. *Id.*

190. *Id.*

191. *Id.*

Subsection 2 of section 537.053 abrogated the holdings in cases such as *Carver*, *Sampson* and *Nesbitt*, in “favor of prior judicial interpretation” which endorsed the “proximate cause” rule.¹⁹² The majority argued this statement was false as well, citing the *Skinner* case as an example that the “proximate cause” rule had never been endorsed in Missouri.¹⁹³

The majority’s analysis that the statute was wrong on its history is seriously misleading. As alluded to earlier, *Skinner* did not reject the traditional common law “proximate cause” rule.¹⁹⁴ *Skinner* is first and foremost a slavery case; all apparent holdings relating to damage resulting from alcohol consumption is secondary.¹⁹⁵ Though Mrs. Hughes suffered the legal injury, the actual physical injury occurred not to a third party, but to the patron himself. After consuming his quart of whiskey, Willis did not fire up Mrs. Hughes’s horse and buggy and crash it into the side of her Platte County home; instead, he, by all estimation, suffered terribly from alcohol poisoning. Moreover, as the Missouri Supreme Court correctly noted in *Andres v. Alpha Kappa Lambda Fraternity*,¹⁹⁶ the *Skinner* case did not focus on Willis’ injuries as a human being, but instead focused on his slave master’s “property loss.”¹⁹⁷ The court in *Skinner* did not abrogate the traditional common law “proximate cause” rule because the court treated the case as one of property, holding that one individual by his actions damaged another individual’s property.¹⁹⁸ To argue that *Skinner* rejected the common law rule in Missouri simply ignores the historical context in which the opinion was written and the relatively limited holding that the opinion therefore produced.¹⁹⁹

Moreover, not until Prohibition did the legislature create dram shop liability, and such liability was part of a larger statutory scheme to prohibit all

192. *Kilmer*, 17 S.W.3d at 551.

193. *Id.*

194. See discussion of facts *supra* Part II.A.

195. For an explanation of the court’s holding in *Skinner*, see discussion *supra* Part II.A.

196. 730 S.W.2d 547 (Mo. 1987).

197. *Id.* at 552 n.12.

198. In addition to the comparison of selling alcohol to the slave to placing “noxious food within the reach of domestic animals,” other details in the case also demonstrate that the court truly issued a property damage holding. *Skinner*, 13 Mo. at 443. One can look first to the trial court’s jury instructions, which the Missouri Supreme Court approved, which referred to the “negro boy, Willis” as the “property of plaintiff.” *Id.* at 441, 444. One can also look to the plaintiff’s measure of damages in this case (\$900.00), which just happened to correspond with the slave’s “worth” on the open market (\$900.00). *Id.* at 441-42.

199. The court in *Skinner* does seem to discuss the idea of proximate cause in holding that the sale of whiskey to the slave was the “natural consequence” of the slave’s death. *Id.* at 443. However, such a holding on causation should be limited to this unique slave-as-property damage situation.

sale and consumption of alcoholic beverages in the state.²⁰⁰ Alcohol was considered contraband, and dram shop liability was established to help remove this contraband from Missouri. When Prohibition ended, the legislature specifically repealed dram shop liability. Since alcohol was no longer contraband, a cause of action helping eliminate it was not necessary. After the repeal of the dram shop statute, and with only the *Skinner* slavery case in the background, dram shop liability should have been presumed not to exist.

In fact, it *was* nonexistent. When the Missouri Court of Appeals discussed the liability of tavern and restaurant owners in *Sampson* and *Nesbitt*, they did not hold that dram shop liability existed based upon the common law.²⁰¹ Rather, the cases endorsed tavern liability on a negligence *per se* theory, piggybacking on the legislature's criminal alcohol statute, section 311.310. Only when the Missouri Court of Appeals could not apply the negligence *per se* theory in *Carver* because the dram shop owners in question were licensed in Illinois and not in Missouri, did the court endorse a common law dram shop liability rule. The *Carver* court did not cite any previous Missouri case law that recognized dram shop liability, and only decided to expand dram shop liability because it foresaw the possibility of injury: "Traveling by car to and from a tavern is commonplace *in current times*."²⁰² Dram shop liability developed in Missouri common law courts in the 1980s; otherwise, it did not exist after, or even before, the 1919 Prohibition-style dram shop act.

The legislature was incorrect in stating that "proximate cause" existed in the year 1607 and was probably less than correct in implying that a prior Missouri case existed which directly on-point endorsed the common law "proximate cause" rule. However, the general historical claim that the legislature makes in subsections 1 and 2, that no dram shop liability had existed in Missouri apart from the Prohibition period and the 1980s cases, is correct. To suggest otherwise, as the majority does, is misleading.

Even if the legislature and this Note were completely incorrect on the history of dram shop liability in Missouri since *Skinner*, one cannot ignore the inescapable conclusion that the legislature intended, in subsections 1 and 2, to eliminate dram shop liability in Missouri. The majority itself even seemed to endorse this notion, admitting that "[h]istorical references aside, if subsections 1 and 2 of section 537.053 were the whole statute, we would accept the obvious proposition that the legislature had indeed abolished dram shop liability."²⁰³ By saying that the legislature "purported" to eliminate dram shop

200. For an explanation of the Prohibition-era dram shop liability act, see discussion *supra* Part II.B.

201. For a discussion of the 1980s abrogation cases, see discussion *supra* Part II.D.

202. *Carver*, 647 S.W.2d at 573 (emphasis added).

203. *Kilmer*, 17 S.W.3d at 551.

liability in subsections 1 and 2, the majority acknowledges the legislature's intent—to eliminate dram shop liability.²⁰⁴

Ultimately, the majority's holding in *Kilmer*, although not removing subsections 1 and 2 from the dram shop liability statute, effectively ignores them. Since subsections 1 and 2 seem to eliminate dram shop liability, and the new court-severed subsection 3 creates liability, the majority must have weighed subsections 1 and 2 against subsection 3 in making its final holding. Since subsections 1 and 2 were based on poor legal history, the majority must have decided that the first two subsections were far too imprecise and unclear and that the newly construed subsection 3, creating dram shop liability, must control.²⁰⁵

However, to weigh the viability of these sections against one another violates the standard canons of statutory construction in Missouri. In interpreting statutes, courts presume that the legislature did not intend for any part of a statute to be without meaning or effect.²⁰⁶ Such a presumption is only overcome when no other conclusion is possible.²⁰⁷ "Each word, clause, sentence and section of a statute" has a meaning;²⁰⁸ a court should only ignore "words or figures when necessary to give effect to the manifest intention of the framers of the statute."²⁰⁹ In *Kilmer*, the majority admitted that the legislature "purported" to eliminate dram shop liability in subsections 1 and 2, yet the majority nonetheless ignored those subsections in its decision. Such a holding violates the canons of statutory interpretation in Missouri.

204. *Id.*

205. One could also argue that the court was literally following the direction of the statute as it then existed. Subsections 1 and 2 eliminated dram shop liability. Subsection 3, after the majority's severance, created it. However, subsection 3 also begins with the words, "Notwithstanding subsections 1 and 2 of this section." The majority could argue that even though subsections 1 and 2 eliminate dram shop liability, subsection 3 as now construed should govern because the "notwithstanding" language places subsection 3 in a superior position to subsections 1 and 2. Such a reading, however, underlines the argument that section 537.053 is a statute with an identity crisis for taking away dram shop liability and then giving it right back.

206. *Stiffelman v. Abrams*, 655 S.W.2d 522, 531 (Mo. 1983) (en banc) (finding that a nursing home resident's actual damages did not disappear upon his death where a statute existed which allowed the deceased resident's estate to file suit for the resident's actual damages).

207. *Missouri State Bd. of Registration for the Healing Arts v. Southworth*, 704 S.W.2d 219, 225 (Mo. 1986) (en banc) (refusing to read the phrase "as a profession" into a statute where the legislature had previously and specifically removed the phrase from the statute).

208. *Hadlock v. Dir. of Revenue*, 860 S.W.2d 335, 337 (Mo. 1993) (en banc) (holding that a statute which allowed an exception to the best evidence rule for copies of various government documents did not also remove the requirement that the documents be authenticated).

209. *Consol. Sch. Dist. No. 1 v. Hackmann*, 302 Mo. 558, 560 (Mo. 1924) (permitting the court to ignore a statute's clerical error of listing the number "VI" instead of the intended the number "IV").

V. RATIONALE FOR *KILMER*'S ACTIVISM: PERSONAL VIEWS OF PROPER LEGAL DEVELOPMENT AND JUDICIAL AUTONOMY

As shown in the above discussion of the Court's reasoning in *Kilmer*, the *Kilmer* opinion is dominated by two important issues, namely whether the criminal conviction requirement is substantive or procedural and whether the court properly interpreted the legislature's intent under the dram shop liability statute for purposes of the severability analysis. Though the court found the criminal conviction requirement as procedural, it provided no significant analysis for why it did so. In interpreting the legislature's intent under the statute, the court delivered an opinion which clearly turns the legislature's intent on its head. In order to understand the majority's decision on both of these issues, at least in part, one must consider two factors which go beyond the realm of pure legal reasoning: the judges' personal views of proper legal development²¹⁰ and the protection of judicial autonomy.

Though not directly addressed in the majority's opinion, one cannot ignore the politics involved in the passage of the dram shop liability statute and the more general background and views of the justices joining in the majority opinion. The enactment of the dram shop liability statute in 1985 overturned a strong pro-plaintiff and health and safety movement in the Missouri courts on the dram shop liability issue. With the passage of section 537.053, dram shop liability as enunciated in *Carver* vanished. Though the Governor's office assured that section 537.053 would provide dram shop liability if certain "qualifications" had been met,²¹¹ those "qualifications" served as an effective roadblock to dram shop liability in Missouri.²¹² As Richard McFadin, lobbyist for the Missouri Restaurant Association, said in 1985 as the new statute was enacted, "We think it's one of the most important bills passed for restaurants in a long time."²¹³ The new dram shop liability statute represented a significant regression in plaintiffs' rights, funded and supported by the restaurant, and presumably the alcoholic beverage brewing and distribution, industries. On the other hand, a number of the justices endorsing the majority opinion in *Kilmer* had demonstrated their sympathies in recent opinions for pro-

210. The author of the *Kilmer* opinion, Justice Michael A. Wolff, has himself advocated studying, especially through social science statistical analysis, "judicial politics, and in particular, examining state supreme courts" according to "personal, ideological, and electoral factors." See Michael A. Wolff, *Exploring Judicial Behaviors in the Laboratories of Democracy*, 83 JUDICATURE 267 (2000).

211. Dvorak, *supra* note 71, at B1.

212. Although the number of actual criminal convictions under section 311.310 may have been few, Missouri case law suggests that such convictions did occur after the passage of section 537.053. See *State v. Denton*, 885 S.W.2d 59 (Mo. Ct. App. 1994); *State v. Erickson*, 874 S.W.2d 539 (Mo. Ct. App. 1994); *State v. Miller*, 750 S.W.2d 519 (Mo. Ct. App. 1988).

213. Dvorak, *supra* note 71, at B1.

plaintiff²¹⁴ and health and safety issues.²¹⁵ For members of the majority, *Kilmer* presented an opportunity to construe a statute that represented the antithesis of their demonstrated sympathies.²¹⁶

Perhaps in an even more profound way, the *Kilmer* decision demonstrates the struggle between the legislature and the judiciary over what powers each branch of government should possess. When the Court of Appeals adopted dram shop liability under the common law in *Carver*, the court explained that although “resolution of public policy arguments is primarily a function of the legislature, a court’s refusal to decide questions of public policy is a mistaken abdication of the function of a common law judge.”²¹⁷ Thus, the *Carver* court felt justified in adopting dram shop liability in Missouri without approval from the legislature.²¹⁸ The legislature, however, would quickly nullify that decision with the passage of section 537.053.

Of course, simply modifying or abolishing causes of action under the common law, even according to the majority in *Kilmer*, is well within the

214. These pro-plaintiff sympathies can be seen in the recent judicial opinions that the justices have authored. For Justice Wolff, see *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62 (Mo. 2000) (suing an insurance company for vexatious refusal to pay does not preempt a plaintiff’s pursuit of other causes of action, such as defamation). For Justice White, see *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo. 1998) (in a case where a plaintiff had suffered injuries from the actions of two separate tortfeasors on two different occasions, instructing the jury that one of the defendants was only responsible for damages which “directly resulted” from the defendant’s conduct unfairly prejudiced the plaintiff). For Justice Price, see *Heins Implement Co. v. Mo. Hwy. & Trans. Co.*, 859 S.W.2d 681 (abrogating the old common enemy rule in surface water run-off situations that favored defendants using surface water for a new reasonable use rule which favors plaintiffs damaged by surface water).

215. These sympathies for health and safety issues can be seen in the following recent judicial opinions that the justices have authored. For Justice Wolff, see *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165 (Mo. 1999) (finding that a Missouri resident could file suit in a Missouri court against the Michigan corporation K-Mart Corporation for a fall that the Missouri resident suffered in a K-Mart store in Colorado). For Justice White, see *Newman v. Ford Motor Co.*, 975 S.W.2d 147 (Mo. 1998) (finding that a statute which excluded evidence in a trial of a plaintiff’s failure to wear a safety belt in an automobile collision also applied in a products liability context against an automobile manufacturer). For Justice Holstein, see *Lough v. Rolla Women’s Clinic, Inc.*, 866 S.W.2d 851 (Mo. 1993) (holding that a plaintiff could bring a tort action against a medical physician for negligent acts that the physician performed upon the plaintiff’s mother, even though such acts occurred before the plaintiff had been conceived).

216. “Her [Kilmer’s] attorney, James G. Krispin of Clayton, called the ruling a big win for people who are injured by drunks who are served liquor for consumption on the premises. ‘It was virtually impossible’ to sue the responsible liquor establishment under the law requiring that the bar owner first be convicted of a criminal charge, Krispin said.” Virginia Young, *Court Makes It Easier to Sue Businesses in Alcohol-Related Car Accidents: State Law Had Banned Suits Unless Owner Was Convicted for Serving a Drunk Person*, ST. LOUIS-POST DISPATCH, May 10, 2000, at B1.

217. *Carver*, 647 S.W.2d at 575.

218. *Id.*

powers of the legislature.²¹⁹ While limiting a cause of action may be within the province of the legislature, absolute control over how such causes of action would be limited is not. In *Kilmer*, the method that the legislature used to limit dram shop litigation sparked a fire amongst the majority of the court, for that method threatened the very autonomy and powers of the judiciary itself.²²⁰ Limiting causes of action by providing that one only existed if a criminal conviction had been obtained placed enormous powers, in effect, upon the local prosecuting attorney to decide whether or not an individual had a cause of action. If a prosecutor decided to pursue a criminal action against a tavern, and was successful, then an injured third party would have a civil action against the tavern. If the prosecutor decided not to pursue a criminal action, the injured third party was left with nothing. This effective discretion by the local prosecutor removed power and authority that a circuit court judge or jury would have held after the *Carver* decision. Instead of a judge, on motions to dismiss or for summary judgment, or a jury, in a fact-finding situation, deciding whether a third party had a strong enough claim against a tavern, the local prosecutor, after the passage of section 537.053, now had this authority, or at the very least the first, and often only step in the decision-making process. The transfer of this authority from the judiciary to the executive clearly angered the majority in *Kilmer*, prompting the court to ask sarcastically and rhetorically why the state supervisor of liquor or the tavern owner's state senator should not instead make such a decision. Such strong disapproval over both the legislature's view as to the proper development of the law and the legislature's attempt to remove power from the judiciary in section 537.053 surely helped to encourage an activist opinion in *Kilmer* which quite cleverly reinvented the legislature's intent by employing technical and mechanical arguments and theories.²²¹

VI. EFFECT OF *KILMER* ON CURRENT MISSOURI STATUTORY LAW

As a result of the *Kilmer* decision, any current Missouri statutes which employ procedural-type techniques to limit the number of causes of action filed may face serious doubts. The Missouri Supreme Court has demonstrated its distaste for such measures, especially if they involve removing authority from the judicial branch and investing it in one of the other branches. The

219. The *Kilmer* majority, however, noted that it could not find an instance where the legislature had "abolished a claim in its entirety." *Kilmer*, 17 S.W.3d at 554 n.24.

220. The majority in *Kilmer* also saw the way that the legislature had handled the "proximate cause" of injury issue in the statute as an encroachment upon judicial authority. See discussion *supra* note 81.

221. Russell Watters, the attorney for the defendant restaurant in the *Kilmer* case commented after the opinion was delivered: "The legislature decides what public policy is, generally, not the courts. But in this case, Justice Wolff has decided what the public policy should be." Young, *supra* note 216, at B1.

court has also shown its willingness not only to declare those procedural techniques unconstitutional under the open courts provision in the Missouri Constitution, but also to remove those pre-civil action requirements from the statute, leaving a much broader, more encompassing area of liability behind.²²² Any current Missouri statute that, like section 537.053, limits a cause of action may suffer a similar fate if challenged in the current Missouri Supreme Court.

One area of Missouri statutory law that may prove problematic under the open courts and separation of powers rationale of *Kilmer* is the Missouri Omnibus Nursing Home Act.²²³ The Nursing Home Act sets forth a series of rights that nursing home residents possess when living in a nursing home in the state of Missouri.²²⁴ If one of those rights is violated by the nursing home, a nursing home resident or his or her family may have a cause of action against the nursing home.²²⁵ If a violation occurs, the resident or his or her family must file a complaint with the Missouri Attorney General's office.²²⁶ The Attorney's General office has sixty days after the complaint is filed to decide whether to pursue legal action, such as enjoining or restraining the facility from further violations of the Nursing Home Act,²²⁷ enjoining the nursing home's acceptance of new residents pending substantial compliance with the Nursing Home Act,²²⁸ or commencing receivership proceedings.²²⁹ If the Attorney General's office decides not to take any action, then the nursing home resident or his or her family may pursue a civil action against the nursing home for actual damages.²³⁰ However, if the Attorney General decides to pursue

222. See discussion *supra* Part IV.

223. See MO. REV. STAT. §§ 198.003-198.186 (1979).

224. Such resident rights include, among others, the right to be free from physical and mental abuse, the right to participate in the planning of the resident's total care and medical treatment, and the right not to be transferred or discharged unless necessary for the resident's medical condition or for non-payment for the resident's stay. See MO. REV. STAT. § 198.088 (1979).

225. See MO. REV. STAT. § 198.093.3 (1979).

226. See § 198.093.1.

227. See § 198.093.3; Alan B. Hoffman & Karen E. Schreier, *A Private Right of Action Under Missouri's Omnibus Nursing Home Act*, 24 ST. LOUIS U. L.J. 661, 675 n.133 (1981).

228. See § 198.093; MO. REV. STAT. § 198.067.1 (1979); Hoffman & Schreier, *supra* note 227, at 675 n.133.

229. See § 198.093; MO. REV. STAT. § 198.099 (1979); Hoffman & Schreier, *supra* note 227, at 675 n.133.

230. If the Missouri Attorney General does not act within sixty days of his receipt of the complaint, then the resident or his estate has 240 days from the date of the filing of the complaint with the attorney general to file suit against the owner or operator of the nursing home for actual damages. See § 198.093.3. Long before the *Kilmer* decision, legal commentators have argued that the Nursing Home Act might also face constitutional problems under an open courts challenge because by forcing nursing home residents to wait at least sixty days before filing suit, the statute effectively hinders a resident's right to "immediate temporary relief." See Hoffman & Schreier, *supra* note 227, at 675-77.

legal action against the nursing home, then the nursing home resident may not file a civil action against the nursing home.²³¹

As with the dram shop liability statute discussed in *Kilmer*, the Missouri legislature used the attorney general complaint process as a screening function to limit the number of civil actions that could be filed.²³² Though different in a number of ways, potential plaintiffs under both the dram shop liability statute and the Nursing Home Act reply upon the decision of a member of the executive branch in determining whether those plaintiffs have a cause of action. Under the dram shop act, the plaintiff needed the local county prosecutor to file and succeed in a criminal action against the tavern or restaurant before a civil cause of action existed. Under the Nursing Home Act, a party must wait until the Attorney General's office decides not to pursue an action against the nursing home before that individual has a cause of action. Though the two statutes are very different, in both cases the plaintiff is dependent upon the discretion of a member of the executive branch for the existence of his cause of action. And under both statutes, the plaintiff, because of the executive branch officer's decision, could be left without a remedy for his or her injury.²³³ If the court finds this pre-civil action requirement "arbitrary" or "unreasonable," then the statute could face a serious challenge.²³⁴

The similarities between the two statutes does not of necessity mean that the Missouri Supreme Court would strike down the attorney general complaint requirement in the Nursing Home Act. After all, under the Nursing Home Act, the Missouri Attorney General does not have to undertake any legal action against the nursing home as the dram shop liability statute required of the local prosecutor. A nursing home resident obtains a cause of action if the attorney general decides to do nothing—in fact, the attorney general's doing nothing is required for a cause of action to arise.²³⁵ The key question is whether the court

231. Hoffman & Schreier, *supra* note 227, at 675-77.

232. See Steve Vossmeier & Diane Felix, *The Missouri Omnibus Nursing Home Act of 1979: A Legislative History*, 24 ST. LOUIS U. L.J. 617, 644 (1981).

233. No where in the Nursing Home Act does it allow the attorney general to pursue a civil action for money damages for the plaintiff.

234. The court may find the attorney general complaint requirement "arbitrary" or "unreasonable" if evidence existed that demonstrated that the requirement effectively prevented any sort of legal action for statutory violations, such as if the Missouri Attorney General's office performed sham or half-hearted legal actions against violating nursing homes in order to protect certain insurance companies and medical groups from significant liability.

235. This difference may well prove crucial. Under section 537.053, if the criminal conviction requirement was not fulfilled, then no legal action against the dram shop would have occurred. The Nursing Home Act, with its pre-civil action requirement, assures that some legal action against the nursing home would be pursued, either by the resident or his estate or by the Missouri Attorney General. This distinction between the two statutes may serve to highlight the relative oddity of the criminal conviction requirement in section 537.053, and may also indicate

would classify the pre-civil action requirement as a procedural precondition to a cause of action, such as the criminal conviction requirement in the dram shop statute,²³⁶ or simply as part of the substantive law, such as the Labor and Industrial Relations Commission's review of workers compensation cases.²³⁷ The Missouri Supreme Court has not enunciated any clear rules for distinguishing between procedural and substantive law in the "open courts" context. Therefore, if the current justices on the Missouri Supreme Court, who seem sympathetic to pro-plaintiff and pro-health and safety concerns, find this requirement an improper development of Missouri law, as well as an attack on the authority and autonomy of the judiciary, then the attorney general complaint requirement could also be severed from the Nursing Home Act under the *Kilmer* analysis.

VII. LEGISLATIVE STRATEGIES FOR WORKING WITH *KILMER*

In an era where tort reform has become a rather popular idea, it seems unlikely that the Missouri legislature would want to abandon its efforts to limit the number of civil actions filed under either existing or future statutes. In order to maneuver around the *Kilmer* decision the legislature has two simple options. First, legislators could make sure that justices sympathetic to pro-plaintiff and pro-health and safety concerns are no longer accepted on the Missouri Supreme Court. Second, the Missouri legislature could attempt to eliminate entire causes of action, or grant large fields of immunity. However, neither of these solutions seems particularly viable politically, nor do they seem in step with traditional notions of good government.

Perhaps the best way for the Missouri legislature to deal with the *Kilmer* decision in its future statutory enactments is not to try to circumvent *Kilmer*, but to work with it.²³⁸ The main problem in *Kilmer* that doomed the dram shop liability statute was the method in which the legislature attempted to limit the

that the possibility of future activism by the current court in striking down other statutes is fairly limited. However, the key question in analyzing the constitutionality of these pre-civil action requirements under Missouri law seems to be whether the court would hold that the requirement is a procedural condition precedent to a civil action or an actual element of the substantive law. As mentioned earlier, how the court would rule on this question is unpredictable. See discussion *supra* Part IV.B.1.b.

236. See *Kilmer*, 17 S.W.3d at 550.

237. See *Goodrum*, 824 S.W.2d at 10.

238. "[W]e [the Missouri Supreme Court] leave it to the legislature to decide whether the statute, as it remains, should be retained, repealed or modified in some constitutionally appropriate manner." *Kilmer*, 17 S.W.3d at 554. As of the date of print of this Note, the Missouri legislature seems poised to repeal the dram shop liability statute, as modified by *Kilmer*, and fully shield taverns and restaurants from liability for the negligent sale of alcoholic beverages. Bills in both houses of the Missouri legislature have been introduced which would accomplish this effect. See Editorial, *Drunken Driving: Taking Responsibility*, ST. LOUIS POST DISPATCH, Feb. 28, 2001, at B2.

amount of litigation that the statute could produce, the criminal conviction requirement. If the legislature truly wants to provide dram shop liability in cases so egregious that a criminal conviction would have been possible if pursued, the legislature can create constitutionally acceptable statutory language that could accomplish this result, such as by requiring heightened levels of intent by the tortfeasor.

For example, the original version of Senate Bill 345 introduced by Senator Panethiere provided the following provisions describing what constituted “reckless” behavior by taverns or restaurants:

1. The service of alcoholic beverages is reckless when the server knows, or a reasonable person in his position should have known, that such service creates an unreasonable risk of physical harm to others that is substantially greater than that which is necessary to make his conduct negligent.
2. Specific serving practices that are admissible as evidence of reckless conduct include, but are not limited to, the following:
 - (1) Active encouragement of intoxicated persons to consume substantial amounts of alcoholic beverages;
 - (2) Service of alcoholic beverages to a person, eighteen years or under, when the server has actual or constructive knowledge of the patron’s age;
 - (3) Service of alcoholic beverages to a person that is so continuous and excessive that it creates a substantial risk of death by alcohol poisoning;
 - (4) The active assistance of a person into a motor vehicle when the person is so intoxicated that such assistance is required and the person giving assistance knows or should know that the intoxicated person intends to operate the motor vehicle.²³⁹

At the time of the bill’s introduction, this section sought to define what constituted “reckless” behavior for the purposes of defining when an injured third party could obtain punitive damages against the dram shop owner, in addition to actual damages.²⁴⁰ However, the legislature could use this section as the standard that must be met for dram shop liability to arise. While parts of this section could be tightened to remove any ambiguities or open questions of liability, this section could nonetheless serve as a model for how the legislature could still provide liability in a few egregious situations, yet limit the amount of total litigation, for simple negligence under this method would not give rise to a cause of action.

Using this method to define when a cause of action exists would pass open courts and separation of powers scrutiny. Without any pre-civil action

239. S.B. 345. For a general discussion of this early version of the dram shop liability bill, see notes 74-75 and accompanying text.

240. *Id.*

requirement, such a statutory scheme could only be described as substantive, thereby overcoming an open courts challenge. Moreover, this method would not rely on a member of the executive branch to determine when a cause of action would arise; judges and juries would interpret this statutory standard based upon the facts before them and thus separation of powers would not pose a problem. However, for the legislature to choose this method to limit litigation while still allowing some liability would force the legislature to trust the judiciary to interpret the statutory language in a manner consistent with the legislature's intent. The absence of this sort of legislative trust in the judiciary, however, provided the impetus in part for the development of section 537.053. The analysis provided in *Kilmer* does not help develop this trust, either. As mentioned earlier, though, this alternative method may prove to be the only politically viable solution.

VIII. CONCLUSION

From its analysis of the history of dram shop liability in Missouri to its interpretation of the legislature's intent behind section 537.053, the majority opinion in *Kilmer* may prove to be one of the most activist interpretations of Missouri statutory law in recent history. However, the lessons of *Kilmer* are fairly clear. The current members of the Missouri Supreme Court will not tolerate subversion of judicial autonomy through the legislature's use of procedural limiting devices, especially if the devices limit the types of civil actions for which the current bench may hold sympathies. Moreover, the current court has shown no hesitancy in removing these pre-civil action requirements from statutes, and in the process of doing so, creating rather large and broad areas of liability. Only by enacting descriptive, and therefore constitutionally acceptable statutes will the Missouri legislature assure itself that its attempts to limit litigation will not be held unconstitutional.

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** J.D. Candidate, Saint Louis University School of Law. I would sincerely like to thank Professor John Griesbach and the *Law Journal* editors and staff members for all of their invaluable suggestions, critiques and insights. I would also like to thank my family, especially my mother, for always supporting me and my educational endeavors. And finally, I would particularly like to thank Jill for encouraging me to write about this topic when I thought that it was a really bad idea, and for unselfishly giving up all of those Saturday nights for the not-so-distinguished privilege of watching me stare at a computer screen while I was writing this article.

