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Recent Cases

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CONSTITUTIONAL LAW—EXPERT WITNESS—STATE'S DUTY TO PROVIDE INDIGENT DEFENDANT WITH EXPERT ASSISTANCE

People v. Watson[1]

I. Introduction

Defendant was convicted of attempted forgery, and sentenced to one to five years in the penitentiary. Prior to trial, defendant's court-appointed attorney filed a motion requesting funds to obtain the services of a questioned-document examiner. Defendant stated that he was indigent and his attorney signed an affidavit that in his opinion such expert testimony was essential to an adequate defense for his client. On argument of the motion, the state contended that handwriting was not an issue in a charge of attempted forgery by delivery of a forged check, and also that there was no statutory authority for appointment of expert witnesses in noncapital cases. The trial court denied defendant's motion. After conviction he appealed to the Supreme Court of Illinois, contending that the trial court's refusal to provide him with expert assistance deprived him of due process of law guaranteed by the United States and Illinois constitutions in that he was not allowed to call witnesses in his own favor. The court reversed defendant's conviction.

The supreme court found that from the facts if defendant did not sign the check, he did not deliver it, since the prosecution's witness testified that defendant signed the check in his presence. Therefore, the issue of handwriting was material to the charge of attempting to deliver a forged instrument. The court then considered the constitutional question.

The court held that in a case where expert assistance is necessary to establish a defense, the indigent defendant is entitled to a reasonable fee for the purpose of hiring an expert witness. The compulsory process clauses of the Illinois and United States constitutions guarantee to the accused the right to obtain witnesses in his own favor.[2] The court said that this right is fundamental to our legal system, and "a right so fundamental should not be made to depend upon the financial circumstances of the defendant."[3] While the defendant can compel the attendance of the expert witness, he can not compel the preparation necessary to forming an opinion.[4] "Thus, although the defendant is afforded the shadow of the right to

1. 36 Ill.2d 228, 221 N.E.2d 645 (1966).
2. Washington v. State of Texas, 388 U.S. 14 (1967).
3. People v. Watson, *supra* note 1, at ——, 221 N.E.2d at 648.
4. See cases collected in 77 A.L.R.2d 1182 (1961). It is generally held that an expert cannot be required to make pretrial preparation or perform professional services.

call witnesses, he is deprived of the substance."[5] In effect, the Illinois Supreme Court said that the accused is entitled to *effective* compulsory process, just as he is entitled to effective assistance of counsel.[6]

An Illinois statute[7] provides for payment of expert witnesses in capital cases, but the court, while recognizing it as a step in the right direction, said the safeguards for a fair trial make no distinction between capital and noncapital cases. Only seven other states have statutes specifically providing for payment of expert witness fees for indigent defendants, and some are very limited in scope.[8] Many states have statutes providing for payment of ordinary witness fees when a defendant is unable to pay, but these have generally been construed to exclude payment of additional compensation to experts.[9] Therefore, the statutory provisions are not adequate and do not protect the indigent defendant, who often needs expert testimony as much as he needs assistance of counsel. While providing reasonable compensation of expert witnesses by the state is clearly a function of the legislature, the courts can do much to stimulate legislation by following the precedent set by Illinois.

There are several possible constitutional grounds for the right of an indigent defendant to receive expert assistance at the expense of the state. The Illinois Supreme Court relied on the right to compulsory process guaranteed by the Illinois constitution, but also intimated that the effective implementation of this right is part of the due process clause of the fourteenth amendment.[10] Other courts have considered the question one of effective assistance of counsel. It can also be argued that denial of expert assistance violates the equal protection clause of the fourteenth amendment.

II. Grounds for the "Right"

A. *Compulsory Process*

In a case decided after *People v. Watson* the United States Supreme Court held that the right of an accused to have compulsory process for obtaining witnesses in his own favor is fundamental and essential to a fair trial, and thus is

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5. People v. Watson, *supra* note 1, at ——, 221 N.E.2d at 648.

6. See, *e.g.*, Williams v. Beto, 354 F.2d 698 (5th Cir. 1965); Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962).

7. Ill. Rev. Stat. ch. 38, § 113-3 (e) (1965).

8. Cal. Civ. Proc. Code § 1871 (any civil, criminal, or juvenile proceeding); Fla. Stat. Ann. § 932.30 (Supp. 1967) (felony cases); N.H. Rev. Stat. Ann. § 604-A:6 (Supp. 1965) (any criminal case—maximum of $300 exclusive of reasonable expenses and extraordinary circumstances); N.Y. Code Crim. Proc. § 308 (maximum of $1,000); Pa. Stat. Ann. tit. 19, § 784 (1964) (limited to capital cases); R.I. Gen. Laws Ann. § 9-17-19 (1956) (on such terms and conditions as may be prescribed by the court); S.D. Code § 36.0109 (Supp. 1960). The federal government also has such a statute. 18 U.S.C. § 3006A (e) (1964) (maximum of $300 exclusive of expenses reasonably incurred).

9. Goldstein and Fine, *The Indigent Accused, The Psychiatrist, and the Insanity Defense,* 110 U. Pa. L. Rev. 1061, 1083 (1962).

10. Compulsory process is now clearly incorporated in the due process clause of the fourteenth amendment. *Supra* note 2.

incorporated in the due process clause of the fourteenth amendment.[11] The Court invalidated a Texas statute disqualifying an alleged accomplice from testifying on behalf of the defendant. In reversing defendant's conviction, the Court said:

> We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.[12]

Although this decision is limited to the right to compel the testimony of a fact witness, it is an important step toward acceptance of the holding in the *Watson* case.

The courts have generally not recognized the right of an indigent defendant to have expert witnesses paid at the state's expense.[13] Now, however, the Supreme Court has held that compulsory process is essential to a fair trial.[14] If compulsory process means more than the sterile issuance of a paper, the courts must either change the rule requiring compensation of expert witnesses[15] or provide indigents with expert assistance at the state's expense. Since the former is neither feasible nor constitutional,[16] the courts will undoubtedly continue to allow experts to demand compensation. Although lawyers are required to defend indigents without compensation, there is a clear distinction between lawyers and expert witnesses. It can be said that by choosing the legal profession, a lawyer accepts a special responsibility for the administration of justice, but this is not true of expert witnesses. Illinois agrees that experts must be compensated, but, unlike other states, furnishes the defendant with effective compulsory process. Recognizing the distinction between the right to call witnesses and the right to have the witnesses paid by the state, the court in *Watson* said that the distinction fails in cases involving indigents, and granted the defendant a new trial with an expert witness provided by the state.[17]

B. *Due Process*

While the *Watson* case seems to be the only modern case where a court has specifically considered the question of whether the right to compulsory process requires the state to provide expert witnesses, several cases have dealt with the question of whether due process requires such assistance.[18] Only one has reached

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11. Washington v. State of Texas, *supra* note 2.
12. *Id.* at 23.
13. Philler v. Waukesha County, 139 Wis. 211, 120 N.W. 829 (1909).
14. Washington v. State of Texas, *supra* note 2.
15. See note 4 *supra.*
16. See cases involving constitutional guarantees against the taking of property without just compensation collected in 77 A.L.R.2d 1182, 1185 (1961).
17. People v. Watson, *supra* note 1, at ——, 221 N.E.2d at 648.
18. United States v. Brodson, 241 F.2d 107 (7th Cir. 1967), United States *ex rel.* Smith v. Baldi, 192 F.2d 540 (3rd Cir. 1951), *aff'd,* 344 U.S. 561 (1953); McGarty v. O'Brien, 188 F.2d 151 (1st Cir. 1951), *cert. denied,* 341 U.S. 928

the result of *Watson*.[19] There is a dual approach with due process. It can be interpreted to include the right to effective compulsory process; or providing an indigent defendant with expert assistance can be deemed essential to the requirement of a fair trial. It is not clear upon which constitutional guarantee the Illinois court based its decision, but it seems that it was grounded largely on the compulsory process clause of the Illinois constitution. But even if the right to compulsory process does not include the right to have the state pay expert witnesses,[20] under some circumstances expert assistance may be required by due process.

State v. Superior Court[21] was an action to determine whether the lower court acted within its jurisdiction in ordering payment of a medical doctor as an expert witness for an indigent defendant. Chronic alcoholism was the essence of the defendant's defense. The court recognized that the lower court had the inherent power to protect the defendant's constitutional rights, but held that due process does not require expert assistance at the state's expense.[22] The court applied the criterion used in *Douglas v. California*,[23] *i.e.* "does the failure of the state to provide at its expense expert witnesses to indigents in criminal cases reduce the trial of an indigent to a 'meaningless ritual?' "[24] The court, relying on an earlier Arizona case,[25] concluded that it did not.[26]

The position of the federal courts on the question of expert assistance is not clear. The Supreme Court of the United States has considered the question only once, and that was before the *Griffin*[27] and *Gideon*[28] decisions. In *United States ex rel. Smith v. Baldi*[29] the defendant contended that he was entitled to the pretrial assistance of a psychiatrist. The Supreme Court held that they could not say that "the State has that duty by constitutional mandate."[30] Since the issue

(1951); Greer v. Beto, 259 F. Supp. 891 (S.D. Tex. 1966); State v. Superior Court, 2 Ariz. App. 458, 409 P.2d 742 (1966).

19. Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965).

20. Feguer v. United States, 302 F.2d 214, 241 (8th Cir. 1962).

21. 2 Ariz. App. 458, 409 P.2d 742 (1966), 41 N.Y.U.L. REV. 832 (1966).

22. State v. Chapman, 365 S.W.2d 551 (Mo. 1963), reached the same result. The court held that refusal to allow an indigent defendant to undergo an eye examination at the state's expense did not deny due process. The defendant contended that an eye examination would prove that he was incapable of driving an automobile, and thus prove that he was not guilty of stealing a motor vehicle.

23. 372 U.S. 353 (1963).

24. State v. Superior Court, *supra* note 18, at ——, 409 P.2d at 746.

25. State v. Crose, 88 Ariz. 389, 357 P.2d 136 (1960). In this case even though the court recognized that "the assistance of experts in advance of trial often lies at the very heart of a successful defense," it said that the constitution does not require the state to provide the defendant with the "full paraphernalia of defense."

26. State v. Superior Court, *supra* note 18, at ——, 409 P.2d at 749. In a companion case decided the same day, the Arizona Court of Appeals refused to construe a statute providing for payment of court appointed attorneys to include payment of expert witnesses. State v. Superior Court, 2 Ariz. App. 466, 409 P.2d 750 (1966).

27. Griffin v. Illinois, 351 U.S. 12 (1956).

28. Gideon v. Wainwright, 372 U.S. 335 (1963).

29. 344 U.S. 561 (1953).

30. *Id.* at 568.

of insanity was presented at trial, and impartial psychiatrists did testify, the Court held that the constitutional requirements had been satisfied. In deciding *Smith*, the Court relied on *McGarty v. O'Brian*,[31] a First Circuit decision. Since both cases involve situations where there was expert testimony at trial on the issue of insanity, they are distinguishable from the *Watson* case.

In *Bush v. Texas*[32] the Supreme Court remanded the case without deciding the question of the right to expert assistance, because on oral argument the state agreed to a new trial. In subsequent habeas corpus proceedings, a United States District Court in Texas held that the state must make available testimony of competent psychiatrists where insanity is "seriously in issue."[33] This case seemed to turn on the fact that the defendant had been adjudicated insane some thirty-seven years before his trial. Indeed, the court in *Greer v. Beto*[34] made that distinction when the question came before it. In that case the defendant was not examined by a psychiatrist in connection with either the insanity hearing or the trial on the merits. The court relied on *Smith*, and said that the *Bush* case was inapposite to the facts of the present case. The court failed to see that the absence of any expert testimony made *Smith* clearly distinguishable too.[35]

Although these federal cases are not clear, they support the view that pretrial expert assistance is not a requirement of due process. If there is expert testimony at trial, that is sufficient. Therefore, with respect to its holding that pretrial assistance is not required, the recent Arizona case[36] would seem to be on solid ground.[37] The *Watson* case, however, comes much closer to the goal that all persons charged with a crime "stand on an equality before the bar of justice in every American court."[38]

It is submitted that a denial of due process of law may result in those situations where an expert witness is essential to a defense. It has been suggested that in some cases expert assitance is more important than the assistance of counsel.[39] While recognizing this, the Arizona court considered all the advantages that the defendant enjoys under our system of criminal law sufficient to protect him.[40] All of these advantages are safeguards against the conviction of an innocent man. If the defendant can be forced to go to trial without the one witness than can

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31. 188 F.2d 151 (1st Cir. 1951), *cert. denied*, 341 U.S. 928 (1951).
32. 372 U.S. 586 (1963).
33. Bush v. McCollum, *supra* note 19.
34. 259 F. Supp. 891 (S.D. Tex. 1966).
35. Most of the cases involving expert assistance involve the insanity defense. For a thorough survey of the law in this area, and a discussion of some of the foregoing cases, see Goldstein and Fine, *supra* note 9.
36. State v. Superior Court, *supra* note 18.
37. Comment, 41 N.Y.U.L. REV. 832, 837 (1966).
38. Chambers v. Florida, 309 U.S. 227, 241 (1940).
39. See *Assistance to the Indigent Person Charged With Crime*, 2 GA. ST. B.J. 197 (1965).
40. *E.g.*, heavy burden of proof on the state; prosecution's duty to disclose exculpatory facts to the defense; defendant's right to appeal and new trial; requirement that the prosecution give advance notice of the witnesses it will call. 2 Ariz. App. at 463, 409 P.2d at 747.

provide him with a defense, these safeguards mean little, and his trial is reduced to a "meaningless ritual."

C. *Equal Protection*

The denial of expert assistance at the state's expense may also deny the indigent defendant the equal protection of the laws guaranteed by the fourteenth amendment. In *Griffin v. Illinois,*[41] the Supreme Court held that an indigent was entitled to a free transcript, if denial of the transcript effectively precluded an appeal. In the opinion of the Court, Mr. Justice Black stated that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[42] This broad language could be interpreted to require the state to eliminate all the disadvantages of indigency. *Griffin* was interpreted by some, however, to apply only where one was deprived of access to an integral part of the trial system.[43]

In *Douglas v. California,*[44] the Supreme Court held that a denial of counsel on a first appeal granted as a matter of right results in a denial of equal protection. This was not an "access" case. The defendant could still present his appeal, but was required to do so without assistance of counsel. It can be argued that this is analogous to the defendant who has a valid defense, but cannot afford the expert necessary to effectively present it. However, in *Douglas* the state had established a procedure for providing indigent defendants with counsel on appeal, when in the court's opinion the appeal was not frivolous. This was held discriminatory, since a nonindigent defendant could have counsel to prosecute even a frivolous appeal. In the expert witness situation, one might argue that there is no such discrimination, since the state provides expert assistance to no one. The language of the Court in *Douglas,* however, has been interpreted to invalidate more than the specific California procedure under direct attack in the case. It has established an absolute right to counsel on first appeal granted as a matter of right.[45] The Court said that a poor man's appeal is reduced to a meaningless ritual, thus denying the equality demanded by the fourteenth amendment, when he lacks counsel on appeal. It can be argued that equal protection also requires expert assistance at trial, if to deny it would reduce the trial to a meaningless ritual where the defendant could not adequately present a valid defense. *Draper v. Washington,* a case concerning denial of a transcript on appeal, also contains language to support this view:

> . . . the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions.[46]

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41. 351 U.S. 12 (1956).
42. *Id.* at 19.
43. Comment, 55 MICH. L. REV. 413, 420 (1957).
44. 372 U.S. 353 (1963).
45. Bosler v. Swenson, 363 F.2d 154 (8th Cir. 1966), *aff'd,* 386 U.S. 258 (1967); Donnell v. Swenson, 258 F. Supp. 317 (W.D. Mo. 1966). For a discussion of these cases see Oliver, *An Absolute Right to Counsel on Appeal: Rule and Retroactivity in Missouri,* 32 Mo. L. REV. 230 (1967).
46. Draper v. Washington, 372 U.S. 487, 496 (1963).

While handwriting analysis is a proper subject for lay testimony,[47] it cannot be denied that expert testimony would be superior in most cases, and must be supplied if the indigent's means are to be as good as the affluent's.

Although all of the above cases involve equality at the appellate level, the same principles should apply at the trial level. This would insure that the indigent defendant has a meaningful opportunity to present his complete case. It is submitted that an opportunity to present a defense at trial is certainly as fundamental to obtaining a just result as appellate review of possible trial court errors.

D. *Effective Assistance of Counsel*

Gideon v. Wainwright[48] held that the due process clause of the fourteenth amendment includes the right to assistance of counsel in state criminal cases. It is well established that this right requires *effective* assistance of counsel.[49] So the question becomes—is expert assistance required to satisfy the guarantee of effective assistance of counsel?

The first case where the point was argued was *McGarty v. O'Brien.*[50] The defendant relied on *Avery v. Alabama,*[51] where it was said:

> But the denial of opportunity for appointed counsel to confer, to consult with the accused *and to prepare his defense,* could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.[52]

The First Circuit refused to consider the question of whether under proper circumstances the state would have a duty to minimize the disadvantages of indigency. Impartial psychiatric testimony was available, and the court felt that it was sufficient.

In *United States ex rel. Smith v. Baldi,*[53] the United States Supreme Court cited *McGarty* with approval, and held that pretrial assistance of a psychiatrist was not necessary to provide the defendant with adequate counsel. Once again, however, the decision was based on impartial expert testimony at trial. This distinction was made by the court in *Bush v. McCollum,*[54] which relied on *Smith* to sustain the defendant's contention that he was denied effective assistance of counsel. The court said that "the right to counsel is meaningless if the lawyer is unable to make an effective defense because he has no funds to provide the specialized testimony which the case requires."[55] This view was shared by the three dissenting judges in the *Smith* case when it was before the Third Circuit:

47. Klaus v. Zimmerman, 174 S.W.2d 365 (St. L. Mo. App. 1943).
48. 372 U.S. 335 (1963).
49. Brubaker v. Dickson, *supra* note 6, at 37.
50. 188 F.2d 151 (1st Cir. 1951), *cert. denied,* 341 U.S. 928 (1951).
51. 308 U.S. 444 (1940).
52. *Id.* at 446 (Emphasis added).
53. 192 F.2d 540 (3rd Cir. 1951), *aff'd,* 344 U.S. 561 (1953).
54. 231 F. Supp. 560 (N.D. Tex. 1964).
55. *Id.* at 565.

> The appointment of counsel for a deaf mute would not constitute due process of law unless an interpreter also was available. Nor, in our opinion, would the appointment of counsel learned in the law fulfill the requirement of due process if that counsel required the assistance of a psychiatrist in order to prepare an insane client's defense.[56]

Therefore, there is support for the position that in some cases there can be no effective assistance of counsel without the assistance of expert witnesses.[57] To date, *Bush v. McCollum* seems to be the only case which has found a denial of effective assistance of counsel in failure to provide an expert witness. And as has been seen, that case can be read to turn on the narrow point of the prior finding of insanity. Cases such as *State v. Crose*[58] and *State v. Superior Court*[59] are therefore in accord with the majority of law on this point.

III. Conclusion

At present, Illinois is the only state that has required expert assistance to indigent defendants in the absence of statutory authorization.[60] Illinois based its decision on the right to compulsory process, but the same result can be reached under due process, equal protection, or effective assistance of counsel. There are many problems that follow a decision that such a right to expert assistance exists,[61] *e.g.*, when must it be granted, and what form must it take? It is submitted that the due process clause presents the most practical basis for this right. It would only require that the state provide expert assistance when it is necessary to insure "fundamental fairness."[62] But regardless of the test involved, the courts should not shrink from the task because of the expense involved. As pointed out by the late Judge Frank:

> . . . in Scandinavia it has been the practice, for upwards of seventy years, not only to allow every accused a defense counsel of his choice at government expense, but to place the police department and the office of the prosecutor equally at the service of the defense and the prosecution; defense counsel may have these agencies, at government expense, make all

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56. United States *ex rel.* Smith v. Baldi, *supra* note 18, at 559 (Biggs, C.J., dissenting).

57. *Ex Parte* Ochse, 38 Cal.2d 230, 231, 238 P.2d 561 (1951).

58. 88 Ariz. 389, 357 P.2d 136 (1960).

59. 2 Ariz. App. 458, 409 P.2d 742 (1966).

60. Illinois had a statute, *supra* note 7, but it did not include noncapital cases.

61. For a discussion of the difficulties inherent in providing expert assistance, see 47 Minn. L. Rev. 1073-78 (1963).

62. Rochin v. California, 342 U.S. 165 (1952). Practical limitations clearly prevent the state from removing all of the disadvantages of indigency, and the Supreme Court has recognized that the state has no such burden. Griffin v. Illinois, *supra* note 27, at 21; Douglas v. California, *supra* note 44, at 356. The affluent defendant will always be able to obtain a more extensive investigation and preparation of his defense by an expert witness than the state can afford to provide to every indigent defendant. Due process would only require that the defense be presented to the trier of fact by a competent expert, not that the state provide the defendant with a battery of the leading experts in the field.

necessary investigations, including searches for witnesses and documents and analyses by handwriting, medical or chemical experts.[63]

Until some or all of the assistance given defendants in Scandinavia is afforded indigent defendants in the American courts, there will continue to be defendants deprived of a fair trial because they lack the funds to present an adequate defense.

W. CLIFTON BANTA JR.

SEARCH AND SEIZURE—SEARCH WARRANT REQUIRED FOR ADMINISTRATIVE INSPECTIONS MADE WITHOUT OWNER'S CONSENT

Camara v. Municipal Court[1]
See v. City of Seattle[2]

The Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

This statement, by Mr. Chief Justice Taft, speaking for the Court in *Carroll v. United States*,[3] recognized the fact that subjective and changing values play important roles in defining the reach and meaning of the fourth amendment. The type of doctrinal change which can occur when such subjective values are incorporated in formulas of constitutional interpretation was made strikingly clear in the companion cases of *Camara v. Municipal Court*[4] and *See v. City of Seattle*.[5] Three factors were enumerated in *Carroll* to be considered in applying the fourth amendment: (1) "what was deemed an unreasonable search and seizure when it was adopted"; (2) "public interests"; and (3) "rights of individual citizens."[6] In *Camara* and *See*, instead of construing the amendment in light of all three factors, the Court, in an opinion by Mr. Justice White, gave a decisive role to the third.

The two cases arose out of similar factual situations. In *Camara*, a San Francisco housing inspector was making a routine annual inspection. He was informed by the manager of an apartment house that appellant Camara was using the ground floor rental unit as a residence. The permit of occupancy restricted the ground floor to commercial use.[7]

63. United States v. Johnson, 238 F.2d 565, 573 (2d Cir. 1956) (Frank, J. dissenting), *rev'd per curiam*, 352 U.S. 565 (1957).

1. 386 U.S. —, 87 Sup. Ct. 1727 (1967).
2. 386 U.S. —, 87 Sup. Ct. 1737 (1967).
3. 267 U.S. 132, 149 (1925).
4. *Supra* note 1.
5. *Supra* note 2.
6. Carroll v. United States, *supra* note 3.
7. Mr. Justice White seems to question the validity of this restriction, stating that the inspector "claimed" there was such a provision in the permit. 386 U.S. at —, 87 Sup. Ct. at 1729. The California District Court of Appeal, however, asserted that there was a valid restriction to commercial use. Camara v. Municipal Court, 237 Cal. App. 2d 128, 129, 46 Cal. Rptr. 585, 586 (1965).

The inspector contacted Camara, who admitted that he was living in the rear of his store, but refused to allow an inspection of the premises in the absence of a search warrant. The inspector returned at a later date and was again denied permission to inspect the ground floor. Camara failed to appear in response to a citation issued by the district attorney, after which the inspector returned and Camara refused to permit an inspection for the third time.[8]

Camara was arrested and charged with a violation of the San Francisco Housing Code for his refusal to allow an inspection authorized by the Code.[9] The present action was initiated when Camara petitioned for a writ of prohibition to stay the criminal proceedings. The District Court of Appeal[10] affirmed a Superior Court decision denying the writ, and the Supreme Court of California refused to hear the case.

See involved a similar municipal regulatory provision. An inspection without a search warrant was not allowed by appellant See when the Seattle Fire Department sought to check his warehouse for possible fire hazards.[11] He was convicted of a misdemeanor for failure to comply with a Seattle ordinance which authorized such inspections.[12] This conviction was affirmed by the Supreme Court of Washington.[13]

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8. At no time during this series of events did the inspector attempt to obtain a search warrant. 386 U.S. at —, 87 Sup. Ct. at 1729. He evidently relied exclusively upon his authority to search without a warrant under the SAN FRANCISCO HOUSING CODE. See *infra* note 9.

9. The inspection was attempted under § 503 of the Code which provides: "Employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

Criminal proceedings were brought against Camara under § 507 of the Code, which provides: "Any person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who restricts or opposes the execution of the provisions of this code. . . shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars ($500.00), or by imprisonment, unless otherwise provided in this code. . . ."

10. Camara v. Municipal Court, 237 Cal. App. 2d 129, 46 Cal. Rptr. 585 (1965).

11. The Seattle Fire Department admittedly had no reason to believe any violation of the city fire code existed in the warehouse. Here, as in *Camara,* no effort was made to obtain a search warrant. 386 U.S. at —, 87 Sup. Ct. at 1738.

12. The inspection was attempted pursuant to SEATTLE ORDINANCE 87870, § 8.01.050, which provides: "It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, . . ."

The prosecution was brought under SEATTLE ORDINANCE 87870, § 8.01.140, which provides: "Anyone violating or failing to comply with any provision of this Title or lawful order of the Fire Chief pursuant hereto shall upon conviction thereof be punishable by a fine not to exceed Three Hundred Dollars or imprisonment in the City Jail for a period not to exceed ninety days, or both. . . , and each day of violation shall constitute a separate offense. . . ."

13. City of Seattle v. See, 67 Wash. 2d 475, 408 P.2d 262 (1965).

Both cases were appealed to the Supreme Court,[14] and both decisions were reversed. The Court concluded that the administrative searches involved were "significant intrusions upon the interests protected by the Fourth Amendment."[15]

The *Camara* decision stands for the proposition that any search or inspection is unreasonable under the fourth amendment unless conducted with the owner's consent, or under circumstances constituting an emergency, or pursuant to a judicially authorized search warrant.[16] These guidelines, which have long been recognized as controlling where a search for criminal evidence is involved,[17] were extended to cover all official intrusions into private premises—regardless of the purpose of the entry.[18]

The decision also removed all doubt[19] as to the applicability of the provisions of the fourth amendment to the states when it stated: "As such, the Fourth Amendment is enforceable against the States through the Fourteenth Amendment."[20]

Once the application of the fourth amendment to these cases was established, the Court proceeded to set out guidelines for the conduct of area-wide administrative inspections in the future. Mr. Justice White made it clear that a search warrant is required whenever a property owner refuses to give his consent to an inspection.[21] These warrants, however, can issue without a showing of probable cause to believe that the condition of the building to be inspected violates some

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14. Probable jurisdiction was noted in October of 1966: Camara v. Municipal Court, 385 U.S. 808 (1966); See v. City of Seattle, 385 U.S. 808 (1966).

15. 386 U.S. at —, 87 Sup. Ct. at 1733 (1967). The Court attempted to refute the reasons advanced in Frank v. Maryland, 359 U.S. 360 (1959), for allowing administrative inspections without search warrants. It emphasized that although such intrusions would usually be of an insignificant nature: "The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." 386 U.S. at —, 87 Sup. Ct. at 1733.

16. "Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." 386 U.S. at —, 87 Sup. Ct. at 1730-31.

17. See, *e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Davis v. United States, 323 U.S. 582 (1946); Feldman v. United States, 322 U.S. 487 (1944); Weeks v. United States, 232 U.S. 383 (1914). *But cf.* Schmerber v. California, 384 U.S. 757 (1966). See also McDonald v. United States, 335 U.S. 451 (1948); Trupiano v. United States, 334 U.S. 699 (1948); Johnson v. United States, 333 U.S. 10 (1948); Agnello v. United States, 269 U.S. 20 (1925).

18. "It is surely anomolous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." 386 U.S. at —, 87 Sup. Ct. at 1732.

19. See Mapp v. Ohio, *supra* note 17, at 655; Frank v. Maryland, *supra* note 15, at 373 (concurring opinion); Wolf v. Colorado, 338 U.S. 25, 26 (1949), holding: "The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight Amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration."

20. 386 U.S. at —, 87 Sup. Ct. at 1730.

21. *Id.* at —, 87 Sup. Ct. at 1733, 1736.

provision of a housing or fire code.[22] Sufficient cause will be shown if the inspecting agency can justify the need for the type of inspection it is making in the area for which the inspection is proposed.[23] In other words: "[I]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."[24]

The warrant requirement for administrative searches will presumably give citizens some protection from arbitrary and capricious inspections made to harass a single resident, or made for no valid reason connected with the agency's function or the usual purpose of such inspections.[25] The Court was specific about the fact that a warrant would have to issue for each house involved, and that even though the suspicion of a nuisance in the general neighborhood would be sufficient justification for the search of an individual dwelling, such general necessity would have to be shown in each case.[26]

The Court recognized an exception to the warrant requirement, however, by observing that in case of a public emergency a warrant would not be necessary. In such circumstances an administrative inspection would satisfy the fourth amendment even if made without prior judicial approval.[27]

The opinion in *See* made the additional point that private business premises, as well as private dwellngs, are protected by the fourth amendment and that a search warrant is required in either case.[28] This holding was impliedly qualified

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22. *Id.* at —, 87 Sup. Ct. at 1735-36, stating: "Having concluded that the area inspection is a 'reasonable' search within the meaning of the Fourth Amendment, it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (*e.g.*, a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling."

23. *Id.* at —, 87 Sup. Ct. at 1736.

24. *Ibid.*

25. *Id.* at —, 87 Sup. Ct. at 1732-33.

26. "Thus, as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry." *Id.* at —, 87 Sup. Ct. at 1736.

27. The court, at 386 U.S. —, 87 Sup. Ct. 1736, cites the following cases as examples of administrative searches properly conducted without a search warrant: North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (seizure of unwholesome food); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory smallpox vaccination); Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U.S. 380 (1902) (health quarantine); Kroplin v. Truax, 119 Ohio St. 610, 165 N.E. 498 (1929) (summary destruction of tubercular cattle). See also United States v. Pine Valley Poultry Dist. Co., 187 F. Supp. 455 (S.D.N.Y. 1960) (inspection of unfit poultry); State v. Dupaquier, 46 La. Ann. 577, 15 So. 502 (1894) (inspection of milk for public consumption); Dederick v. Smith, 88 N.H. 63, 184 Atl. 595 (1936) (destruction of tubercular cattle).

28. 386 U.S. at —, 87 Sup. Ct. at 1739. See Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Amos v. United States, 255 U.S. 313 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). *Cf.*, Davis v. United States, 328 U.S. 582 (1946).

by two distinctions between residential and commercial property: (1) dwellings are more private than commercial premises and, therefore, less showing of cause is necessary to justify a warrant to inspect the latter;[29] and (2) the public nature of most business premises carries with it an almost de facto presumption that the request to inspect them has a legitimate basis and springs from a pure motive.[30] It was also implied that the "emergency" excepton to the warrant requirement might be more readily applied to business property because of the greater public interest therein.[31]

The dissent,[32] written by Mr. Justice Clark, in which Mr. Justice Harlan and Mr. Justice Stewart joined, was concerned primarily with the two aspects of the test from *Carroll* which were not considered at any great length by the majority: the historical meaning attributed to the term "unreasonable search and seizure,"[33] and the public interest in effective enforcement of health, housing, and fire codes (particularly in urban areas where inspection is a necessary part of any urban renewal program).[34] It was observed that inspections such as those involved in these two cases presently are being made in virtually every city in America. Mr. Justice Clark argued that search warrants for such inspections would add yet another administrative problem to the already numerous difficulties surrounding the enforcement of housing and fire codes in city slums.

The most effective argument advanced by the dissenters, however, was based upon the history behind the fourth amendment and the construction which it has been given since it was promulgated.[35] As originally proposed in the First Congress, the fourth amendment stated: "The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issued without probable cause, . . ."[36] This draft was amended by adding the words, ". . . , against unreasonable searches and seizures, . . ." immediately following the word "effects."[37] The obvious purpose of this change was to remove all but "unreason-

29. 386 U.S. at —, 87 Sup. Ct. at 1741.
30. *Id.* at —, 87 Sup. Ct. at 1739-40.
31. *Id.* at —, 87 Sup. Ct. at 1739. See cases cited note 27, *supra.*
32. One dissent was filed for both cases. 386 U.S. at —, 87 Sup. Ct. at 1741.
33. "Moreover history supports the *Frank* disposition. Over 150 years of city *in rem* inspections for health and safety purposes have continuously been enforced. In only one case during all that period have the courts denied municipalities this right. See District of Columbia v. Little, [note 53, *infra*]." 386 U.S. at —, 87 Sup. Ct. at 1742.
34. *Id.* at —, 87 Sup. Ct. at 1743-44. See generally Grad and Gribetz, *Housing Code Enforcement: Sanctions and Remedies,* 66 COLUM. L. REV. 1254 (1966); Guandolo, *Housing Codes in Urban Renewal,* 25 GEO. WASH. L. REV. 1 (1956); Comment, *Administrative Inspections and the Fourth Amendment—A Rationale,* 65 COLUM. L. REV. 288 (1965); Note, *Enforcement of Municipal Housing Codes,* 78 HARV. L. REV. 801 (1965); Note, NIMLO MUNIC. L. REV. 286 (1959).
35. See note 33, *supra.*
36. 1 ANNALS OF CONG. 784 (1789) [1789-90].
37. *Ibid.* The fourth amendment now reads in full: "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

able" searches from the purview of the amendment.[38]

It is unlikely that the framers of the fourth amendment believed that administrative inspections were within the scope of its provisions.[39] The amendment was written with reference to the common law right to be free from unreasonable searches and seizures.[40] That this right evolved from efforts to protect Englishmen from searches for incriminating evidence to be used in *criminal proceedings*[41] is evident from an examination of *Entick v. Carrington*,[42] the classic English case in

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38. United States v. Rabinowitz, 339 U.S. 56, 65-66 (1950); State *ex rel.* Eaton v. Price, 168 Ohio St. 123, 137, 151 N.E.2d 523, 532 (1958), *aff'd mem. by equally divided court*, 364 U.S. 263 (1960).

39. Administrative inspections were evidently common at the time of the ratification of the Fourth Amendment. Such procedures were initiated in Maryland before the American Revolution and in other areas, including New York and Boston, even earlier. Frank v. Maryland, *supra* note 15, at 367; Guandolo, *supra* note 34, at 5 n.5. For general history of the efforts of colonial Americans to combat fire and sanitation problems see BRIDENBAUGH, CITIES IN THE WILDERNESS (1938).

Although state practices of long standing are not necessarily constitutional, such usage is often considered by the court reviewing such practices. See, *e.g.*, Boyd v. United States 116 U.S. 616, 622 (1886), stating: "No doubt long usuage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it in the law, or in the historical facts which have imposed a particular construction on the law favorable to such usage." See also Frank v. Maryland, *supra* note 15, at 370-71, 373; Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922); Ownbey v. Morgan, 256 U.S. 94, 103, 111-12 (1921); Louisville & N. R. Co. v. Barber Asphalt Co., 197 U.S. 430, 434 (1905); Field v. Clark, 143 U.S. 649, 683, 691 (1891); Henderson's Distilled Spirits, 81 U.S. (14 Wall.) 44, 61 (1871).

40. It is observed in Boyd v. United States, *supra* note 39, at 626-27: "As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom [Entick v. Carrington, *infra* note 42] and considered it as a true ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory as to what was meant by 'unreasonable searches and seizures.'"

Smith v. Alabama, 124 U.S. 465, 478 (1888), states: "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." *Cf.*, South Carolina v. United States, 199 U.S. 437, 450 (1905); United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898).

41. See Money v. Leach, 3 Burr. 1742, 97 Eng. Rep. 1075 (1765); Rex v. Dixon, 3 Burr. K. B. 1687, 97 Eng. Rep. 1047 (1765); Wilkes v. Wood, 2 Wils. K. B. 203, 95 Eng. Rep. 766 (1763); Huckle v. Money, 2 Wils. K. B. 206, 95 Eng. Rep. 768 (1763); Rex v. Purnell, 1 Wils. K. B. 239, 242, 95 Eng. Rep. 595, 597 (1748), ". . .[W]e all agree the rule could not be granted, because it was a criminal proceeding, and that the motion was to make the defendants furnish evidence against themselves; . . ."; Rex v. Cornelius, 2 Strange 1210, 93 Eng. Rep. 1133 (1744); Regina v. Mead, 2 Ld. Raym. 927, 92 Eng. Rep. 119 (1703), "A man shall not be compelled to produce or give a copy of books of a private nature. . . [because] it would be to make a man produce evidence against himself."

Some of the above cases are cited and discussed in United States v. 3 Tons of Coal, 28 Fed. Cas. 149 (No. 16,515) (C.C.D. Mich. 1875). The court concludes that in all of them, "[t]he proceeding was direct, and its character as a 'criminal case' was clear."

42. 2 Wils. K. B. 275, 95 Eng. Rep. 807 (1765).

point. *Entick* declared the general warrant[43] (which was an instrument issued by the Secretary of State to aid officers in finding the publishers of criminal libel, by giving them blanket authority to search for evidence) illegal. The court made it clear that the common law right to be free from unreasonable searches was a derivative of the common law right not to give evidence against oneself.[44]

The "privilege against self-incrimination" view of unreasonable searches and seizures was carried over into colonial law and is illustrated by the early Massachusetts decision in *Paxton's Case*.[45] This opinion concerned the validity of the writs of assistance, which were similar to English general warrants and used to enforce customs laws in the colonies.[46] The colonists' concern for the proper application of the common law right to be free from unreasonable searches is apparent in this case.[47] Instead of deciding the question when it was argued, the Massachusetts court delayed decision until word could be received about English law on the subject.[48]

An equation of the rights presently guaranteed by the fourth and fifth amendments has thus been a part of American constitutional law since before the Bill of Rights was written.[49] In fact, in the year in which the Bill of Rights was ratified, Congress passed a revenue act ". . . which authorized inspections, searches and seizures, and required books to be kept by distillers, subject to government inspection."[50] Congress did not condition the exercise of these powers on the

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43. See generally 47 Am. Jur., *Searches and Seizures* § 2 (1943); CORNELIUS, SEARCH AND SEIZURE § 3 (2d ed. 1930).

44. The court in *Entick* states at 95 Eng. Rep. 812: ". . .[I]t is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study; but if having it in one's custody was the crime, no power can lawfully break into a man's house and study to search for evidence against him; this would be worse than the Spanish Inquisition; for ransacking a man's secret drawers and boxes to come at evidence against him, is like racking his body to come at his secret thoughts."

This line of reasoning continued at 95 Eng. Rep. 816: "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust and it would seem, that a search for evidence is disallowed upon the same principle. There too the innocent would be confronted with the guilty."

The opinion concluded at 95 Eng. Rep. 818: "The law never forces evidence from the party in whose power it is; . . . Our law is wise and merciful, and supposes every man accused to be innocent before he is tried by his peers: upon the whole, we are all of the opinion that this warrant is wholly illegal and void."

45. QUINCY 51 (1761).

46. See generally GIBSON, THE COMING OF THE AMERICAN REVOLUTION 28-39 (1954); QUINCY, MASSACHUSETTS REPORTS, *Appendix* I (1863).

47. Paxton's Case, *supra* note 45, at 52; Mr. Thacher (who was James Otis' co-counsel) appealed to the Court that: "As says Just. Holt, 'There can be no discretionary power whether a man shall be hanged or not.'"

48. TUDOR, THE LIFE OF JAMES OTIS 86 (1823).

49. See notes 39, 43, & 47, *supra*. See also Frank v. Maryland, *supra* note 15, at 365.

50. United States v. 3 Tons of Coal, *supra* note 41, at 151. See 2 ANNALS OF CONG. 2383 (1791) [1791-92].

authority of a search warrant.[51] This suggests that no significant doubts about the validity of such procedures under *Entick v. Carrington,* or under the spirit of the new fourth amendment to the Constitution, were entertained.

Recent American case law has consistently reaffirmed the fact that the fourth amendment does not apply to routine administrative inspections.[52] As Judge Holtzoff states in *District of Columbia v. Little*: "No reported case has been found that extends the scope of the Fourth Amendment to fields other than crminal law or the enforcement of penaltes."[53] *Little* was the only case which applied the amendment to civil inspections prior to the Supreme Court decisions in *Camara* and *See*.[54]

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51. See authorities cited note 50, *supra.*

52. Boyd v. United States, *supra* note 39, at 620: "We have already noticed the intimate relation between the two amendments [4th and 5th]. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to give evidence against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment." See Frank v. Maryland, *supra* note 15, at 366; Wilson v. United States, 221 U.S. 361 (1911); Bram v. United States, 168 U.S. 532 (1897); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); Henderson's Distilled Spirits, *supra* note 39, at 44; Murray v. Hoboken Land Improv. Co., 59 U.S. (18 How.) 227, 239 (1855); United States v. 62 Packages, Etc., 48 F. Supp. 878 (D.D.C. 1943), *aff'd,* 142 F.2d 107 (7th Cir. 1944); United States v. 3 Tons of Coal, *supra* note 41; United States v. Hughes, 26 Fed. Cas. 421 (No. 15,419) (C.C.S.D. N.Y. 1875); *In re* Strouse, 23 Fed. Cas. 261 (No. 13,548) (C.C.D. Nev. 1871); Stanwood v. Green, 22 Fed. Cas. 1077 (No. 13,301) (C.C.S.D. Miss. 1870); *In re* Meador, 16 Fed. Cas. 1293 (No. 9,375) (C.C.N.D. Ga. 1869).

53. 178 F.2d 13, 24 (D.C. Cir. 1949) (dissenting opinion), *aff'd on other grounds,* 339 U.S. 1 (1950).

54. Cases which have refused to apply the fourth amendment to civil inspections and administrative discovery orders are too numerous to cite in a casenote. *E.g.,* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (inspection of records under Fair Labor Standards Act); Currin v. Wallace, 306 U.S. 1 (1939) (challenge to constitutionality of Tobacco Inspection Act of 1935); Wilson v. United States, 221 U.S. 361 (1911) (investigation of mail fraud; inspection of offending material); American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907) (seizure of copies of article infringing copyright laws); United States v. Rickenbacker, 309 F.2d 462 (2d Cir. 1962) (census schedule); Hughes v. Johnson, 305 F.2d 67 (9th Cir. 1962) (inspection of game storage facilities by federal game wardens); Newman v. United States, 277 F.2d 794 (5th Cir. 1960) (inspection pursuant to liquor tax laws); Shafer v. United States, 229 F.2d 124 (4th Cir. 1956) (inspection of wheat acreage under AAA); Bloch v. United States, 226 F.2d 185 (9th Cir. 1955) (inspection of federal narcotics register in hospital); United States v. Crescent-Kelvan Co., 164 F.2d 582 (3d Cir. 1948) (inspection under federal food and drug laws); United States v. George Spraul & Co., 185 Fed. 405 (6th Cir. 1911) (seizure of goods under Pure Food and Drug Act of 1907); United States v. Jackson, 122 F. Supp. 295 (W.D.N.Y. 1954) (federal liquor inspection); United States v. First Nat'l Bank, 295 Fed. 142 (S.D. Ala. 1924) (federal bank inspection); United States v. Mulligan, 268 Fed. 893 (N.D.N.Y. 1920) (inspection of records under price control laws); Sister Felicitas v. Hartridge, 148 Ga. 832, 98 S.E. 538 (1919) (inspection of private orphanage); Price v. Hamilton, 146 Ga. 705, 92 S.E. 62 (1917) (search for unlawful obstructions of rivers and streams under private control); Deibeikis v. Link Belt Co., 261 Ill. 454, 104 N.E. 211 (1914) (inspection

The inability of the Court to support its decisions in *Camara* and *See* with specific precedent becomes even more apparent when consideration is given to numerous recent state decisions adhering to the traditional view that administrative inspections are not subject to the requirements of the fourth amendment.[55] Since the *Little* case was decided in 1949, state courts in California,[56] Iowa,[57] Maryland,[58] Massachusetts,[59] Missouri,[60] Ohio,[61] South Carolina,[62] and Washington[63] have upheld administrative inspections in the face of constitutional challenges. In addition, in *Frank v. Maryland*[64] and *Ohio ex rel. Eaton v. Price*[65] the Supreme Court upheld the validity of similar searches made without a warrant. The latter two cases were repudiated by the majority in *Camara,*[66] while other authority was ignored.[67]

See and *Camara* thus represent a significant change in a principle of Anglo-American constitutional law which had enjoyed a tenure of more than two hundred

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under Workmen's Compensation Act of Illinois); Financial Aid Corp. v. Wallace 216 Ind. 114, 23 N.E.2d 472 (1939) (inspection of records of small loan companies); Albert v. Milk Control Bd., 210 Ind. 283, 200 N.E. 688 (1936) (inspection under milk regulations); Hubbell v. Higgins, 148 Iowa 36, 126 N.W. 914 (1910) (sanitary inspection of hotels); Mansbach Scrape Iron Co. v. City of Ashland, 235 Ky. 265, 30 S.W.2d 968 (1930) (inspection of junk yards); Keiper v. City of Louisville, 152 Ky. 691, 154 S.W. 18 (1913) (sanitary inspection of food where sold or served); Simms v. Liuzza, 168 La. 714, 123 So. 301 (1929) (fire inspection); Commonwealth v. Carter, 132 Mass. 12 (1881) (inspection of milk); Weimer v. Banbury, 30 Mich. 201 (1874) (seizure of property of persons owing taxes); Ploch v. St. Louis, 345 Mo. 1069, 138 S.W.2d 1020 (1940) (inspection pursuant to cigarette tax laws); *In re* Conrades, 112 Mo. App. 21, 85 S.W. 150 (St. L. Ct. App. 1905) (inspection of corporate books by city tax authorities); Carples v. Cumberland Coal Co., 240 N.Y. 187, 148 N.E. 185 (1925) (seizure of property in debtor's safe deposit box under writ of attachment); Sanning v. Cincinnati, 81 Ohio St. 142, 90 N.E. 125 (1909) (inspection of small loan businesses); State v. Armeno, 29 R.I. 431, 72 Atl. 216 (1909) (inspection of barber shops); Park v. Laurens Cotton Mills, 75 S.C. 560, 56 S.E. 234 (1906) (inspection of books and records of cotton buyers); State *ex rel.* Melton v. Nolan, 161 Tenn. 293, 30 S.W.2d 601 (1929) (inspection of barber shops); State v. McFarland, 60 Wash. 98, 110 Pac. 792 (1910) (inspection of inns, hotels and public lodging houses). See also cases cited notes 27, 39, 41, and 52, *supra,* and notes 56-65, *infra.*

55. Only passing reference is made to these cases at 386 U.S. —, 87 Sup. Ct. 1730 n.3.

56. Camara v. Municipal Court, *supra* note 7.

57. State v. Rees, — Iowa —, 139 N.W.2d 406 (1966).

58. Givner v. State, 210 Md. 484, 124 A.2d 764 (1956).

59. Commonwealth v. Hadley, — Mass. —, 222 N.E.2d 681 (1966).

60. City of St. Louis v. Evans, 337 S.W.2d 948 (Mo. 1960).

61. State *ex rel.* Eaton v. Price, *supra* note 38.

62. De Pass v. City of Spartanburg, 234 S.C. 198, 107 S.E.2d 350 (1959); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955).

63. See v. City of Seattle, *supra* note 13.

64. Frank v. Maryland, *supra* note 15.

65. Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960) (equally divided Court).

66. See note 15, *supra.*

67. See note 55, *supra.* In contrast with *Camara,* the *Frank* opinion dealt at great length with the historical foundations and judicial precedent effecting this area of the law. Frank v. Maryland, *supra* note 15, at 362-65. A thorough discussion of applicable case law is to be found in District of Columbia v. Little, *supra* note 53, at 21-25 (dissenting opinion).

years. Since no specific legal precedent for this change was given by the Court in either opinion, these decisions must be explained as an attempt to give judicial recognition to the fact that technological changes, and changed patterns in municipal regulation of living conditions, have made such governmental practices subject to the fourth amendment.

A policy of altering established rules of law, with only brief reference to established precedent, could have the effect of depriving the Constitution of much of the stability and continuity which it has long possessed.[68] This effect can be avoided through more careful efforts to justify such innovations than were made in *Camara* and *See* in light of past decisions.

Nevertheless, the relative ease with which the procedures outlined by the Court can probably be used should preserve the effectiveness[69] of present community efforts to fight health, fire, and safety hazards that can only be controlled through periodic inspections.[70] All men should have as much privacy in their homes as is possible in light of present social conditions and necessary regulatory measures. The Court seems to have preserved such individual rights with the sacrifice of a minimum of administrative convenience.

RICHARD A. KING

68. "It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law." Mapp v. Ohio, *supra* note 17, at 677 (Harlan's dissenting opinion).

69. In the cases presently considered, as well as in *Frank*, there has been a difference of opinion among the members of the Court on this point. The Justices who presently comprise the majority on the issue believe that the fact a search warrant is required before an administrative inspection can be made will make little difference in the high percentage of residents who have always voluntarily consented to such inspections. 386 U.S. at —, 87 Sup. Ct. at 1735-36; Frank v. Maryland, *supra* note 15, at 384 (dissenting opinion). The dissenters, however, fear that the requirement of a search warrant will generate defiance when inspections are attempted: "But when voluntary inspection is relied on the 'one rebel' is going to become a general rebellion." 386 U.S. at —, 87 Sup. Ct. at 1744 (dissenting opinion); Frank v. Maryland, *supra* note 15, at 371.

70. The practical importance of periodic administrative inspections in urban renewal areas is recognized by all members of the Court. 386 U.S. at —, 87 Sup. Ct. at 1735.

COMPULSORY SCHOOL ATTENDANCE—ONE CHILD, ONE SCHOOL

Special District for the Education and Training of Handicapped Children

v.

Wheeler[1]

I. INTRODUCTION

Plaintiff, Special District, provided speech therapy as part of its program of special education for the children of St. Louis County, including those children attending parochial schools within the county.[2] The special district was entitled to state aid for this and other programs.[3] The State Board of Education, however, refused to reimburse the special district for the 1963-64 school year,[4] because of the way it conducted the speech therapy program.

During the 1963-64 school year special district speech therapists conducted speech correction classes in parochial as well as public schools. When the State Board refused payment of state aid under this scheme, special district did not send its speech therapists into parochial schools in the 1964-65 school year, but offered speech correction services to parochial children in its own buildings.[5] Parochial children were released from their regular schools for that portion of the school day necessary to attend the special classes.[6] The special district again altered its practices for the 1965-66 school year. Parochial students were offered speech therapy in special district buildings, but only after the regular school day had ended.[7]

The Special District sought a declaratory judgment asserting the validity of its speech therapy programs for these three successive school years and seeking a determination of its right to state reimbursement for the first year.[8]

The trial court held that the programs providing speech correction services to parochial children during the 1963-64 and 1964-65 school years were invalid. As a consequence, plaintiff's right to state aid was denied.[9] The program for the 1965-

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1. 408 S.W.2d 60 (Mo. En Banc 1966) (hereinafter cited as Special District v. Wheeler).
2. Section 178.640, RSMo 1965 Supp. requires that the Special District "shall provide free instruction . . . for children under the age of twenty-one years, resident within the county, who are physically or mentally handicapped." See also, Opinion of Attorney General of Missouri, February 15, 1963, O'Connor, No. 104.
3. Under § 178.720, RSMo 1965 Supp. "the special school district shall receive state aid under provisions of 163.151 RSMo."
4. 408 S.W.2d at 62.
5. *Ibid.*
6. Brief for Appellant, p. 7, Special District v. Wheeler, *supra* note 1.
7. 408 S.W.2d at 62.
8. *Ibid.*
9. Although not clear from the opinion or the briefs that the special district had applied for state aid for the latter two school years, it is assumed that it had. Neither the report of the case nor the briefs mention any prayer for payment of state aid for the 1964-65 and 1965-66 school years. Appellant's brief does state

66 school years was held valid. Plaintiff appealed from the adverse determination in regards to 1963-64 and 1964-65. The supreme court affirmed,[10] holding first that plaintiff was not entitled to receive state aid when the speech therapy program was conducted in parochial schools;[11] second, the court construed the Compulsory School Attendance Law to be applicable to publicly financed special education in a program that required parochial children to divide their school day between parochial and public schools in order to participate in speech therapy.

II. The 1963-64 School Year

With regard to the 1963-64 practice of sending speech therapists into the parochial schools, the court relied on the statutory and constitutional provisions requiring that the state school fund be used for "establishing and maintaining free public schools and for no other purposes whatsoever."[11a] The court concluded that sending speech therapists into parochial schools was not for the purpose of maintaining free public schools. Consequently, such use of public school funds would not be pursuant to the constitution or statutes[12] and would be unlawful.[13] As an example the court cited the holding that using such funds for bussing parochial students was not within the statutory and constitutional limitations.[14]

In *McVey v. Hawkins*,[15] a consolidated district bus transported some Catholic school pupils as well as those attending the district's public school. The transportation of the Catholic pupils was without additional expense to the district over and above the cost that would have been incurred if only public school students had been transported. Nevertheless, the court held that the district was using public school funds to transport parochial school children and that such use of funds was not for the purpose of maintaining free public schools.

The holding in the instant case regarding the 1963-64 program of the special district is consistent with the holding in *McVey*. Considered together, they indicate that the court will find unlawful the use of public school funds any time a use of public school facilities or personnel results directly or indirectly in classroom time for the pupils in the parochial school itself.

III. The 1964-65 School Year

On the issue of the 1964-65 practice the Attorney General of Missouri intervened as plaintiff. One of his reasons was that "the trial court's . . . decree en-

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that the trial court found that special district was not entitled to state aid during the 1964-65 school year for any unit of instruction that included children enrolled in parochial schools who received instruction in special district buildings. See Brief for Appellant, p. 7, Special District v. Wheeler, *supra* note 1.

10. 408 S.W.2d at 65.
11. *Ibid.*
11a. Mo. Const. art. IX, § 5.
12. Mo. Const. art. IX, § 5; 166.011, RSMo 1965 Supp.
13. 408 S.W.2d at 63.
14. *Ibid.*
15. 364 Mo. 44, 258 S.W.2d 927 (Mo. En Banc 1953). See also, Cegas, *Transportation of Parochial School Pupils*, 3 St. Louis U.L.J. 273 (1955).

dangered existing educational programs conducted throughout the State . . . ."[16] In addition, various organizations and persons were permitted to file briefs amicus curiae.[17]

The controversy arose because the 1964-65 practice resulted in what is called "released time" or "shared time." The Attorney General characterized it as "dual attendance."[18] That is, the parochial children were dismissed from their schools during the regular school day to attend speech correction classes in the special district's buildings.[19] It was held that the Compulsory Attendance Law[20] was violated by this practice.

A. *Construction of the Language*

The court narrowly construed the language of the Compulsory Attendance Law. The case turned on the question of whether the language of the statute permits a child to be a full-time pupil in one school, but spend part of his school day[21] in another. The act provides that: "Every parent, guardian or other person in this state having charge, control or custody of a child between the ages of seven and sixteen years shall cause the child to attend regularly some day school, public, private, parochial or parish. . . ."[22] Holding that "some day school" means one school in one day and not "some day school or schools" in one day, and that this language was clear and unambiguous, the court did not consider legislative intent. The court said that to do so would be legislating by "judicial fiat."[23] The report of the case makes it self-evident that the meaning of the words "some day school" is not clear and unambiguous. Two members of the court concluded that the meaning of these words was ambiguous and would have reached an opposite result. Judge Finch, joined by Judged Hyde in dissent, pointed out that "some" does not necessarily mean "one."[24]

In construing the compulsory attendance law the court departed from its normal canons of construction of statutes involving school matters. The Missouri courts have repeatedly stated that statutes governing activities of schools and school districts are entitled to liberal construction.[25] An example of this approach is found in *State v. Tillatson*:

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16. Brief for Intervenor-Appellant, p. 6, Special District v. Wheeler, *supra* note 1.
17. The number and sizes of the briefs point out the emotion that was ignited by the case. Six briefs amicus curiae were filed.
18. Brief for Intervenor-Appellant, p. 6, Special District v. Wheeler, *supra* note 1.
19. Brief for Respondent, p. 2-3, Special District v. Wheeler, *supra* note 1.
20. § 167.031, RSMo 1965 Supp.
21. Section 160.041, RSMo 1965 Supp. states that the "school day consists of six hours . . . ."
22. § 167.031, RSMo 1965 Supp.
23. 408 S.W.2d at 63, citing State v. Pilkington, 310 S.W.2d 34 (Spr. Mo. App. 1958).
24. *Id.* at 66.
25. Fowler v. McKown, 315 Mo. 1336, 290 S.W. 123 (1927) (statute on organization of common school districts); State *ex rel.* School Dist. v. Smith, 336 Mo. 703, 80 S.W.2d 858 (En Banc 1935) (statute requiring annual meeting of

> In construing the application of our school laws we must remember the repeated and universal expressions of our courts to the effect that they are to be interpreted liberally, and that substantial compliance with the statutes is sufficient, for generally these laws are administered by laymen.[26]

A liberal construction would have allowed the court to conclude logically that "some day school" means "some day school or schools." The court said in *State v. Pretended Consolidated School District No. 1*:

> We may not capriciously ignore the plain language of the statute but in determining what the language really means we may consider the entire purpose and policy of the statute and "the language in the totality of the enactment" and construe it in the light of "what is below the surface of the words and yet fairly a part of them." The meaning of statutes and particularly the meaning of our school statutes may not be found in a single sentence but in all their parts and their relation to the end in view or to the general purpose.[27]

Thus, to be consistent with the history of cases construing school statutes, the court should have considered the time-honored purpose of compulsory school attendance. That purpose was to insure that parents send their children to school for a minimum time. "Compulsory education laws are enacted to enforce the natural obligation of parents to provide an education for the young . . . ."[28] Such a consideration would also show that it had not before been decided that a compulsory attendance law had any effect on *where* a child went to school,[29] except as expressed in the statute,[30] but that the law was passed to see *that* the

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school district); State v. Heath, 345 Mo. 226, 132 S.W.2d 1001 (1939) (statute imposing qualifications for school district officials); School Consolidated Dist. No. 10 v. Wilson, 345 Mo. 598, 135 S.W.2d 349 (1940) (statute governing validity of a depositary bond); State v. Pretended Consolidated School Dist. No. 1, 359 Mo. 639, 223 S.W.2d 484 (En Banc 1949) (consolidated school district statute); State v. Manring, 332 Mo. 235, 58 S.W.2d 269 (1933); State *ex rel.* Reorganized School Dist. No. 4 v. Holmes, 360 Mo. 904, 231 S.W.2d 185 (En Banc 1950); State *ex rel.* Rogersville Reorganized School Dist. No. R-4 v. Holmes, 363 Mo. 760, 253 S.W.2d 402 (En Banc 1953) (organization of six-director districts); State *ex rel.* School Dist. No. 1 v. Andrae, 216 Mo. 617, 116 S.W. 561 (1909), School Dist. No. 16 v. New London School Dist., 181 Mo. App. 583, 164 S.W. 688 (St. L. Ct. App. 1914), State *ex rel.* School Dist. No. 34 v. Begeman, 221 Mo. App. 257, 2 S.W.2d 110 (St. L. Ct. App. 1928); State v. Hermann, 403 S.W.2d 1 (Spr. Mo. App. 1966) (statutes concerning formation and boundaries of school districts); State v. Consolidated School Dist. No. 1, 238 S.W. 819 (Spr. Mo. App. 1922) (statutes affecting organization of school districts); Lemasters v. Willman, 281 S.W.2d 580 (St. L. Mo. App. 1955) (statute making teachers immune from dismissal by school board—holding that a town school district superintendent was a teacher within the meaning of the statute); Reorganized School Dist. No. R-IV v. Williams, 289 S.W.2d 126 (K.C. Mo. App. 1956) (statute governing change of school district boundaries by special election).

26. 312 S.W.2d 753, 757 (Mo. En Banc 1958).

27. 223 S.W.2d 484, 488 (Mo. En Banc 1949).

28. People v. Levisen, 404 Ill. 574, 575, 90 N.E.2d 213, 215 (1950).

29. Pierce v. Society of the Sisters, 268 U.S. 510 (1925).

30. § 167.031, RSMo 1965 Supp.: "some day school, public, private, parochial or parish . . . ."

child goes to school. The purpose[31] and history of compulsory school attendance[32] reveals that it was never intended to confine school attendance to one school in one day.

B. *Who "Shall Cause" the Child to Attend?*

As the Attorney General stated succinctly: "a school district cannot violate the compulsory attendance law."[33] The statute expressly pertains not to school districts, but to parents, guardians or other persons "in this state having charge, control, or custody of a child" of the prescribed ages.[34] There is no statutory or case authority for bringing a school district within the mandate of the compulsory attendance law. Moreover, this statute had not previously been invoked for any purpose other than to compel parents to send their children to school. Only in Illinois has an attempt been made to use it for another purpose. The Illinois Compulsory Attendance Law was urged as a basis on which to invalidate an act of the Chicago Board of Education.[35] The Board authorized school superintendents to "release" public school children for one hour each week upon parents' request to attend religious education classes.[36] The Supreme Court of Illinois upheld the constitutionality of the practice and rejected without discussion the suggestion that the compulsory attendance law could be applied as a restriction on the Board.

The court's reference to the definition of a "school day" as "six hours in which the pupils *are under the guidance and direction of teachers in the teaching process*" adds nothing to the holding. This statutory definition infers a purpose of providing a minimum of education,[37] but has no relation to where that six hours must be spent.

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31. Special District v. Wheeler, 408 S.W.2d 60, 67 (Mo. En Banc 1966). The dissent discussed the historical causes considered in Encyclopedia Americana, 1957 Edition, Vol. 9, p. 599, *et seq.* Judge Finch quoted the title of the first Compulsory Attendance Act in Missouri to show its purpose to be mandatory school attendance not attendance at a single school. See Laws, 1905, p. 146. The title of a statute is frequently considered in construing it. See Lemasters v. Willman, 281 S.W.2d 580 (St. L. Mo. App. 1955), where the court said: "Often helpful in ascertaining the meaning of legislation is the title it carries."

32. It is interesting to note that Judge Blair in the trial court had said in an opinion he rendered while sitting as a special judge on the St. Louis Court of Appeals: "Judicial notice can be taken of school history that is common knowledge for no requirement forces courts to profess an ignorance of subjects with which all men of ordinary affairs are familiar." Lemasters v. Willman, *supra* note 31 at 585.

33. Brief for Intervenor-Appellant, p. 13, Special District v. Wheeler, *supra* note 1.

34. § 167.031, RSMo 1965 Supp.

35. People *ex rel.* Latimer v. Board of Education, 394 Ill. 228, 68 N.E.2d 305 (1946).

36. This situation is what is more commonly referred to as "released time." It is actually the converse of the situation in dispute in the instant case where parochial children were released to attend a public school. In *Latimer, supra* note 35, public school children were released from school for religious purposes. This latter practice was held not to violate the first amendment in the celebrated case of Zorach v. Clauson, 343 U.S. 306 (1952).

37. § 160.041, RSMo 1965 Supp. (emphasis added). See Campbell v. American Farmers Mut. Ins. Co., 238 F.2d 284, 288 (8th Cir. 1956). In considering the

Applying the Compulsory Attendance Law to a school district as a restriction on the administration of its programs is less logical when one considers in addition to what the statute proscribes, what constitutes a violation and how it is enforced. Section 167.061, RSMo 1965 Supp. provides a criminal penalty for any "parent, guardian, or other person . . . who violates" the compulsory attendance law. The legislature did not provide for sanctions against a school district. It has even been held that a child who stays at home because ordered to do so by his parents could not himself be guilty of violating statutes similar to Missouri's.[38] Furthermore, section 167.111, RSMo 1965 Supp. charges the state commissioner of education, school boards, school superintendents, county superintendents of public welfare, probation officers and school attendance officers with enforcing the compulsory attendance laws. There are only two means of enforcement appearing in Chapter 167, RSMo 1965 Supp. The first is by prosecution of the parent or guardian for failure to cause the child to attend school.[39] The second method is in the power of a school attendance officer to arrest a truant child and place him in school,[40] although a truant child could not be prosecuted under section 167.061. As the dissent in the instant case pointed out, unless a parent could be prosecuted, there has been no violation of section 167.031, RSMo 1965 Supp. "It is the recalcitrance of the person in charge of the child that constitutes the offense."[41] The criminal penalties provided by section 167.061 for persons who violate section 167.031 persuasively imply that the legislature did not contemplate that a school district could be guilty of violating the statute. The court, however, invoked the Compulsory Attendance Law. It allowed the commissioner to apply the law to a school district, not a parent, because he is one of those given the duty of enforcement.[42] Enforcement was effected by withholding state aid from the district, not by a means found in the statute, because the court said that school appropriations "shall be . . . distributed according to law."[43]

Why did the court invoke the Compulsory Attendance Law? The court itself suggests an answer by refusing to consider the appellant's argument that the program involved children who came within an express exception to compulsory attendance. Section 167.031, RSMo 1965 Supp. provides that "(1) A child who, to the satisfaction of the superintendent of the district . . . is determined to be mentally or physically incapacitated may be excused from attendance at school for the full time required, or any part thereof; . . . ." The court did not accept this contention since there was nothing in the record to show that the children concerned had been specifically determined by the superintendent to be physically incapaci-

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Missouri statute, the court said: "It is obvious that the six hour regulation was to meet minimum educational requirements."

38. Holmes v. Nester, 81 Ariz. 372, 306 P.2d 290 (1957); ARIZ. REV. STAT. ANN. §§ 15-321, 323 (1956).

39. § 167.061, RSMo 1965 Supp.

40. § 167.111, RSMo 1965 Supp.

41. 79 C.J.S. Schools and School Districts § 463a (1952).

42. § 167.111, RSMo 1965 Supp.

43. MO. CONST. art. IX, § 3(a).

tated.[44] If the record had reflected such a determination, the court said that the constitutionality of the 1964-65 practice "could be subjected to judicial scrutiny,"[45] citing Article I, sections 6 and 7, and Article IX, section 8 of the Missouri Constitution. These sections deal with religious freedom and use of public funds to support religion. This seems to indicate that if the court had found that the practice complied with the compulsory attendance law, it might have concluded that the use of state funds in aid of religion was involved. The court did not pursue this issue, saying that the question was not before it.

Since the only link between the expenditure of state funds and parochial schools was that the children being treated for speech defects otherwise attended parochial schools, the case may create serious difficulty in the future. It may indicate that the court would find that any participation of parochial school children in programs of special education violates Article I sections 6 and 7, and Article IX, section 8 of the State Constitution. At least, "judicial scrutiny" of special education programs involving parochial school children may be far more searching than the holding in *McVey*.

C. *Constitutional Inquiries*

A serious question raised by the case is whether denying speech therapy to the parochial school students during the school day is a violation of the first and fourteenth amendments to the United States Constitution. The trial court held that the 1965-66 practice of holding speech correction classes for the parochial children after their regular six hour school day did not violate the Compulsory Attendance Law. Therefore, the parochial students are not being deprived of all opportunity for speech therapy. Yet, two questions remain: (1) Can speech therapy be characterized as a benefits program gratuitously offered by the state?[46] (2) If so, is there discrimination in administering the benefit to parochial children because of their parents' election to send them to a parochial school?

The starting point is to acknowledge that parents have a right derived from the United States Constitution to send their children to parochial schools.[47] Next is the question of whether speech therapy is a benefit or privilege comprehended

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44. This statement is somewhat difficult to understand as the case was tried on stipulated facts. The speech defective are clearly physically handicapped (see Brief for Appellant, p. 30, Special District v. Wheeler, *supra* note 1, and § 178.260, RSMo 1965 Supp). Since it was stipulated that the children were receiving speech correction services, it is hard to imagine that such services were being given to children with no speech defects.

45. 408 S.W.2d at 64.

46. The Attorney General argued that it is of a higher quality than a mere benefits program or gratuity, because it involves the right to a free public education guaranteed by Article IX, section 1 of the Missouri Constitution. He contended that, therefore, the case results in a denial of due process. See Brief for Intervenor-Appellant, p. 42, Special District v. Wheeler, *supra* note 1. One of the amicus briefs argued that the program was therapeutic and clinical and, therefore, not an educational, but a public welfare program. See brief for amici curiae Vincent and Mary Ann Knese, Special District v. Wheeler, *supra* note 1.

47. Pierce v. Society of the Sisters, *supra* note 29; School District of Abington Township v. Schempp, 374 U.S. 203, 242 (1963).

by such cases as *Everson v. Board of Education* and *Sherbert v. Verner*.[48] State courts, including the Missouri Supreme Court in *McVey*,[49] have generally rejected the theory that free public transportation of parochial students is a benefit to the child and not to the school. The theory was nonetheless accepted by the United States Supreme Court in rejecting a constitutional challenge to the New Jersey bussing statute in *Everson*.[50] In concluding that the statute did not support parochial schools, but merely aided parents as part of a general program to get their children to school, the Court did point out that it was not saying that New Jersey could not provide transportation for public school pupils alone. Yet, the Court treated school transportation like a public welfare program.[51] In *Sherbert* the appellant had been denied unemployment compensation, because she would not work on Saturday. Working on that day was contrary to her religious convictions. The Court held that this denial was unmistakable pressure on her to forego the practice of her religion.[52] One might argue that unemployment compensation is more readily characterized as a special benefit than a bus ride, because the bus ride is part of the overall program of education. And it is the duty of the state to provide education.[53] Speech therapy, however, is tied to education only by the statutory label. This is also true of other types of therapeutic training under special education programs. The therapeutic or clinical distinction propounded by the amici curiae has real validity.[54] The state statutes may give therapeutic programs such as speech therapy the special education label, but they are not education in the traditional sense of reading, writing and arithmetic. *Everson* indicates that the United States Supreme Court would consider such a program of speech therapy no differently than any other public welfare program, regardless of the state label. Then the question becomes whether the program as administered by the state denies equal protection to the children and their parents or infringes upon the free exercise of their religion.

"It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or

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48. 330 U.S. 1 (1947) and 374 U.S. 398 (1963).

49. 258 S.W.2d at 933. For other jurisdictions rejecting the "child benefit" theory of free transportation, see: Mathews v. Quinton, 362 P.2d 932 (Alaska 1961); Taub v. Brown, 36 Del. 181, 172 A. 835 (1934); Sherrard v. Jefferson County Board of Education, 294 Ky. 469, 171 S.W.2d 963 (1942); Judd v. Bd. of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938); Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941); Mitchell v. Consolidated School Dist. No. 201, 17 Wash. 2d 61, 135 P.2d 79 (1943); State *ex rel.* Van Straten v. Milquet, 180 Wis. 109, 192 N.W. 392 (1923). Two jurisdictions which have accepted the theory: Bd. of Educ. v. Wheat, 174 Md. 314, 199 A. 628 (1938); Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256 (1946). Louisiana adopted the theory of a "child benefit" in upholding a statute that provided free textbooks to parochial as well as public schools in Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1929). *Contra,* Dickman v. School Dist., 232 Ore. 238, 366 P.2d 533 (1961).

50. 330 U.S. 1, 16-18 (1947).

51. *Id.* at 16.

52. 374 U.S. 398, 404.

53. Mo. Const. art. IX, § 1.

54. *Supra* note 46.

privilege."[55] The result of the instant case is that parochial school children may not receive free speech therapy from the special district during regular school hours. If public school children receive free speech therapy during regular school hours, the coercive effect prohibited by the Free Exercise clause may well be present.[56] The court would not consider the question here saying that it was merely "incidental" that parochial students rather than public school students were involved.[57] If public school pupils are offered speech therapy during the regular school day, they have to be dismissed (released) from their regular classes to participate. The net effect is that public school students are released from classes for speech therapy, but parochial students may not be released to obtain the same benefit, because they attend a different school. Furthermore, the speech therapist may not come to the parochial school, because such a practice violates the state constitution.[58] This could deter a parent who wished to do so from sending his speech defective child to a parochial school. It is submitted that the only meaningful distinction that can be made is that the parochial school children may not receive the same free speech therapy, because the parents have exercised their constitutional choice[59] of sending them to a parochial school.[60]

It is doubtful that a constitutional challenge could be successfully prosecuted in the instant case. First, it was stipulated that the speech correction classes were held in both public and parochial schools in the 1963-64 school year. For the 1964-65 school year it was merely stipulated that the parochial school children attended speech classes in special district buildings. There were no stipulations as to treatment of public school pupils for the 1964-65 school year.[61] Therefore, the record does not technically show the difference in services provided the public school and parochial school children for the year in question. This enabled the Missouri Supreme Court to avoid the question. Second, it is highly doubtful that the special district would have standing to raise the constitutional rights of the parochial school children and their parents. In *Pierce v. Society of the Sisters* parochial and private schools were granted standing to challenge an Oregon statute compelling attendance at public schools.[62] This standing was based, however, on allegations that the schools' business and property interests would be destroyed if the statute were enforced. The special district has no such property rights to be protected.

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55. Sherbert v. Verner, 374 U.S. 398, 404 (1963).
56. School District of Abington Township v. Schempp, 374 U.S. 203 (1963). See also Clark, *Religion and the Law*, 15 S.C.L. Rev. 855 (1963).
57. 408 S.W.2d at 64. While saying that the fact that the children involved were parochial pupils was incidental, the court, in denying a motion for rehearing, said that it "does not hold that the compulsory attendance law is not applicable equally to public school pupils." 408 S.W.2d at 68.
58. Special District v. Wheeler, *supra* note 1.
59. School District of Abington Township v. Schempp, *supra* note 53, at 242.
60. If considered in the light of the fact that parochial school children are not deprived of all opportunity for the benefit, the result may not necessarily be different. Requiring parochial students to come after school hours is again different treatment and could well be coercive so as to constitute a denial of equal protection.
61. Brief for Appellant, p. 6, Special District v. Wheeler, *supra* note 1.
62. 268 U.S. 510 (1925).

Nevertheless, if raised in a proper action by the parochial school children and their parents, the question of deprivation of first and fourteenth amendment rights might succeed.

IV. Conclusion

The decision indicates that the Missouri Supreme Court will strictly construe statutes when questions arise that involve parochial school children. In addition to the possible constitutional questions raised, the holding that releasing the parochial pupils is unlawful brings into question the validity of several existing dual attendance practices. The statute requires attendance "not less than the entire term of the school . . . ." The dissent pointed out that the court's interpretation would mean that parents who moved during a term and transferred a child to a school in their new district would violate the statute.[63] That is, indeed, what the majority seems to say. Other practices were discussed by amicus, School District of Kansas City.[64] In one program in effect since 1940, parochial students attend academic classes in parochial schools, then industrial arts and home economics classes in public schools within walking distances during the school day. In another, gifted students with special interests are released from their public high school to take courses during regular school hours in a junior college. Still another program is the Cooperative Occupational Educational program, started in Kansas City in 1948. Students released for half-day work receive school credit for on-the-job training, but are not in school.[65]

Progressive educational programs such as these have been put in serious jeopardy.[66]

Wendell E. Koerner, Jr.

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63. 408 S.W.2d at 66.

64. Brief for amicus curiae, School District of Kansas City, Missouri, p. 10-11, Special District v. Wheeler, *supra* note 1.

65. *Ibid.*

66. An attempt was made in the 74th General Assembly to partially abrogate the case legislatively and clearly make programs of special education available to parochial and private school pupils. The proposal, House Bill 24, merely stated that attendance by handicapped or educationally deprived children at more than one school in one day would constitute compliance with the compulsory attendance law. It then provided for state aid to a school district for such students. By floor amendment the House deleted "educationally deprived" and the bill passed in this form. Legislative maneuvering, however, permitted the bill to die in Senate committee and the session adjourned without further action on it. The author of this proposed legislation was apparently more concerned with special education than with existing dual attendance programs. The bill was narrowly aimed at handicapped and educationally deprived children. There was no attempt to preserve the other programs which might be endangered. Undoubtedly, the narrow scope of the bill was realistic. Passage would be more likely than for a broader, simpler bill, changing the compulsory attendance law to read "some day school or schools."

TAX DEDUCTIONS FOR COMMUTERS CARRYING TOOLS USED IN THEIR WORK

Sullivan v. Commissioner[1]

Taxpayer Sullivan, who was employed as a wire lather, commuted daily by private automobile between his home and job sites assigned by his employer. Sullivan carried a bag 24 inches by 18 inches by 6 inches, weighing about 32 pounds, to and from work which contained personally owned tools used on the job. He carried these tools daily for fear of theft if they were left at the job site and because his employer might notify him in the evening to report to a different job site the next morning.

For the tax year 1962, Sullivan deducted 67% of his total automobile expense as ordinary and necessary expenses paid in carrying on a trade or business under section 162 (a), *Internal Revenue Code of 1954*.[2] This amount represented the expense allocable to transportation between home and job sites. The Internal Revenue Service disallowed the deduction and asserted a deficiency on the ground that travel expenses are not deductible unless the taxpayer can show that he would not have used his automobile except for the necessity of carrying his tools.[3] Here the evidence indicated that the taxpayer had a bad knee, was not able to use

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1. 368 F.2d 1007 (2d Cir. 1966).

2. INT. REV. CODE OF 1954, §§ 62(2)(c) and 162(a)(2). These two sections are authority for travel deductions. Section 62(2)(c), used when taking the standard deduction, allows a deduction from gross income of transportation expenses if "allowed by Part VI (sec. 161 and following) . . . paid or incurred by the taxpayer in connection with the performance of services by him as an employee." Treas. Reg. § 1.62-1 (g) (1957), as amended, T.D. 6722, 1964-1 CUM. BULL. 144, T.D. 6796, 1965-1 CUM. BULL. 142, draws a distinction between transportation and travel stating that transportation expense is a narrower concept than travel and does not include meals and lodging, but only includes the cost of transporting the employee from one place to another in the course of his employment while he is not away from home in a travel status. Continuing, the regulation states that "[t]ransportation expenses do not include the cost of commuting to and from work; this cost constitutes a personal living or family expense and is not deductible." Section 162(a)(2), used when itemizing deductions, allows the taxpayer to deduct ordinary and necessary travel expenses while away from home in pursuit of a trade or business. Treas. Reg. § 1.162-2 (1958) as amended, T.D. 6306, 1958-2 CUM. BULL. 64, does not make the travel- transportation distinction, but does expressly hold that "commuters' fares are not considered as business expenses and are not deductible." Due to the fact that both sections of the Code allow the same type deductions and their use depends upon whether the taxpayer elects to take the standard deduction or itemize, the Treasury Department's allowance of a deduction for transportation expenses without any overnight or travel requirement, can be impliedly read into § 162. These provisions were carried over without substantive change from INT. REV. CODE OF 1939, §§ 23(a)(1)(A) and 24(a).

3. Lawrence D. Sullivan, 45 T.C. 217 (1965). The Commissioner's position was based on Rev. Rul. 63-100, 1963-1 CUM. BULL. 34, which held that under such circumstances transportation expenses are ordinary and necessary expenses paid or incurred in carrying on a trade or business because they are occasioned primarily by the necessity of transporting tools of the trade. See Treas. Reg. § 1.162-2 (a)

public transportation to and from his job sites, and needed to drive his own automobile for that purpose.[4]

Sullivan argued: (1) that his travel was to and from temporary job sites and hence his expenditures qualified as traveling expenses "away from home,"[5] and (2) that his job required him to carry tools and his car was therefore being used for business transportation. The Tax Court dismissed Sullivan's first contention, holding that his employment was one job serving the same employer at various sites in the city. Therefore, he was not "away from home" within the meaning of the language of section 162 (a) (2). In disposing of Sullivan's second argument, the court took a more extreme position than the Commissioner, stating that the taxpayer's transportation expenses were personal commuting expenses regardless of whether he carried tools, or that doing so dictated a certain mode of travel.

On appeal, the Second Circuit Court of Appeals[6] reversed. Stating that even the Service rule was too narrow, the court declared the applicable rule to be that "even if taxpayer would have driven to and from work had it not been necessary to transport his tools, he ought to be allowed to deduct that portion of his reasonable driving expenses which is allocable to the transportation of tools."[7] Such a rule more fairly reflects the dual character[8] of the taxpayer's transportation expense than the Commissioner's. It established the following procedure to determine the amount deductible once an initial finding has been made that it is necessary for the taxpayer to carry his tools to and from work:[9] (1) If taxpayer would have

(1958), as amended, T.D. 6303, 1958-2 CUM. BULL. 64. See also Clarence H. O'Donnell, 31 P-H Tax Ct. Mem. 114 (1962) where an airline pilot was denied a deduction when he carried a flight bag to and from work. Such transportation was held incidential to the dominant purpose of the trip which was commuter travel.

4. Reference to this testimony is not made in the Tax Court decision but only in the case on appeal.

5. See E. G. Leach, 12 T.C. 20 (1949); Harry F. Schurer, 3 T.C. 544 (1944).

6. Sullivan v. Commissioner, 368 F.2d 1007 (2d Cir. 1966).

7. *Id.* at 1008.

8. The Tax Court had previously allowed a partial deduction for commuter transportation expenses allocable to business purposes when such commuting was of a dual business and personal character. Charles Crowther, 28 T.C. 1293 (1957); Francis Eaton, 27 P-H Tax Ct. Mem. 52 (1958); Henery P. Canclini, 26 P-H Tax Ct. Mem. 956 (1957). Such decisions are exceptions to the Tax Court cases which deny commuter transportation expense deductions as the taxpayer is not "away from home"—his tax home being his business home and not his residence, *e.g.* Mort L. Bixler, 5 B.T.A. 1181 (1927). The Second Circuit utilized the Tax Court's doctrine rather than following the decisions of the Sixth and Ninth Circuits, holding that the taxpayer's tax home is his residence. If this latter rule had been applied, the transportation expenses would be ordinary and necessary business expenses incurred while away from home. Burns v. Gray, 287 F.2d 698 (6th Cir. 1961); Wallace v. Commissioner, 144 F.2d 407 (9th Cir. 1944). The significance of employing the dual purpose doctrine is more evident when consideration is given to the effect that the recent Supreme Court decision in Commissioner v. Stidger, 386 U.S. 287 (1967), holding that an Army officer's tax home is his permanent duty station regardless of where his family is located, may have on this conflict of what constitutes the taxpayer's home under INT. REV. CODE OF 1954, § 162(a)(2).

9. See Ewell L. Teer, 33 P-H Tax Ct. Mem. 545 (1964) where a nurse who carried her satchel of equipment to and from work was denied a deduction as she failed to show the necessity of carrying the bag.

driven to work absent the necessity of transporting his tools, the deduction will be determined by allocating his reasonable driving expenses between transportation of the taxpayer and his tools, the latter being deductible. (2) If taxpayer would not have driven absent the necessity of transporting his tools, all of his reasonable driving expenses will be deductible.[10] In both situations, the court placed a maximum amount on the deduction for the transportation of tools, to wit: the cost of some alternative means of storage if it would be feasible.

From the beginning, the Tax Court and Internal Revenue Service have consistently denied commuter expenses as a business deduction.[11] This position was upheld by the Supreme Court in *Commissioner v. Flowers*,[12] where the taxpayer had chosen to live in Jackson, Mississippi and to drive to the place of his employment in Mobile, Alabama. The court, finding it unnecessary to settle the "away from home" conflict, declared that the commuting expenses were not incurred in the pursuit of the business of the taxpayer's employer and were a non-deductible expense regardless of the fact that the taxpayer's post of duty was a great distance from his home by his own choice. "[T]he exigencies of business rather than the personal conveniences and necessities of the traveler"[13] is the test for deductibility.

However, in *Charles Crowther*,[14] the Service acknowledged circumstances under which commuter transportation expenses could be deducted. The taxpayer in *Crowther* was employed as a "faller" to cut down trees and saw them into marketable logs. He commuted daily, partly over rough unimproved private roads, between distant logging sites and his home. He carried a gasoline can, spare tools such as a sledgehammer, and any tools or parts in need of repair or sharpening. No public transportation or living accommodations were available near the logging sites. Although the taxpayer claimed a full deduction the Tax Court, agreeing with the Commissioner, allowed the deduction of a portion of the taxpayer's total transportation expenses, recognizing that the taxpayer's travel was for the dual

10. See Rev. Rul. 63-100, *supra* note 3.

11. Frank H. Sullivan, 1 B.T.A. 694 (1927); Charles H. Sachs, 6 B.T.A. 68 (1927); Abraham W. Ast, 9 B.T.A. 694 (1927); Treas. Reg. § 39.23 (a)-2 (1953).

12. 326 U.S. 465 (1946). The Supreme Court set out three requirements for a travel expense deduction: (1) The expense must be a reasonable and necessary traveling expense. (2) The expense must be incurred "while away from home." (3) The expense must be incurred in pursuit of business. There must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or his employer.

13. Commissioner v. Flowers, 326 U.S. 465, 474 1946). The Tax Court adhered to this position in later cases where a special mode of commuter travel was necessitated by the employee's physical disability, John C. Bruton, 9 T.C. 882 (1947); James Donnelly, 28 T.C. 1278 (1957), *aff'd*, 262 F.2d 411 (2d Cir. 1959), where a medical technician on 24 hour call, commuted from various locations to the hospital; Edward Mathews, 36 T.C. 483 (1961), where a husband and wife worked in different areas; Robert A. Coerver, 36 T.C. 252 (1961), where no public transportation or living accommodations at a job site were available; Robert H. Bodholt, 30 P-H Tax Ct. Mem. 435 (1961); Clarence L. Atkinson, 26 P-H Tax Ct. Mem. 734 (1957); George Daniels, 26 P-H Tax Ct. Mem. 799 (1957); Edward Mathews, 36 T.C. 483 (1961) and where a building inspector was required to use his car in his work; Robert D. Steele, 29 P-H Tax Ct. Mem. 1070 (1960).

14. 28 T.C. 1293 (1957).

purpose of commuting and transporting his tools. To the extent that such transportation expenses represented the expense of transporting tools and equipment it was an ordinary and necessary business expense.[15] It should be noted that the court concluded that the record in some instances would warrant larger deductions with regard to some of the deductible items than those allowed by the Service. However, it failed to indicate its basis for those determinations, and therefore, established no criteria for the allocation of transportation expenses. Furthermore, despite the fact that the Treasury Department by a prior *Revenue Ruling*[16] had acknowledged a deduction for commuter transportation under circumstances where such expense was increased by the necessity of carrying tools, neither the Service nor the Tax Court gave any express consideration to increased expense. On appeal, the Ninth Circuit Court of Appeals reversed,[17] allowing the taxpayer a full deduction for the transportation expenses in question. Emphasizing the business necessity of transporting tools to and from work and the lack of accommodations at the logging sites, the court concluded that the taxpayer had met all the requirements for deductibility set out by *Flowers*.[18]

Later, in *Rice v. Riddell*,[19] *Crowther* was not limited to its facts. A musician was allowed to deduct fully his expenses when he used his car to transport his tuba and bass violin to and from work. The Internal Revenue Service approved this decision in *Revenue Ruling 63-100*,[20] the position it later took in *Sullivan*.

The virtue of the Service's rule is its simplicity. By its "all or nothing" alternatives it avoids the allocation problem. This approach facilitates administra-

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15. It should be noted that this rule was not applied in Lawrence D. Sullivan, 45 T.C. 217 (1965), although recognized, as it was explained that *Crowther* was limited to the very special facts of that case.

16. Rev. Rul. 56-25, 1956-1 CUM. BULL. 152, denied commuter transportation deductions notwithstanding the fact that tools used by the taxpayer in his work were transported. The ruling did indicate that if such expenses were increased by reason of transporting the tools, a partial deduction might be allowed. See Teague v. Riddell, P-H 1959 Fed. Tax Serv. (4 Am. Fed. Tax R. 2d 5190) ¶ 59-5055 (D.C. Calif. June 29, 1959); Conrad P. Stephans, 21 P-H Tax Ct. Mem. 158 (1952).

17. Crowther v. Commissioner, 269 F.2d 292 (9th Cir. 1959). Before *Crowther* was decided on appeal, the Tax Court made similar holdings on almost identical facts. See Francis Eaton, 27 P-H Tax Ct. Mem. 52 (1958); Henery P. Canclini, 26 P-H Tax Ct. Mem. 956 (1957); Benjamin C. Allenby, 26 P-H Tax Ct. Mem. 794 (1957).

18. See note 11 *supra*. As *Crowther* was held to have met all the requirements of *Flowers*, the Ninth Circuit impliedly found that the taxpayer's tax home was his residence. In light of Commissioner v. Stidger, *supra* note 8, this basis for the *Crowther* decision is questionable.

19. 179 F.Supp. 576 (S.D. Calif. 1959). There was some evidence in this case that the taxpayer operated his business from his residence which if relied upon by the court, would allow such expenses to fall within the Tax Court's concept of "away from home." This weakens the strength of the implication that transportation expenses from one's place of work to other job sites are deductible as a business expense. See Steinhort v. Commissioner, 32 T.C. 947 (1959), *aff'd*, 283 F.2d 865 (5th Cir. 1960). But see, Teague v. Riddell, *supra* note 16, where the same court denied transportation deductions to a musician carrying his bass violin to and from work because such expenses were not increased as a result of carrying the instrument. See Rev. Rul. 56-25, *supra* note 16.

20. *Supra* note 5.

tive convenience. The *Sullivan* rule liberalizes the Service rule by allowing a deduction for expenses allocable to transportation of tools when the taxpayer would have driven absent the necessity of carrying them. This liberalization is desirable from the taxpayer's viewpoint in that it will reduce the inequities that can occur in the application of the Service's "but for" rule. For under the Service rule commuter *A*, having no public transportation available to him and being forced to drive to work absent the necessity of carrying his tools, gets no deduction. On the other hand, commuter *B*, with public transportation available, would qualify for a full deduction by claiming that he would have used some less expensive form of transportation "but for" the necessity of carrying his tools. The deduction in this case would depend upon the availability of public transportation—a consideration that the Tax Court has held does not alter the personal character of commuter expenses. Under the *Sullivan* rule, commuter *A* would be allowed a partial deduction.

In practice, the determination of the portion of the total commuter expenses allocable to transportation of tools may prove troublesome to the taxpayer. The court in *Sullivan* did not indicate what criteria should be utilized in allocating between commuter and tool expense. Earlier Tax Court cases allowing such allocable deductions are of no assistance for the same reason. However, rational bases for allocation can be suggested. The increased transportation cost attributable to carrying the tools would be a logical and most accurate measure of the actual business expenses involved. Such a basis might involve difficult problems of proof in a factual situation similar to *Sullivan* due to the insubstantial size and weight of the tools. But a taxpayer carrying heavier and larger equipment might show increased operating costs and a decrease in the utility and useful life of his automobile. When increased cost would be difficult to prove, a deduction could be allowed in an amount equal to the reasonable charge for carrying the tools for someone who daily travelled the same route as taxpayer. Another possibility would be to allocate the total transportation expense in the same ratio as the relative weights of the taxpayer and his tools.

A subjective approach could also be taken, measuring the relative importance to the taxpayer of the "dual purpose" of transporting his tools and himself and allocating the total expense accordingly. Such relative importance to the taxpayer would not be readily determinable on physical evidence such as weight or cost. Since substantiation is not required[21] for transportation expenses, the court would in effect be allowed to make a case by case determination of the relative importance of the purposes and apply the *Cohan* rule[22] in determining the amount of the deduction.

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21. Treas. Reg. § 1.274-5(a)(1) (1962), as amended, T.D. 6630, 1963-1 CUM. BULL. 58, states that no deduction shall be allowed without substantiation for any expenditure with respect to "traveling away from home (including meals and lodging) deductible under § 162 or 212" thus indicating that local transportation expense will not require substantiation.

22. Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930) announced the rule that where evidence indicates that a taxpayer incurred a deductible travel or entertainment expense, but the exact amount cannot be determined, the court will make a close approximation and will not dissallow the deduction entirely. This rule has been applied by the Tax Court in determining the allocable commuter expense deduction. See cases cited *supra* note 17.

It remains to be seen what impact the *Sullivan* rule will have in the Tax Court, other Circuits and on the Service. Even if it is widely followed, until some guidelines for proper allocation are available to the taxpayer, the tool carrying commuter will not know what portion of his commuter expense he can properly deduct. This situation may result either in the taxpayer not claiming as much as the Internal Revenue Service would allow or litigation if the Commissioner feels he has claimed too much.

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FENCES AS MONUMENTS UNDER THE DESTRUCTION OF LANDMARKS STATUTE

Mulberry v. Commonwealth[1]

Defendant removed a fence from a boundary line and accordingly was fined $325 under KY. REV. STAT. section 433.770(2)(1962). This statute provides that anyone who "willfully and knowingly . . . breaks down, damages or removes any monument erected to designate . . . the boundaries of any tract or lot of land, or any tree, post, stone or mark planted for that purpose, shall be fined not less than ten dollars nor more than two thousand dollars." The issue on appeal was whether a fence should be considered a monument within the meaning of the statute.[2] The court relied on property law distinctions as to what is a monument and concluded that a fence is a monument under the Kentucky statute.[3]

The need for defining monument in the law of property arises when a court is faced with the application of the often quoted rule of deed construction that monuments should prevail over courses and distances.[4] Actually, the rule is only a deduction from the broader objective of arriving at the intention of the parties.[5] That is, the court presumes that the parties may make errors when using courses and distances but are not as likely to do so when using monuments.[6] It is also felt that the average citizen may not understand a course and distance description but can readily see the stone or tree marking the boundary.[7]

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1. 408 S.W.2d 649 (Ky. App. 1966).
2. Since no transcript was filed on appeal, there is no means of ascertaining whether or not defendant knew that the particular fence was a landmarker or monument. The strong wording of the statute would indicate that such specific knowledge would be required, and this discussion will assume such. As to this point in Missouri, it has been held that defendant must intentionally remove the cornerstone and know that the stone is a cornerstone. State v. Ferguson, 82 Mo. App. 583 (K.C. Ct. App. 1900).
3. Mulberry v. Commonwealth, *supra* note 1.
4. Burnham v. Hitt, 143 Mo. 414, 45 S.W. 368 (1898); Di Maio v. Ranaldi, 49 R.I. 204, 142 Atl. 145 (1928); 1 PATTON, TITLES §§ 148-153 (2d ed. 1957).
5. Presnell v. Headley, 141 Mo. 187, 43 S.W. 378 (1897).
6. Newsom v. Pryor's Lessee, 20 U.S. (7 Wheat.) 7 (1822).
7. Delphey v. Savage, 227 Md. 373, 177 A.2d 249 (1962).

Because the rule is an attempt to arrive at intention, it follows that what is considered a monument will be determined, in part at least, by other factors evincing intention. There are, however, a few consistent guidelines. An obvious requirement is that a monument in some way designate a land boundary.[8] In Missouri a monument must also be a "fixed visible object."[9] Thus, it has been held that the corner of an adjacent lot is not a monument because it is no more visible than the boundary line in question.[10] The North Carolina court has stressed the fixed or permanent nature of a monument when it recognized that stakes are not such as would generally be considered monuments, but an imbedded stone could be, because it is more permanent.[11] The concern here is probably related to problems of proof, as the reasons for the rule of construction do not dictate that a monument be fixed or permanent. At any rate, these general considerations have led courts to label as monuments such items as ponds,[12] streams,[13] highways,[14] trees,[15] and fences.[16]

Missouri has a statute similar to the Kentucky statute,[17] but the appellate courts of Missouri have never considered the issue presented in *Mulberry*. Should the issue arise, the propriety of construing the word "monument" by resorting to property law distinctions is questionable. While the object of the property law is to ascertain the parties' intention, the evident purpose of the statute is to protect certain types of landmarkers from removal or destruction.[18] By following the

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8. Thompson v. Hill, 137 Ga. 308, 73 S.E. 640 (1912); Parran v. Wilson, 160 Md. 604, 154 Atl. 449 (1931).

9. Koch v. Gordon, 231 Mo. 645, 652, 133 S.W. 609, 610 (1910).

10. *Ibid. Accord,* Dolphin v. Klann, 246 Mo. 477, 151 S.W. 956 (1912); Guitar v. St. Clair, 238 Mo. 617, 142 S.W. 291 (1911); Pritchard v. Rebori, 135 Tenn. 328, 186 S.W. 121 (1916). However, Missouri appears to be in a minority position as to this point, as other cases indicate adjacent lots are such as could be termed monuments. See Beach v. Whittlesey, 73 Conn. 530, 48 Atl. 350 (1901); Van Ness v. Boinay, 214 Mass. 340, 101 N.E. 979 (1913); Lumber Co. v. Hutton, 152 N.C. 537, 68 S.E. 2 (1910); Di Maio v. Ranaldi, *supra* note 4.

11. Nelson v. Lineker, 172 N.C. 279, 90 S.E. 251 (1916).

12. Rathbun v. Geer, 64 Conn. 421, 30 Atl. 60 (1894).

13. Carter Oil Co. v. Watson, 116 F.2d 195 (7th Cir. 1940); Burnham v. Hitt, *supra* note 4.

14. Haverstick v. Beaver, 34 Ohio L. Abs. 363, 37 N.E.2d 650 (Ct. App. 1941).

15. Higley v. Bidwell, 9 Conn. 447 (1833).

16. Rodgers v. Roseville Gold Dredging Co., 135 Cal. App.2d 6, 286 P.2d 536 (1955); Perich v. Maurer, 29 Cal. App. 293, 156 Pac. 471 (1915); City of Warsaw v. Swearngin, 295 S.W.2d 174 (Mo. 1956); Chicago Club of Lake Geneva v. Ryan, 203 Wis. 272, 234 N.W. 488 (1931).

17. Section 560.530, RSMo 1959, which states: "Every person who shall willfully or maliciously, either: First, remove any monument of stone or any other durable material, created for the purpose of designating the corner or any other point in the boundary of any lot or tract of land, or of the state, or any legal subdivision thereof; or, second, deface or alter the marks upon any tree, post or other monument, made for the purpose of designating any point in such boundary; or, third, cut down or remove any tree upon which any such marks shall be made for such purpose, with intent to destroy such marks, shall, upon conviction, be adjudged guilty of a misdemeanor."

18. Robinson v. State, 7 Ala. App. 172, 62 So. 303 (1913).

property cases, it would be possible to label any object designating a land boundary that is "fixed and visible" as a monument. To read such a broad classification into the criminal statute does not seem to be particularly desirable. Indeed, a narrow interpretation of the Kentucky statute might indicate that only objects especially erected or planted for the purpose of designating boundaries are meant to be included.[19] Considering the wording of the statute as well as the normal strict construction rule when dealing with criminal statutes, this argument is by no means weak. On the other hand, it could be said that such a narrow interpretation would not fulfill the statute's more general purpose of keeping certain landmarkers and monuments intact and thereby achieving the desired stability of real property boundaries.

Rejecting both the application of property law definitions and the narrow statutory interpretation, the problem becomes what types of markers or monuments should be included. There is little question that markers placed on the land by public officials are within the protective purpose of the statute.[20] In addition to this group of markers, Alabama also includes those objects which are known to be landmarkers by all parties concerned for a sufficient length of time.[21] With the same general idea but stating it somewhat differently, Maryland refuses to include landmarkers of a private nature.[22] Both of these rules are at best vague, but the important point to note is that they refuse to read blindly the property law definition into the statute. At the same time there is no limitation to official landmarkers or objects erected to designate boundaries. Rather, the approach is to eliminate some monuments by declaring them to be too restrictive in their usage to be within the statute.

If such an approach were used by the Missouri courts, it would not mean that the destruction of a fence would not be a crime in Missouri. There are at least two other statutes that may apply in a given situation. Section 560.395, RSMo 1959 declares the destruction of a fence to be a misdemeanor. Section 560.405, RSMo 1959 makes it a misdemeanor to "break or cut down, injure, take or carry away any portion of a fence . . . ." In addition to these criminal statutes, section 537.350, RSMo 1959 permits a fence owner to recover double damages in some instances. In most cases of fence destruction, these statutes would be more appropriate than the "Destruction of Landmarks" statute.

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19. The Missouri statute, *supra* note 17, has similar wording in all three parts and would also lend itself to this interpretation.

20. Ruth v. State, 20 Md. 436 (1863); Merkle v. Otteusmeyer, 50 Mo. 49 (1872) (the surveyor of St. Louis County placed a cornerstone).

21. Cornelious v. State, 22 Ala. App. 150, 113 So. 475 (1927).

22. Ruth v. State, *supra* note 20.

FUNERAL EXPENSES—LIABILITY OF A MARRIED WOMAN'S ESTATE FOR HER FUNERAL EXPENSES

Gibson v. Muehlebach Funeral Home, Inc.[1]

The Muehlebach Funeral Home filed a claim against the estate of Dorothy Lee Burroughs for the expenses of her funeral. She was survived by her husband and the Kansas City Courts of Appeals determined that the only question before it was "whether the husband of a deceased wife, her decedent estate or both, are liable for the expenses of her burial."[2] Since the case before the court involved only the funeral home and the wife's estate, the court's comments concerning the husband's liability were dictum. Nevertheless, the court approved two earlier Missouri cases[3] which had held that the husband was liable for his wife's funeral expenses under the common law and that his duty was neither removed nor diminished by the Married Women's Acts or by administration statutes providing for priority of claims against decedent's estates.

The court faced a more difficult problem when it dealt with the issue of whether the wife's estate was also liable for the expense of her funeral. The relevant Missouri cases were in conflict on this question. The court in *Reynolds v. Rice*,[4] while holding that the husband could not recover his wife's funeral expenses from her estate after he had paid them, observed that the estate of a deceased wife was liable to third parties for her funeral expenses. The court in *Kent v. Knight*[5] later ruled that the statements in *Reynolds* relating to a third party's ability to recover from the wife's estate were obiter dictum and refused to allow an undertaker to recover from the wife's estate. The court in the noted case allowed a funeral home to recover from the wife's estate disaffirming the opinion in *Kent* due to changes in Missouri law brought about by the adoption of the 1955 Probate Code, specifically sections 474.010 and 472.010(4), RSMo 1959.[6]

At common law the legal existence of the wife was merged into that of the husband and he was vested with an ownership and power over her personal property.[7] As a consequence of this doctrine the law placed the duty of providing the

1. 409 S.W.2d 759 (K.C. Mo. App. 1966).
2. *Id.* at 760.
3. Kent v. Knight, 231 Mo. App. 235, 98 S.W.2d 318 (K.C. Ct. App. 1936); Reynolds v. Rice, 224 Mo. App. 972, 27 S.W.2d 1059 (K.C. Ct. App. 1930).
4. *Supra* note 3.
5. *Supra* note 3.
6. It is submitted that the changes in the statutory law of descent and distribution are not as substantial or material on the subject of funeral expenses as the court indicates. While no allusion was made to the specific subject of funeral expenses in the statutes dealing with descent and distribution in 1936, only an indirect allusion was made in those dealing with that subject at the time the noted case was decided. An allusion was made in § 182, RSMo 1929 where funeral expenses were classed as the first demand against the estate of any deceased person. Further § 208, RSMo 1929 required that "all demands against any estate" be paid in the order classed. These statutes were in force at the time the *Kent* case was decided.
7. Smyley v. Reese, 53 Ala. 89 (1875); Kenyon v. Brightwell, 120 Ga. 606, 48 S.E. 124 (1904); McClellan v. Filson, 44 Ohio 184, 5 N.E. 861 (1886).

wife with necessaries upon the husband.[8] His duty to provide for her funeral expenses "is generally deemed to be included in, or to be incident to, or to grow out of, the duty to support and maintain the wife while living and to furnish her with necessaries."[9] Some cases hold that the duty, at least in part, arose from common decency, from the husband's rights in his wife's body, from his right to dictate the place and manner of her burial, and from the need to protect the public health by insuring the prompt burial of all bodies.[10]

The question of the liability of a deceased wife's estate for her funeral expenses did not arise until after the passage of the Married Women's Acts and other statutes taking away the husband's common law right to the wife's personal property and thereby creating a separate estate in the wife.[11] The passage of these statutes gave rise to the argument that they alone, or in conjunction with administration statutes providing for priority of claims against a decedent's estate, had imposed an obligation upon the wife's estate to pay for her funeral expenses. It was also argued that these statutes had the effect of removing the burden of paying his wife's funeral expenses from the husband. Courts faced with these arguments normally relied on one of the following rules in reaching their decisions:[12] (1) The wife's estate is under no legal liability to pay for her funeral expenses.[13] (2) The wife's estate is liable for her funeral expenses to a third party, but the ultimate liability remains on the husband and he may be required to reimburse her estate for any expenses it has borne.[14] (3) The wife's estate and the husband are severally liable to a third party for her funeral expenses and neither has a right of reimbursement against the other.[15] (4) The wife's estate is ultimately liable

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8. Stonesifer v. Shriver, 100 Md. 24, 59 Atl. 139 (1904).

9. Reynolds v. Rice, *supra* note 3, at 1060; See also Gibson v. Muehlebach Funeral Home, Inc., *supra* note 1; Kenyon v. Brightwell, *supra* note 7; Stonesifer v. Shriver, *supra* note 8.

10. Kent v. Knight, *supra* note 3.

11. Johnston v. Johnston, 173 Mo. 91, 73 S.W. 202 (1903); Leete v. State Bank of St. Louis, 115 Mo. 184, 21 S.W. 788 (1893); Reynolds v. Rice, *supra* note 3; Rezabek v. Rezabek, 196 Mo. App. 673, 192 S.W. 107 (St. L. Ct. App. 1917).

12. Some of these decisions were undoubtedly influenced by the wording of the statutes in the jurisdictions involved. An attempt to delve into the precise wording of each statute is beyond the scope of this note. Thus if a court's decision is based on or changed by an unusual type of statute that fact will be mentioned without an attempt being made to analyze the wording of the statute.

13. Lott v. Graves, 67 Ala. 40 (1880); Stonesifer v. Shriver, *supra* note 8; Galloway v. McPherson, 67 Mich. 546, 35 N.W. 114 (1887); Kent v. Knight, *supra* note 3; Bowen v. Daugherty, 168 N.C. 242, 84 S.E. 265 (1915).

14. Phillips v. Tribbey, 82 Ind. App. 68, 141 N.E. 262 (1923); Palmer v. Turner, 241 Ky. 322, 43 S.W.2d 1017 (1931); Carpenter v. Hazelrigg, 103 Ky. 538, 45 S.W. 666 (1898).

15. *In re* Guthrie's Estate, 28 Ohio N.P. 447 (1931) (the husband was granted the right to reimbursement from the wife's estate under the 1932 Ohio Probate Code). The following cases are not precisely in point, but they hold either the husband or the wife's estate liable while indicating that the other may be equally liable. Gibson v. Muehlebach Funeral Home, Inc., *supra* note 1; Reynolds v. Rice, *supra* note 3; Johnson's Petition, 15 R.I. 438, 8 Atl. 248 (1887); Nashville Trust Co. v. Carr, 62 S.W. 204 (Tenn. 1900); Ambrose v. Kerrison, 10 C.B. 777, 138 Eng. Rep. 307 (1851).

and either her husband or a third party may recover her funeral expenses from her estate.[16]

The first rule is the common law rule and it is usually followed by courts that hold the Married Women's Acts and the administration statutes have not relieved the husband from, or imposed upon the wife's estate, the burden of paying for her funeral expenses. Some courts which follow this rule allow equitable exceptions under certain circumstances. Courts which allow such exceptions normally limit them to cases where the husband is insolvent and the third party could not recover from him or his estate.[17] Courts have allowed exceptions where the wife had exercised a power of appointment by distributing her assets to her creditors, but failed to provide for funeral expenses,[18] and where the wife's estate was considerable and the husband was poor.[19] Courts following the first rule have also held the wife's estate liable where the wife by will[20] or contract[21] has provided that her funeral expenses be taken from her estate, but they hold that the wife's estate is not liable if she has provided for her funeral expenses by will and her husband elects to take against the will.[22]

The second and third rules are essentially the same except that under the second rule the wife's estate has a right of indemnification against the husband if it is forced to pay the funeral expenses. Under either rule the payment of the funeral expenses by either the wife's estate or the husband to a third party discharges the other's obligation to that third party. These rules are probably an outgrowth of courts holding that the adoption of Married Women's Acts and administration statutes did not alter the husband's common law duty, but imposed a similar obligation upon the deceased wife's estate. The primary justification for granting a third party, often the undertaker or funeral home, an option to proceed against either the husband or the wife's estate is the public necessity that the dead be promptly buried.[23] This provides two sources from which a third party may recover funds expended upon the funeral of a deceased wife, without requiring that he first show he cannot recover from the husband.

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16. *In re* Skillman's Estate, 146 Iowa 601, 125 N.W. 343 (1910); Constantinides v. Walsh, 146 Mass. 281, 15 N.E. 631 (1888); McCue v. Garvey, 14 Hun. 562 (N.Y. 1878); Rees v. Hughes, [1946] 1 K.B. 517; Gregory v. Lockyer, 6 Madd. 89, 56 Eng. Rep. 1024 (Ch. 1821).

17. Kent v. Knight, *supra* note 3; Gould v. Moulahan, 53 N.J. Eq. 341, 33 Atl. 483 (1895); Bowen v. Daugherty, *supra* note 13; Waesch's Estate, 166 Pa. 204, 30 Atl. 1124 (1895).

18. *In re* M'Myn, [1878 M. 3.] 33 Ch. 575.

19. Riley v. Robbins, 25 P.2d 539 (Cal. 1933); *In re* Weringer's Estate, 100 Cal. 345, 34 Pac. 825 (1893).

20. Rocap v. Blackwell, 79 Ind. App. 232, 153 N.E. 515 (1923); Watt v. Atlantic Safe Deposit & Trust Co., 92 N.J. Eq. 224, 112 Atl. 186 (1920); Brown v. Brown, 199 N.C. 473, 154 S.E. 731 (1930); Willeter v. Dobie, 2 K. & J. 647, 69 Eng. Rep. 942 (1856).

21. Lott v. Graves, *supra* note 13; Kirtman v. Gallentine, 169 N.E.2d 1 (Ind. App. 1960).

22. Gustin v. Bryden, 205 Ill. App. 204 (1917); Brand Ex'r v. Brand, 109 Ky. 721, 60 S.W. 704 (1901); *In re* White's Estate, 150 Neb. 167, 33 N.W.2d 470 (1948); *In re* Koska's Estate, 179 Pa. Super. 519, 108 A.2d 829 (1954).

23. Rocap v. Blackwell, *supra* note 20.

The fourth rule is normally maintained by courts that have determined that the Married Women's Acts and administration statutes have relieved the husband of his primary liability for his wife's funeral expenses and placed the liability on the wife's estate. This means that a third party or the husband, who in some states may still be held liable to a third party,[24] can recover the funeral expenses from the wife's estate if she leaves one.

The *Kent* case which rejected the dictum in *Reynolds* placed Missouri among those jurisdictions following the first rule. This view was not rejected in Missouri until the decision in the *Muehlebach* case which apparently places Missouri in the group of states following the third rule. The language of the *Muehlebach* case does not specifically preclude the possibility that Missouri could follow either the second or fourth rule. However, the acceptance of the holding of the *Reynolds* case would seem to preclude an adoption of the fourth rule. The Court's statement that "[e]ach liability arose by operation of law, exists separate from and independent of the other, and is equally available to the creditor"[25] apparently gives both liabilities equal status and would seem to indicate Missouri will follow the third rule.

Whether or not one agrees with the reasoning of the court in the *Muehlebach* case one is impelled to the conclusion that the change in the law is for the better. Someone must bear the expense of providing for a deceased wife's funeral and there is no reason to exempt either the wife's estate or her husband from that obligation. Under the rule in force in Missouri prior to the *Muehlebach* case a third party would have been forced to show the husband was insolvent before he could have turned to the wife's estate. This rule was likely to cause unnecessary litigation, embarrassment, ill-feeling, and the possible inequitable result of having a poor husband bear a burden which a wealthy estate could have handled with ease. Further, a prompt and proper burial is more likely to occur where the third party has recourse to two possible sources for reimbursement for his expenses. The court's holding is to be commended.[26]

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24. *In re* Koretzkey's Estate, 180 Misc. 108, 40 N.Y.S.2d 928 (1943); *In re* Johnson's Estate, 198 S.C. 526, 18 S.E.2d 450 (1942).
25. Gibson v. Muehlebach Funeral Home, Inc., *supra* note 1.
26. See generally Annot., 82 A.L.R.2d 873 (1962).

TRUSTS—APPLICABILITY OF THE CY PRES DOCTRINE TO CHARITABLE BEQUESTS

American Cancer Society, Missouri Division, Inc. v. Damon Runyon Memorial Fund for Cancer Research, Inc.[1]

Testatrix made a bequest to the Damon Runyon Memorial Fund for Cancer Research, St. Joseph, Missouri Division. The bequest was for $10,000 and was one of about 20 such gifts, most of which were to be used locally. There was no Damon Runyon Memorial Fund for Cancer Research, St. Joseph, Missouri Chapter. This fund is incorporated in New York and does not operate through local chapters. There was a St. Joseph Chapter of the American Cancer Society, Missouri Division, Inc. of which testatrix was an active member.

Upon petition in probate court for construction of the bequest, the two societies intervened each claiming the gift. The probate court found the Damon Runyon Fund entitled to the bequest. The circuit court held that the American Cancer Society was entitled to the bequest. The Damon Runyon Society appealed to the Kansas City Court of Appeals. That court held that neither organization was entitled to the bequest, that the bequest failed for lack of an organization capable of taking, and that the $10,000 should go to the residuary legatees.

In the case of *Chambers v. City of St. Louis*[2] the Supreme Court of Missouri indicated that the general principles of the English law of charities are in force in Missouri.[3] English courts have allowed parol evidence to determine which charity the testator intended to receive the gift in cases of a misnamed charity.[4] In Missouri the context of the instrument of gift or surrounding circumstances may be used to identify the trustee when it has been erroneously or uncertainly designated.[5] In the case under discussion the circuit court allowed parol evidence to determine to which organization the testatrix had intended the bequest to go, and the evidence was reviewed by the Court of Appeals. That evidence showed that testatrix had done volunteer work for and had contributed money to the local unit of the American Cancer Society, and that testatrix and her husband were friendly with Mr. and Mrs. Ellershaw who were leaders in the local unit of the American Cancer Society.[6] From this evidence the Court of Appeals determined

1. 409 S.W.2d 222 (K.C. Mo. App. 1966).
2. 29 Mo. 543 (1860).
3. *Id.* at 582-588.
4. *Re* Pritt, Morton v. National Church League, (1916) 85 L.J. Ch. 166 (1915); *Re* Hill, Davis v. Napper, (1909) 53 Sol. J. 228; *Re* Alchin's Trusts, *Ex parte* Furley, *Ex parte* Earl Romney, (1872) 14 Eq. 230; Owens v. Bean, Cas. *temp.* Finch, 395, 23 Eng. Rep. 216 (Ch. 1678). For American cases in accord see: Estate of Black, 211 Cal. App. 2d 75, 27 Cal. Rptr. 418 (1962); Equitable Security Trust Co. v. Home for Aged Women, 35 Del. Ch. 553, 123 A.2d 117 (1956); Hays v. Illinois Industrial Home for the Blind, 12 Ill.2d 625, 147 N.E.2d 287 (1958); Pope v. Hinckley, 209 Mass. 323, 95 N.E. 798 (1911); *In re* Chapman's Will, 32 N.Y.S.2d 290 (1941); Black's Estate, 398 Pa. 390, 158 A.2d 133 (1960).
5. *In re* Estate of Rahn, 316 Mo. 492, 512, 291 S.W. 120, 128 (1927).
6. American Cancer Society, Missouri Division, Inc. v. Damon Runyon Memorial Fund for Cancer Research, Inc., *supra* note 1, at 225.

that testatrix knew of the local unit of the American Cancer Society and that it was inconceivable that she would misname an organization with which she was that familiar. The court concluded that the testatrix did not intend for the bequest to go to either the American Cancer Society or the Damon Runyon Fund.

Assuming the correctness of the Court of Appeals' determination that the evidence was insufficient to establish what charitable organization the testatrix intended to benefit, the court should at least have discussed the applicability of the *cy pres* doctrine. If that doctrine was applicable, the legacy should have been devoted to cancer research in some manner instead of being given to the residuary legatees.

The cy pres doctrine has been recognized by Missouri courts since 1860.[7] Cy pres is a rule of equity and means "as near to."[8] The reason for the rule is to permit the intention of the settlor of a charitable trust to be carried out as nearly possible where the exact purpose fails.[9] The only limitation on the rule is that the general purpose of the trust cannot be changed.[10] Before the cy pres doctrine can be applied, it must be shown that the settlor had a general charitable intent.[11] A general charitable intent exists in any case where there is an intent to aid a certain type of charity.[12] General charitable intent is negatived only where the settlor intended to aid a particular charity exclusively by a particular means; if that means fails the gift fails.[13] Once failure of the specific gift and a general charitable intent have been shown, the property will be applied under the direction of the court to some charitable purpose falling within the general intention of the testator.[14]

If it be assumed that the legacy involved in the case under discussion could not take effect in the exact manner intended because no organization with precisely the name mentioned in the will existed, it would seem that the cy pres doctrine should have been applied. The fact that the testatrix made several other large gifts to charities indicates that she had a general charitable intent.[15] She

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7. Chambers v. St. Louis, *supra* note 2.
8. Thatcher v. Lewis, 335 Mo. 1130, 1142, 76 S.W.2d 677, 682 (1934).
9. *Ibid.*; RESTATEMENT (SECOND), TRUSTS § 399 (1959); BOGERT, TRUSTS AND TRUSTEES § 431 (2d ed. 1964); 4 SCOTT, TRUSTS § 399 (2d ed. 1956).
10. Thatcher v. Lewis, *supra* note 8, at 1142, 76 S.W.2d at 682.
11. Ramsey v. City of Brookfield, 361 Mo. 857, 862, 237 S.W.2d 143, 145 (1951).
12. *Id.* at 862, 237 S.W.2d at 146.
13. *Ibid.*; Parsons v. Childs, 345 Mo. 689, 136 S.W.2d 327 (1940); RESTATEMENT (SECOND), TRUSTS § 399 (1959); BOGERT, TRUSTS AND TRUSTEES § 431 (2d ed. 1964); 4 SCOTT, TRUSTS § 399 (2d ed. 1956).
14. Thatcher v. Lewis, *supra* note 3, at 1142, 76 S.W.2d at 682; Ramsey v. City of Brookfield, *supra* note 6, at 682, 237 S.W.2d at 145.
15. Christian Herald Ass'n., Inc. v. First Nat. Bank, 40 So.2d 563 (Fla. 1949); Kentucky Children's Home v. Woods, 289 Ky. 20, 157 S.W.2d 473 (1941); Lynch v. South Congregational Parish, 109 Me. 32, 82 Atl. 432 (1912); Town of Brookline v. Barnes, 87 N.E.2d 843 (Mass. 1949); Wendell v. Hazel Wood Cemetery, 3 N.J. Super. 457, 67 A.2d 219 (1949); *In re* Mill's Will, 121 Misc. 147, 200 N.Y.S. 701 (1923); Rhode Island Hospital Trust Co. v. Williams, 50 R.I. 385, 148 Atl. 189 (1929).

intended to assist a cancer society, but expressed no intention that her assistance depended upon the existence of a society with the exact name specified in the will. As the Testatrix did express an intent that her gifts be used locally, the court might well have given the bequest to the local charity, the American Cancer Society, Missouri Division, Inc., in which the testatrix was known to have been interested.

The gift of the testatrix was not made in trust, but was bequeathed directly to the misnamed charitable corporation. In Missouri, however, this still results in a gift to charity to which the doctrine of cy pres will apply. The Supreme Court of Missouri quoting Scott with approval, said:

> 'The owner of property may devote it to charitable purposes not only by transferring it to trustees in trust for such purposes, but also by transferring it to a charitable corporation.' 4, SCOTT, *supra,* § 348.1, p. 2553. 2 RESTATEMENT, TRUSTS, 2nd, § 348f, pp. 211, 212. 'Certainly many of the principles applicable to charitable trusts are applicable to charitable corporations. In both cases the Attorney General can maintain a suit to prevent a diversion of the property to other purposes than those for which it was given; and in both cases the doctrine of cy pres is applicable.' SCOTT, *Id.,* nn. 2, 3; see also § 391, p. 2753; RESTATEMENT, Id., p. 212.[16]

The testatrix's gift failed at inception. The *Restatement of Trusts*[17] indicates that it is easier to find a general intent when the trust fails after it has been operating than when it fails at the outset. However, if the court finds a general charitable intent, it may apply the cy pres doctrine to trusts that fail at inception.[18] The *Ramsey* case indicates that this is the rule in Missouri.[19] Thus, in the case under discussion the time when the failure occurred should not have affected the consideration of the cy pres doctrine.

A recent Wisconsin case[20] illustrates the proper application of the cy pres doctrine to bequests to charitable corporations. There the testator bequeathed a sum of money to the Masonic Home for Crippled Children of the State of Illinois. There was no such institution. The court found a general charitable intent and applied the cy pres doctrine giving the bequest to the Shriner's Hospital for Crippled Children in Chicago. The court said: "While most of the descriptions of *cy pres* confine its operation to charitable 'trusts', there is no sound reason for the requirement that there be a formal trust, as such. In our opinion, it is sufficient if there is a bequest to charity."[21] Had the Kansas City Court of Appeals considered the cy pres doctrine in the *American Cancer Society* case, it might have reached a similar result.

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16. Voelker v. Saint Louis Mercantile Library Ass'n., 359 S.W.2d 689, 694 (Mo. 1962).
17. RESTATEMENT (SECOND), TRUSTS § 399, comment *i.* (1959).
18. Goree v. Georgia Industrial Home, 187 Ga. 368, 200 S.E. 684 (1938); Miller v. Mercantile-Safe Deposit and Trust Co., 224 Md. 380, 168 A.2d 184 (1961); Howard Savings Institution of Newark v. Peep, 34 N.J. 494, 170 A.2d 39 (1961); Wendell v. Hazel Wood Cemetery, *supra* note 10; *In re* Kashiwabara's Will, 171 N.Y.S.2d 1001 (1958); *In re* Yungel's Will, 153 N.Y.S.2d 418 (1956); Rhode Island Hospital Trust Co. v. Williams, *supra* note 10.
19. Ramsey v. City of Brookfield, *supra* note 6, at 864, 237 S.W.2d at 147.
20. *In re* Estate of Bletsch, 25 Wis. 2d 40, 130 N.W.2d 275 (1964).
21. *Id.* at 43, 130 N.W.2d at 278.

CONSTITUTIONAL LAW—JURY TRIAL FOR CONTEMPT

Shillitani v. United States[1]

Cheff v. Schnackenberg[2]

Salvatore Shillitani was called before a grand jury impaneled in the Southern District of New York to investigate violations of the federal narcotics laws. He appeared before the jury three times, and on each occasion refused to answer certain questions on the ground that a truthful reply might tend to incriminate him. Upon application by the government, the District Court granted Shillintani full and absolute immunity and ordered him to respond to the questions.[3] He still refused to testify and after a hearing before the District Judge was sentenced to two years imprisonment for contempt, with a proviso that the sentence would be terminated if petitioner complied with the court order. The Second Circuit Court of Appeals affirmed the conviction.[4]

The Supreme Court granted certiorari to consider petitioner's contention that he was denied the right of indictment and trial by jury. The Court held that the conditional nature of the sentence rendered the action one for civil contempt for which indictment and jury trial are not constitutionally required.[5] However, the sentence was vacated because the grand jury, before which the contempt was committed, had been dismissed and defendant could no longer comply with the court order.

The *Shillitani* case is the latest effort by the Supreme Court to formulate a satisfactory test for distinguishing civil and criminal contempt. The test as stated by the court is: "[w]hat does the court primarily seek to accomplish by imposing sentence?"[6] In determining the nature of contempt proceedings courts have traditionally used the "dominant purpose" test. This test is based on the character and purpose of the sanction imposed. If the sentence is punitive in character and its purpose is to vindicate the authority of the court, the contempt is criminal; if the sentence is remedial in nature and for the benefit of the complainant the contempt is civil.[7] The *Shillitani* test is essentially a "dominant purpose" test, and it perpetuates the defects which have caused the latter test to fail when applied to certain types of contempt.

One salient defect in the "dominant purpose" test is the fact that basing the nature of the proceedings on the final decree makes it impossible to apprise the contemner of the nature of the proceedings against him. It is also difficult to apply this test to some contempt decrees because the incarceration may serve both

1. 384 U.S. 364 (1966).
2. 384 U.S. 373 (1966).
3. Immunity was granted under the Narcotic Control Act, 18 U.S.C. § 1406 (1964).
4. United States v. Shillitani, 345 F.2d 290 (2d Cir. 1965).
5. Myers v. United States, 264 U.S. 95, 104-5 (1924).
6. Shillitani v. United States, *supra* note 1, at 370.
7. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911).

punitive and remedial purposes.[8] An example of the ambiguity inherent in the "dominant purpose" test can be seen in the noted case. Criminal contempt is punitive in nature and incarceration must be for a definite period of time.[9] Shillitani was given a two year sentence which would indicate a punitive purpose. However, the court held the insertion of a purge clause transformed what would normally be construed as criminal contempt into civil contempt.[10] Some experts have expressed doubt that a comprehensive test, which applies in all situations, in possible.[11] Clearly, the *Shillitani* test does not meet this requirement.

The classification of the action as civil or criminal is a key issue in any contempt case. Many of the contemner's procedural rights are based upon this distinction. For example, criminal Statutes of Limitation[12] and the privilege against self-incrimination[13] apply to criminal but not civil proceedings. A civil contemner may be incarcerated indefinitely, while sentences for criminal contempt must be for a definite length of time.[14] The burden of proving the offense is greater for criminal contempt[15] and the eighth amendment's prohibition against cruel and unusual punishment applies to sentences for criminal but not civil contempt.[16] Despite these consequences, no reliable test exists for distinguishing civil and criminal contempt. The *Shillitani* case illustrates the confusion which exists with respect to the character of many contempt proceedings. The District Court and the Court of Appeals referred to Shillitani's conduct as criminal contempt. Both parties submitted briefs to the Supreme Court with the understanding that the action was criminal, but the Court based its decision on the conclusion that the action was for civil contempt.

The decision in *Cheff v. Schnackenberg*,[17] a companion case decided at the same time as *Shillitani*, makes the distinction between civil and criminal contempt even more important. The *Cheff* case was a criminal contempt proceeding instituted against the petitioner for violation of a District Court order demanding compliance with a Federal Trade Commission decree. Cheff requested and was refused a jury trial. He was subsequently convicted and given a six month sentence.[18] The Supreme Court granted certiorari and affirmed the conviction, concluding that Cheff was properly convicted without a jury. The Court was nevertheless careful to limit its decision to those cases where a sentence not exceeding six months is imposed. The Court stated: ". . . we rule further that sentences exceeding six months for *criminal* contempt may not be imposed by federal courts absent a jury trial or waiver thereof."[19]

8. United States v. UMW, 330 U.S. 258, 299 (1947).
9. Gompers v. Bucks Stove & Range Co., *supra* note 7, at 442-43.
10. 384 U.S. at 370.
11. RAPALJE, A TREATISE ON CONTEMPT 25 (1884); GOLDFARB, THE CONTEMPT POWER, 52 (1963).
12. Gompers v. United States, 233 U.S. 604, 611-12 (1914).
13. Gompers v. Bucks Stove & Range Co., *supra* note 7, at 444.
14. *Id.* at 442-43.
15. *Id.* at 444.
16. GOLDFARB, *op. cit. supra* note 11, at 266.
17. Cheff v. Schnackenberg, *supra* note 2.
18. *In re* Holland Furnace Co., 341 F.2d 548, 555 (1965).
19. Cheff v. Schnackenberg, *supra* note 2, at 380.

Historically all contempts were treated as sui generis and the right to trial by jury was withheld on this basis.[20] Even today any arguments concerning jury trials for civil contempts have been peremptorily dismissed as simply not applicable.[21] Prior to the *Cheff* decision there was no right to jury trial for criminal contempt, except as provided by statute.[22] Under the *Cheff* rule the right to jury trial in all criminal contempt cases not covered by statute will depend upon two factors: (1) length of the sentence imposed; and (2) classification of the contempt as civil or criminal.

The *Cheff* rule is an attempt to mitigate the procedural harshness which has characterized contempt proceedings throughout our history.[23] The extension of jury trial to a limited class of contempts is a significant step, but it may be frustrated by the artificial dichotomy between civil and criminal contempt. Under the *Cheff* and *Shillitani* decisions the judge could circumvent the contemner's right to jury trial for sentences exceeding six months by the simple expedient of inserting a purge clause along with a definite sentence for two or three years. Furthermore, since application of the *Cheff* rule is dependent upon classification of a contempt as criminal, the lack of a satisfactory criteria for making the classification prospectively will create problems for both the court and the contemner.

In so far as the contemner is subject to imprisonment all contempts are quasi-criminal.[24] Yet civil contempt procedure is summary and does not embrace many safeguards such as jury trial.[25] The phrase that defendants ". . . carry the keys of their prison in their own pockets"[26] has been advanced as a reason why procedure is not of substantial concern to the civil contemner. This argument overlooks the fact that once the contemner has made up his mind to undergo the penalty rather than obey, the likelihood of effective coercion becomes increasingly small and the accumulation of penalties assumes an excessively vindictive character.[27] Also there may be compelling reasons for the contemner's refusal to testify,

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20. Myers v. United States, *supra* note 5.

21. "Since civil contempts most often arise out of equity proceedings, the Seventh Amendment's guarantee of jury trials in civil matters would by its own terms ('In Suits At Common Law') be inapplicable. So, civil contemnors are between two rules, one providing for jury trial in civil matters arising out of other than equity actions; the other guaranteeing jury trial in criminal cases, a category from which civil contempts have been distinguished . . ." GOLDFARB, *op. cit. supra* note 11, at 175.

22. United States v. Barnett, 376 U.S. 681, 692 (1964); Green v. United States, 356 U.S. 165, 183 (1958). Jury trial is required by statute only if the act of contempt is also a state or federal crime, 18 U.S.C. §§ 402, 3691 (1964), or arises out of a labor dispute, 18 U.S.C. § 3692 (1964), or arises under provisions of the Civil Rights Act of 1957, 71 Stat. 638 (1957), 42 U.S.C. § 1995 (1964).

23. It has been said that the contempt power ". . . is, perhaps, nearest akin to despotic power of any power existing under our form of government." State *ex rel.* Attorney General v. Circuit Court, 97 Wis. 1, 8, 72 N.W. 193, 194-5 (1897).

24. Township of Noble v. Aasen, 10 N.D. 264, 273, 86 N.W. 742, 745 (1901).

25. *Ibid.*

26. *In re* Nevitt, 117 Fed. 448, 461 (8th Cir. 1902).

27. For example, a witness may refuse on insufficient grounds to answer certain questions. If the reason for the refusal is sufficiently strong for him to submit to coercive sanctions, it is quite possible that the obedience is beyond the

such as fear for himself and his family, or he may believe he has complied with a court order and his compliance thus becomes an issue of fact. Under these circumstances an indefinite sentence for civil contempt may be a more severe sanction than a definite sentence for criminal contempt.[28]

Because of the tenuous distinction between civil and criminal contempt, procedural safeguards are desirable for civil as well as criminal contemners. An alternative to the *Cheff* rule would be to extend the right of jury trial to all contempts where a sentence in excess of six months is imposed other than those offenses which are committed in the presence of the court and for which the exigencies of courtroom decorum require immediate action. Procedural safeguards are especially necessary in those civil contempt proceedings where a sovereign is the opposing party because the entire weight of the government is thrown against the contemner as in a criminal proceeding. Moreover, the fact that the government chooses to insert a purge clause should not so change the character of the proceeding as to deprive the offender of procedural rights to which he would be entitled in the absence of the purge clause.

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possibility of coercion and the sanction becomes reprobative. An example of a contemner who couldn't be coerced may be seen in an Illinois case where defendant was confined for four years for failure to turn over certain trust fund property to a receiver. Tegtmeyer v. Tegtmeyer, 292 Ill. App. 434, 11 N.E.2d 657 (1937).

28. One case was reported in which a man was incarcerated for a civil contempt for nine years for refusing to answer certain questions. GOLDFARB, *op. cit. supra* note 11, at 61.