1967

Constitutional Law: Matching Financial Grants to Church-Related Colleges Unconstitutional

Minn. L. Rev. Editorial Board

Case Comments

Constitutional Law: Matching Financial Grants to Church-Related Colleges Unconstitutional

Plaintiffs challenged the validity of several Maryland statutes, which provided matching financial grants to four private church-related colleges, on the ground that they violated the establishment clause of the first amendment to the United States Constitution and provisions of the state constitution.[1] A divided court of appeals reversed the dismissal of the complaint, *holding* that grants to three of the colleges, while permissible under Maryland's constitution, violated the establishment clause of the first amendment.[2] *Horace Mann League v. Board of Pub. Works*, 242 Md. 645, 220 A.2d 51 (1966).

Although substantial litigation involving the establishment clause has arisen, the Supreme Court has rarely dealt with the effect of this clause upon direct financial grants to church-related schools.[3] In *Everson v. Board of Educ.*,[4] the Court held that indirect state financial aid reimbursing parents for the cost of transporting their children to church-related schools did not contravene the establishment clause. The Court relied upon the state's secular interest in the safety of its children, and dismissed the benefit to religion as being negligible.[5] Recently,

1. The establishment clause was made applicable to the states through the fourteenth amendment by Everson v. Board of Educ., 330 U.S. 1 (1947). See MD. DECLARATION OF RIGHTS, Articles 15, 23, 36.

2. The grants to Western Maryland College (Methodist), St. Joseph College (Roman Catholic), and Notre Dame College (Roman Catholic) were held unconstitutional. The grant to Hood College (United Church of Christ) was upheld on the ground that the college was nonsectarian for purposes of the first amendment, although it maintained loose church ties.

3. Several reasons for this dearth of authority are evident. First, taxpayers lack standing to challenge the constitutionality of numerous federal financial programs involving aid to church-related schools. See Frothingham v. Mellon, 262 U.S. 447 (1923); Elliot v. White, 23 F.2d 997 (D.C. Cir. 1928); KURLAND, RELIGION AND THE LAW 32-36 (1962). Second, numerous state constitutions explicitly proscribe aid to church-related schools. *E.g.*, MINN. CONST. art. 8, § 2. See also Drinan, *The Constitutionality of Public Aid to Parochial Schools*, in THE WALL BETWEEN CHURCH AND STATE 55, 71 (Oaks ed. 1963). Finally, in several cases involving financial aid to church-related institutions, the constitutional issue was not reached. See, *e.g.*, Cochrane v. Board of Educ., 281 U.S. 370 (1930); Bradfield v. Roberts, 175 U.S. 291 (1899).

4. 330 U.S. 1 (1947); see 45 MICH. L. REV. 1001 (1947); 22 NOTRE DAME LAW. 400 (1947).

5. *Everson* has given rise to the child benefit theory. See La Noue, *The Child Benefit Theory Revisited*, 13 J. PUB. L. 76 (1964);

in *Abington School Dist. v. Schempp*,[6] a case involving a voluntary Bible reading program, the court stated that "to withstand the strictures of the establishment clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[7] This suggests that governmental aid to church-related institutions, which is strictly limited to secular functions, and which is justified by a secular state interest, does not violate the establishment clause.[8]

Although the state decisions are not entirely consistent, several state courts have found financial aid to be unconstitutional when not strictly confined to the secular fuctions of a sectarian institution.[9] For example, in *Almond v. Day*,[10] use of tax money for orphans' tuition to church-related schools, was held unconstitutional. And in *Swart v. South Burlington Township*,[11] the court invalidated a statute which permitted local school districts to pay the tuition of students attending private schools, in lieu of furnishing free public schools. Arguably, these decisions may be consistent with *Everson* and *Schempp*, for tuition benefits the institution as a whole, rather than a specific secular function of the institution.

It has been suggested that all aid, even if carefully confined to the secular activities of church-related institutions, is actually aid to their religious activities, since this enables the in-

Comment, 21 ST. JOHN'S L. REV. 176, 179 (1947). The Supreme Court of Delaware recently rejected the child benefit theory, refusing to follow *Everson* in Opinion of the Justices, 216 A.2d 668 (Del. 1966) (free transportation for nonpublic school pupils violates state constitution); *accord*, Board of Educ. v. Allen, 273 N.Y.S.2d 239 (Sup. Ct. 1966); see 31 ALBANY L. REV. 152 (1966).

6. 374 U.S. 203 (1963).

7. *Id.* at 222.

8. Sky, *The Establishment Clause, the Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1445 (1966).

9. The use of tax funds to pay private school tuition also was struck down. Williams v. Board of Trustees, 173 Ky. 708, 191 S.W. 507 (1917); Otken v. Lamkin, 56 Miss. 758 (1879); Synod of Dakota v. State, 2 S.D. 366, 50 N.W. 632 (1891). However, it has been held that a state could defray expenses of delinquents at a church-related industrial school. St. Hedwig's School v. Cook County, 289 Ill. 432, 124 N.E. 629 (1919). Tuition payments for veterans were found to be permissible. Veterans' Welfare Bd. v. Riley, 189 Cal. 159, 208 Pac. 678 (1922). See Manning, *Aid to Education—State Style*, 29 FORDHAM L. REV. 525 (1961); Note, *Current Legislation*, 12 SYRACUSE L. REV. 387 (1961), concerning the constitutionality of a New York state plan for partial tuition payments to students attending private colleges, including those with church affiliation.

10. 197 Va. 419, 89 S.E.2d 851 (1955); 42 VA. L. REV. 437 (1956).

11. 122 Vt. 177, 167 A.2d 514 (1960); 29 FORDHAM L. REV. 578 (1961); 59 MICH. L. REV. 1254 (1961). See also Annot., 81 A.L.R.2d 1309 (1962).

stitutions to free their own funds for religious uses.[12] Carried to its logical conclusion, the freeing of funds argument would operate to bar any form of governmental aid to church-related institutions. However, this argument appears to have been implicitly rejected by the Court in both *Everson* and *Schempp*. *Everson* allowed state aid for transportation although this money might release funds for sectarian functions. *Schempp*, by requiring that the "primary effect [was not] to advance religion," appears to recognize that a secondary effect, such as freeing of funds, is constitutionally permissible. In *Murray v. Comptroller of Treasury*,[13] decided shortly before *Horace Mann*, the Maryland court explicitly rejected this argument while upholding tax exemptions for church owned property.[14]

In *Horace Mann*, the court held that the controlling factor for constitutional purposes was the degree of "religiousness" of the aided institution, since not all state financial aid to religion is prohibited by the establishment clause.[15] The court relied upon a number of factors which it thought were indicative of the substantiality of each institution's religious orientation: the institution's stated purposes; the character of its governing board, administration, student body, and faculty; the place of religion in the overall program; the accomplishments of the overall program; the institution's affiliation with religious groups and the support derived from them; and its image in the community.[16]

By concentrating upon the religiousness of the institution receiving aid,[17] the majority's standards differ from the stand-

12. 77 HARV. L. REV. 1353 (1964); 22 LA. L. REV. 266, 268 (1961).

13. 241 Md. 383, 216 A.2d 897 (1966). The exemptions were upheld by finding that churches tend to attract people and thus increase the general tax base. The secular services provided by churches, such as counseling, recreation, and cultural activities were also found to be secular justifications. The court also believed that the free exercise clause might present difficulties should the exemptions not be granted. Since the secular benefits and services provided by even the most religiously oriented colleges are more obvious than those provided by churches, it is difficult to reconcile *Horace Mann* with *Murray*.

14. "Logically, [the freeing of funds] argument is strong. But, as this Court has said before, logic is a minion of the law, not its master." 241 Md. at 399, 216 A.2d at 906.

15. 242 Md. at 671, 220 A.2d at 65.

16. *Id.* at 672, 220 A.2d at 65, 66.

17. Following the analysis suggested in *Everson* and *Schempp*, the dissent argued that providing expanded opportunities for higher education constituted a valid secular purpose for the grants, and that because of the relatively large number of church-related colleges, no workable alternatives were available to accomplish this purpose. 242 Md. at 645, 698-99, 220 A.2d 51, 81.

ards of both *Everson* and *Schempp*. In those cases the Supreme Court suggested that where a financial grant was designed to accomplish a secular purpose, where no reasonable alternatives were available, and where the benefit to religion would be indirect or merely incidental to accomplishment of the secular purpose, the establishment clause would not be violated. The *Horace Mann* court disregarded the projected uses of the grants, which were on a matching basis with the college and were to be used for construction of dining halls, classrooms, and dormitories. Moreover, the opinions neither discussed the availability of alternatives nor found the primary or direct effects of the grants to be of concern. Instead, the court implicitly reasoned that the more religiously oriented the school, the more likely financial aid would be used to benefit religion to an impermissible degree. By this reasoning, once an institution is found to be sufficiently religious, an irrebuttable presumption is raised that aid to it is unconstitutional.[18]

Accepting this interpretation of the reasoning in *Horace Mann*, it is arguable that, contrary to its decision in *Murray*, the Maryland court placed some reliance on the freeing of funds argument. Thus, once the primary secular purpose of financial aid is disregarded and the institution is determined to be religious, an inference must necessarily follow that the funds will confer a substantial benefit on the institution's religious aspects, regardless of how the funds are actually used.

Although an analysis of the religiousness of institutions might be feasible when applied to aid programs limited to a few schools, as in *Horace Mann*, it would be extremely cumbersome if used to analyze the constitutionality of broad programs. For instance, in programs such as those instituted by the federal government, the religiousness of each beneficiary institution would have to be examined, and some type of quantitative evaluation made to determine whether the overall benefit to religion was too substantial. Moreover, if only the constitutionality of particular applications of the program were challenged, although the *Horace Mann* analysis could satisfactorily dispose of

18. There is some doubt that the majority's interpretation of the establishment clause will ultimately be accepted in Maryland. Two members of the four member majority in *Horace Mann* are no longer on the court. In a concurring opinion in Truitt v. Board of Pub. Works, 221 A.2d 370, 392-93 (1966), which unanimously upheld state aid to church-related hospitals, one of the new justices expressed "grave doubts in regard to the correctness" of *Horace Mann* and declared that he would further express his views "as and when the decision in *Horace Mann* is later relied on as controlling authority . . . ."

any particular case, the possibility of multiplication of litigation is apparent.

In addition, application of the *Horace Mann* standard to such programs as the Higher Education Facilities Act of 1963[19] appears undesirable. Under this program the Commissioner of Education distributes federal funds to the states, which in turn allocate the funds to various private educational institutions subject to the commissioner's veto power.[20] Funds may be used only for "academic facilities," which are defined as structures . . . especially designed for instruction or research in the natural or physical sciences, mathematics, modern foreign languages, or engineering, or for use as a library." No funds may be utilized for any facility to be used for religious worship or instruction.[21] Nevertheless, the act would violate the first amendment as interpreted by *Horace Mann* insofar as it permits government funds to benefit strongly religious institutions. Since there are a large number of colleges with widely varying degrees of religious orientation, major benefits to society as a whole would have to be foregone because of relatively minimal benefits to religion. Under the *Schempp* standard, on the other hand, the act would be constitutional in its entirety.

Thus the test adopted by the Supreme Court in *Everson* and *Schempp* would appear to resolve the conflicting interests under the establishment clause more satisfactorily than would the test adopted in *Horace Mann*. It would permit much needed aid

19. 77 Stat. 363 (1963), 20 U.S.C. § 701 (Supp. 1966).

20. A memorandum prepared by the Health, Education, and Welfare Department, reprinted in 50 GEO. L.J. 349 (1961), suggested that government aid to sectarian colleges is permissible, while similar aid to sectarian primary and secondary schools is not. The Department argued that religious indoctrination is less pervasive in sectarian colleges, that free public higher education is not available to all qualified college-age students, and that college enrollment does not have the power of compulsion behind it. These arguments have not been adopted by any court and appear to be of doubtful validity. Since the pervasiveness of religious indoctrination on sectarian college campuses varies greatly, to refer to it in general terms is meaningless.

If aid to sectarian grade and high schools is unconstitutional because it will help those institutions propagate the tenets of a particular faith and will force others to support teaching of beliefs repugnant to them with their tax dollars, it is difficult to comprehend why such aid becomes permissible simply because a greater percentage of students attend church-related colleges than church-related grade and high schools. Compulsory school attendance laws will exist whether or not state aid is extended to sectarian schools and colleges; they should be irrelevant in determining whether such aid is constitutional.

21. 79 Stat. 1266 (1965), 20 U.S.C. § 716 (Supp. 1966). The Maryland statute involved in *Horace Mann* contained a similar limitation.

to private educational institutions while condemning excessive and unnecessary benefits to religion.[22]

Constitutional Law: Right to Jury Trial for Criminal Contempt

Defendant was cited for criminal contempt for violation of a pendente lite order requiring compliance with a cease-and-desist order. Following denial of his request for a jury trial, defendant was convicted and sentenced to six months' imprisonment. On appeal, the Supreme Court affirmed, *holding* that defendant did not have a constitutional right to a trial by jury. However, acting pursuant to its supervisory powers over the inferior federal courts, the Court ruled that in criminal contempt proceedings a sentence in excess of six months' imprisonment may not be imposed without a trial by jury. *Cheff v. Schnackenberg,* 384 U.S. 373 (1966).

While both article III, section 2[1] and the sixth amendment[2] of the Constitution ostensibly require a jury trial in all criminal prosecutions, it is well settled that this right is available only to the extent that it was recognized at the time of the adoption of the Constitution.[3] Since the practice at common law was to try petty offenses in summary proceedings,[4] these offenders were not entitled to a jury trial.[5] However, the present scope of the

22. There is considerable controversy over whether the framers of the first amendment intended to proscribe all aid to religion, or merely to prohibit governmental preference of one religion over another. See Pfeffer & O'Neill, *The Meaning of the Establishment Clause: A Debate,* 2 BUFFALO L. REV. 225 (1953).

1. U.S. CONST. art. III, § 2. Note that cases of impeachment are excepted.

2. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

3. See cases cited in Green v. United States, 356 U.S. 165, 191 n.2 (1957). For a contrary view see FOX, HISTORY OF CONTEMPT OF COURT 203-09 (1927). The historical development of criminal contempt is discussed in Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in the Separation of Powers,* 37 HARV. L. REV. 1010 (1924); Comment, 57 MICH. L. REV. 258 (1958).

4. Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,* 39 HARV. L. REV. 917, 969 (1926).

5. See District of Columbia v. Clawans, 300 U.S. 617 (1937) (city ordinance regulating secondhand dealers under penalty of a fine of not

petty offense exception is uncertain for the applicable standards are to be interpreted in terms of contemporary judicial thinking.[6] This is the result of the realization that commonly accepted views as to the severity of punishment may so change that penalties once considered mild may now be considered so harsh as to require a trial by jury.[7]

In *Green v. United States*,[8] the Court broadly asserted that a criminal contempt proceeding did not constitutionally require a jury trial, thus implying that the nature of the crime was determinative, regardless of the seriousness of the violation or the severity of the penalty imposed.[9] Subsequently, in *United States v. Barnett*,[10] although the Court agreed with the *Green* decision to the extent that the nature of the crime was controlling, the Court stated in dictum that the severity of the penalty imposed might determine whether a jury trial was constitutionally required.[11] Hence, the Court recognized that the severity of the penalty, as well as the nature of the crime, might be the decisive factors in defining the constitutional scope of petty offenses.

In the instant case, the Court relied upon federal statute rather than the Constitution to limit the power of the federal courts to dispose summarily of criminal contempt citations. The Court drew upon the statutory definition of petty offense,[12] its supervisory power,[13] and its power to revise criminal contempt

more than $300 or imprisonment not to exceed 90 days); Schick v. United States, 195 U.S. 65 (1904) (state statute regulating the sale of oleomargarine under penalty of a fifty dollar fine); Lawton v. Steele, 152 U.S. 133 (1894) (state statute regulating fishing under penalty of a fifty dollar fine); Natal v. Louisiana, 139 U.S. 621 (1891) (city ordinance regulating public markets under penalty of a twenty-five dollar fine and imprisonment not to exceed thirty days if fine unpaid).

6. See United States v. Barnett, 376 U.S. 681, 728 (1964) (Goldberg, J., dissenting); Green v. United States, 356 U.S. 165, 193 (1958) (Black, J., dissenting). In applying this concept to criminal contempt, both Justices stated that although criminal contempt was a petty crime according to common law standards, the present application of this crime has transformed it into a serious offense.

7. District of Columbia v. Clawans, 300 U.S. 617, 627 (1937).

8. 356 U.S. 165 (1957).

9. *Id.* at 188-89. Although the Court in *Green* recognized that criminal contempt was subject to sentences of imprisonment exceeding one year, it refused to make an exception, based on severity of sentence, to its determination that criminal contempt was a petty crime.

10. 376 U.S. 681 (1963).

11. *Id.* at 694 n.12.

12. "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense." 62 Stat. 684 (1948), 18 U.S.C. § 1(3) (1964).

13. 63 Stat. 104 (1949), 28 U.S.C. § 2071 (1964).

penalties[14] in concluding that it would not tolerate sentences exceeding six months for criminal contempt unless defendant was afforded the right to a jury trial.[15] Since the sentence in *Cheff* fell within this proscription, the defendant was not entitled to a jury trial. Significantly, in reaching this conclusion and rejecting the defendant's contention that the right to a jury trial attaches in all criminal cases, the Court relied upon the dictum in *Barnett* to the effect that punishment by summary trial without a jury is constitutionally limited to those penalties provided by statute for petty offenses,[16] regardless of the seriousness of the offense.

The Court may have based its decision upon its supervisory power rather than the Constitution in the belief that it was more prudent to avoid the constitutional issue and its possible effect upon state proceedings.[17] Although it is true that the Court may have more strictly limited the severity of penalties to be imposed in summary proceedings than required by the Constitution, there is reason to believe that the six-month limitation is a constitutional as well as a supervisory standard.[18]

---

14. United States v. Green, 356 U.S. 165, 188 (1958).

15. 384 U.S. at 380.

16. United States v. Barnett, 376 U.S. 681, 694 n.12 (1963). This suggests that, following *Cheff*, the Court may feel that in criminal contempt cases the sentence imposed should be the focal point of the constitutional test. In District of Columbia v. Clawans, 300 U.S. 617 (1937), it was suggested that at some point the severity of the sentence may entitle a contemner to a jury trial. Although no specific limit was set, ninety days was held below whatever that limit might be. The *Barnett* decision was the first case to suggest a constitutional limit on the federal courts' power to summarily punish an individual charged with criminal contempt. For an analysis of *Barnett* see Tefft, *United States v. Barnett: 'Twas a Famous Victory*, 1964 SUP. CT. REV. 984 (1964).

17. The right to jury trial has not yet been applied to state criminal proceedings. See Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 158 (1931); Olesen v. Trust Co., 245 F.2d 522, 524 (7th Cir. 1957). However, the remainder of the sixth amendment has been made binding upon the states. See Klopfer v. North Carolina, 35 U.S.L. WEEK 4248 (U.S. March 14, 1967) (right to a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (right of defendant to be confronted with the witnesses against him which includes the right of cross-examination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right of an indigent defendant to secure court appointment of counsel); *In re* Oliver, 333 U.S. 257 (1948) (providing defendant the right to a public trial).

In Ford v. Boeger, 362 F.2d 999 (8th Cir. 1966), the court discussed the possible applicability of the *Cheff* rule to state proceedings. However, it appears that the court was under the mistaken belief that the jury requirement applied to state proceedings.

18. See Burdick, *Problems and New Developments in Contempt*, 43 N.D.L. REV. 237, 241 (1967).

The six-month exception parallels the requirement of the Criminal Justice Act that counsel be provided for indigents in all criminal cases except the petty offense,[19] defined as one carrying a penalty of less than six months.[20] Furthermore, according to the concurring opinion of Justice Harlan, the *Cheff* majority was comprised of two justices who believed that the six-month exception was constitutionally required, and four justices who relied upon the supervisory power but also found the constitutional question difficult.[21] Thus, when faced with a conviction which it cannot handle under its supervisory powers, the Court may recognize that the six-month rule has constitutional force.

In addition to the constitutional question raised by *Cheff*, the propriety of the six-month rule is subject to question. In support of the rule is the realization that severe penalties may result from criminal contempt proceedings and that the common law exception of petty offenses cannot be maintained in the face of current ideas of justice.[22] On the other hand, the courts must not be unduly hindered in the administration of justice,[23] and the imposition of community sentiment through the jury may

19. In every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a *petty offense*, and appears without counsel, the United States commissioner or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel . . . .
62 Stat. 814 (1948), 18 U.S.C. § 3006 A(b) (1964). (Emphasis added.) From the Court's reference to the criminal code in defining a petty offense and the general structure of the opinion, it appears that the Court intended the six-month standard to be connected to the Constitution. See 384 U.S. at 378-79. *But see* Winters v. Beck, 385 U.S. 907 (1966), where the Court, by denying petitioner's request for writ of certiorari, in effect affirmed the Arkansas court's determination that all misdemeanors are excluded from the constitutional rule of *Gideon v. Wainwright*. Since some misdemeanors in Arkansas are punishable by up to three years imprisonment, the Court in *Winters* appears to have departed from utilizing severity of the punishment in deciding which crimes will be denied constitutional protection and instead relied on a felony-misdemeanor distinction.

20. See note 12 *supra*.

21. 384 U.S. at 381.

22. See United States v. Thompson, 214 F.2d 545 (2d Cir. 1954), where the Court affirmed several sentences ranging from three to four years imprisonment.

23. See, *e.g.*, Michaelson v. United States, 266 U.S. 42, 65 (1924) (essential to the administration of justice); *Ex parte* Terry, 128 U.S. 289, 303 (1888) (inherent power essential to the execution of the courts' powers); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873) (power essential to the preservation of order and necessary to the due administration of justice); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (contempt power necessary to the exercise of all other powers of the courts).

unduly handicap the ability of the courts to enforce their orders.[24] Faced with these competing interests, the six-month rule appears to be a reasonable compromise.

Although the *Cheff* decision imposes a reasonable limitation based upon the duration of imprisonment, it is deficient in several important respects. The standard adopted totally disregards the use of punitive fines in lieu of or in addition to imprisonment. Although the courts may be limited to fines of five hundred dollars by the statutory definition of petty offense,[25] it is arguable that this limitation may not be applicable, thus presenting an opportunity for violation of the Court's intent in advancing the six-month rule.

Furthermore, the Court disregarded the diverse nature of criminal contempt as a substantive offense.[26] Criminal contempt may involve insults to the dignity of the court which occur in court as well as out of court. The language of the *Cheff* rule precludes consideration of the nature of the behavior which gave rise to the contempt citation and thus deprives the court of flexibility in its administration of justice. Finally, under this rule, the court must make a pretrial determination as to the possible sentences it may impose in order to determine whether it is required to grant a jury trial. If the court recognizes the possibility of imposing a sentence of more than six months a jury trial will be necessary. However, if the court does not anticipate a sentence of more than six months, but changes its mind after hearing the evidence, it may be forced to impose a lesser sentence than required by the facts of the case, or declare a mistrial.

It is suggested that a better solution is to make the place and the effect of the contempt determinative as to whether a jury trial is required.[27] In the normal situation the right to a jury trial will be preserved, and the jury can act as a buffer be-

24. "Among the prominent shortcomings of the new rule, which are simply disregarded, is the difficulty it may generate for federal courts seeking to implement locally unpopular decrees." 384 U.S. at 382 (Harlan, J., concurring). For a general discussion of the benefits of summary power see *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994 (1965); Note, 65 YALE L.J. 846 (1965).

25. See note 12 *supra*.

26. See 384 U.S. at 380.

27. See the Civil Rights Act, 71 Stat. 638 (1957), 42 U.S.C. § 1995 (1964), which provides either a limitation upon the penalty which may be imposed or the right to a jury trial in all contempt proceedings except "contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice . . . ." The Civil Rights Act of 1964 has an identical provision. 78 Stat. 268 (1964), 42 U.S.C.A. § 2000(h) (1964).

tween the government and the defendant without posing a serious threat to the administration of the law. However, because the orderly administration of justice requires summarily disposing of some cases without a jury trial, the defendant would not be entitled to a jury trial for contempts which occured in the presence of the court or which would directly interfere with that administration. In these cases the appellate courts would serve as a safeguard against excessive sentences.[28] However, beyond setting a constitutional minimum, the balance between the competing interests of defendant's right to a jury trial and the need for an effective judiciary is best left to the legislature.

Copyright: Right of Copyright Owner To Suppress Publication

Defendants prepared a biography of Howard Hughes for publication. As completed, the biography contained two direct quotes and an eight line paraphrase from a series of copyrighted magazine articles. Upon learning of the forthcoming publication, Hughes caused plaintiff, a corporation which he indirectly controlled, to purchase the copyrights to the magazine articles.[1] Plaintiff then commenced an action to enjoin publication of the book, alleging an infringement of copyright. Finding that a prima facie case of infringement had been shown and that defendants' commercial motive in publishing the book precluded the defense of fair use, the district court granted a preliminary injunction.[2] The court of appeals reversed, *holding* that the fair use defense was not limited to noncommercial uses of copyrighted material and that, since plaintiff had shown neither probable success at trial nor imminent and irreparable injury, the preliminary injunction was an inappropriate remedy. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966).

---

28. The "discretion" to punish vested in the District Courts by § 401 is not an unbridled discretion. Appellate courts have here a special responsibility for determining that the power is not abused, to be exercised if necessary by revising themselves the sentences imposed.
United States v. Green, 356 U.S. 165, 188 (1958).

1. Before purchase of the magazine copyrights, Hughes' attorneys had attempted to persuade or threaten Random House not to publish the book. Brief for Appellant, pp. 68a-71a, Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966).

2. Rosemont Enterprises, Inc. v. Random House, Inc., 256 F. Supp. 55 (S.D.N.Y. 1966).

A nonfictional writing may be thought of as a composite of four elements: facts, ideas, the collection and organization of facts and ideas, and the specific sequence of words chosen to express facts and ideas.[3] The copyright protection accorded to such a writing does not extend to the facts[4] and ideas[5] contained therein even if the author discovered the facts through his own research and personally created each of the ideas.[6] The author may not even be protected against an appropriation of the entire collection of facts and ideas contained in his work.[7] The principal, and probably sole, function of copyright is to protect the copyright owner from unauthorized uses of the manner of expression chosen to relate facts and ideas.[8]

In the instant case, therefore, the plaintiff could have no right of action under the copyright law based on proof that factual material appearing in defendants' biography was taken from the copyrighted magazine articles. Copyright protection existed only as to the two direct quotations in the biography which were taken from the copyrighted articles of plaintiff. However, even if copyright protection has been infringed, the defendant may still raise the defense that the copying was a fair use of the copyrighted material.[9]

---

3. Gorman, *Copyright Protection for the Collection and Presentation of Facts*, 76 HARV. L. REV. 1569, 1578 (1963).

4. Collins v. Metro-Goldwyn Pictures Corp., 106 F.2d 83, 86 (2d Cir. 1939); Echevarria v. Warner Bros. Pictures, Inc., 12 F. Supp. 632, 638 (S.D. Cal. 1935).

5. See, *e.g.*, Dellar v. Samuel Goldwyn, Inc., 40 F. Supp. 534 (S.D.N.Y. 1941), *aff'd*, 150 F.2d 612 (2d Cir. 1945), *cert. denied*, 327 U.S. 790 (1946).

6. Echevarria v. Warner Bros. Pictures, Inc., 12 F. Supp. 632, 638 (S.D. Cal. 1935).

7. For cases holding no infringement by similar factual patternings concerning historical events see, *e.g.*, Eisenschiml v. Fawcett Publications, Inc., 246 F.2d 598 (7th Cir. 1957) (article on Lincoln's assassination using plaintiff's work published in magazine did not infringe); Lake v. Columbia Broadcasting Sys., Inc., 140 F. Supp. 707 (S.D. Cal. 1956) (radio episodes on the life of Wyatt Earp did not infringe the biographer's copyrights). See also Gorman, *supra* note 3, at 1578. *Contra*, Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950), (compilation of facts for a biography of Hans Christian Andersen infringed by defendant's later biography); Triangle Publications, Inc. v. New England Newspaper Publishing Co., 46 F. Supp. 198 (D. Mass. 1942) (copyrighted publication containing horse racing information held infringed by defendant); NIMMER, COPYRIGHT § 29.4 (1963).

8. Orgel v. Clark Boardman Co., 301 F.2d 119 (2d Cir.), *cert. denied*, 371 U.S. 817 (1962); Chicago Record-Herald Co. v. Tribune Ass'n, 275 Fed. 797 (7th Cir. 1921).

9. See, *e.g.*, Berlin v. E. C. Publications, Inc., 329 F.2d 544 (2d Cir. 1964).

If infringement is shown and the defense of fair use fails, the question arises whether proof that the plaintiff's sole reason for acquiring the copyright to the magazine articles is to suppress publication of defendants' biography constitutes a defense to the action. A concurring opinion,[10] in which two members of the three-judge panel joined, indicated that copyright protection would be precluded altogether when the proprietor's sole motive is to suppress information he does not want publicized. The opinion reasoned that the policy of the constitutional grant and the copyright law—to provide protection as an incentive to creation—precludes efforts, such as that of the plaintiff, to use this law to suppress copyrighted material.[11] Furthermore, since the life of Howard Hughes is a matter of public interest, the first amendment would prohibit suppression of writings concerning his life.

Although the Supreme Court has never directly considered the question of whether a copyright may be used for the purpose of suppression, its decisions involving patent suppression are relevant since the patent and copyright laws derive from a common constitutional base.[12] In *Continental Paper Bag Co. v. Eastern Bag Co.*,[13] the Court stated that the exclusive right to make or vend, conferred by the patent law, generally included the exclusive right to suppress. However, because the patentee's suppression was not found unreasonable,[14] the Court reserved the question of whether suppression would be protected in every instance.[15] In *Special Equipment Co. v. Coe*,[16] the holding of the *Continental* case was reaffirmed but, again, the Court failed to decide whether an unjustifiable suppression would be protected.

10. The concurring opinion might arguably have some stare decisis effect, since it represents a majority of the three-man panel. This might work in three ways: a) the trial judge might subsequently feel bound by the concurring language, even though the holding of the case was narrower; b) should the result of the trial be appealed, the Second Circuit panel, even though of a different composition than that sitting on the instant appeal, might feel bound to some extent; c) courts in later cases might feel some binding effect.

If the trial judge upon remand felt bound by the concurring opinion, a directed verdict for defendant would seem to be his only course of action.

11. 366 F.2d at 311.

12. U.S. CONST. art. I, § 8(8).

13. 210 U.S. 405 (1908).

14. *Id.* at 428-29. The patentee sought to protect his financial interests in a related patent. *Id.* at 428.

15. *Id.* at 429.

16. 324 U.S. 370, 378-79 (1944), 93 U. PA. L. REV. 456 (1945); Note, 58 HARV. L. REV. 726 (1945); Note, 31 VA. L. REV. 668 (1945).

This attitude was extended to copyrights in *Fox Film Corp. v. Doyal*,[17] where the Court, citing *Continental*, stated in dictum that a copyright owner may "refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property."[18] In view of its derivation, this statement arguably should be interpreted as permitting only a reasonable use of a copyright to suppress as, for example, where a copyright owner suppresses to protect his financial interest in a related work. But even so, these decisions do not support the view that suppression may be a ground for denial of copyright protection even where the suppression is unreasonable.

It is also difficult to justify the position of the concurring judges in *Rosemont*, both as a matter of copyright policy and constitutional law. Section 1 of the Copyright Law accords the owner of copyright in a published work the "exclusive right . . . to print, reprint, publish, copy and vend the copyrighted work . . . ."[19] Section 28 provides that a copyright "may be assigned, granted, or mortgaged . . . ."[20] Thus, the statutory language seemingly treats copyright as a traditional property right, with the resulting implication that a copyright owner enjoys unlimited control over the protected work.[21] Nevertheless, courts have distinguished copyrights from other personal property,[22] and have been unwilling to extend unlimited power of control to the owners of literary or artistic property. For example, the doctrine of fair use is a limitation judicially imposed to permit reasonable criticism and analysis of published works.[23]

That the extent of copyright protection should not be governed by traditional notions of property right is evident. Congress is constitutionally empowered to grant copyrights "to promote the Progress of Science and useful Arts . . . ."[24] In consonance with this directive,[25] the policies underlying copyright

17. 286 U.S. 123 (1932).
18. *Id.* at 127.
19. 17 U.S.C. § 1 (1964).
20. 17 U.S.C. § 28 (1964).
21. "An author or proprietor of a literary work or manuscript possesses such a right of sale as fully and to the same extent as does the owner of any other piece of personal property." Maurel v. Smith, 271 Fed. 211, 214 (2d Cir. 1921). See also Remick Music Corp. v. Interstate Hotel Co., 58 F. Supp. 523, 534-35 (D. Neb. 1944).
22. See, *e.g.*, Chamberlain v. Feldman, 300 N.Y. 135, 139, 89 N.E.2d 863, 865 (1949).
23. See BALL, COPYRIGHT AND LITERARY PROPERTY 260 (1944).
24. U.S. CONST. art. I, § 8(8).
25. For analyses and histories of the constitutional clause, see BOWKER, COPYRIGHT ITS HISTORY AND ITS LAW (1912); TAUBMAN, COPY-

legislation have been found to be based upon public, rather than private, interests. Personal benefit to the copyright owner is not a primary consideration:[26] "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labor of authors."[27] It is unavoidable that such policies will, at times, conflict with the essentially private interests represented by rights to tangible personal property. Thus the question whether a copyright may be used to suppress is not capable of solution by analogy to personal property rights.

In certain instances the right to suppress copyrighted material is clearly desirable and necessary. Assume, for example, the owner of copyright in a published nonfictional writing procures a revision of that work. After the revision has been published,[28] the owner will probably choose to discontinue publication of the original. However, publication of the original by others could severely injure him competitively. The right to suppress the original supports the economic value of the revision. If that right were denied, the incentive to produce the revision would be sharply reduced.

If suppression is, in any case, to be a ground for denial of copyright protection, the limitation must be restricted to situations in which copyright policies are not served by the right to suppress. Since the evident purpose of the purchase of the magazine copyright was to suppress a publication regarded by Hughes as an invasion of his privacy,[29] *Rosemont* would appear to be such a case. The right to suppress to protect against invasions of privacy would not foster creative incentive. It is unlikely that an author would be motivated to write a biographical or historical work by the possibility that, subsequent to its publication,[30] some person will purchase and suppress the work to

---

RIGHT AND ANTITRUST 5-41 (1960); Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109 (1929); Note, *Copyright—Study of the Term "Writings" in the Copyright Clause of the Constitution*, 31 N.Y.U.L. REV. 1263 (1956).

26. Mazer v. Stein, 347 U.S. 201, 219 (1954); United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948); EVANS, COPYRIGHT AND THE PUBLIC INTEREST 29 (1949); *cf.* Pennock v. Dialogue, 27 U.S. (2 Pet.) 1 (1829).

27. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

28. The revision would be copyrightable independent of the original. 17 U.S.C. § 7 (1964).

29. 366 F.2d at 311.

30. A work which is suppressed prior to publication would not be affected by the construction of the copyright law propounded by the concurring judges in *Rosemont* since such a work would be protected

protect his privacy.

However, even in such situations, there is little justification for a denial of copyright protection. Because the protection given a copyright holder does not extend to the factual material and ideas contained in the protected work, copyright is an ineffective tool for the guarding of privacy. Defendants in the instant case could have appropriated all factual material contained in the copyrighted articles without fear of liability. Thus the benefit which would flow from a denial of relief to a copyright holder who has attempted to suppress to maintain his privacy is minimal.

Further, to withhold protection in such instances would cause a certain disadvantage. Creation is encouraged when the validity of a copyright can be established with certainty and without resort to litigation.[31] A denial of copyright protection to a plaintiff who has suppressed to preserve his privacy would necessarily rest upon a finding as to the intent and purpose of the copyright holder. Instances will arise in which the facts lend themselves to conflicting inferences of intent. Validity of the copyright could, in such situations, be determined only by litigation. In copyright law, as elsewhere, many problems can be satisfactorily resolved only by rules of law which raise difficult problems of proof. However, such solutions should be preferred only when the benefit derived therefrom outweighs the effect of the uncertainty which they cause.

The first amendment furnishes no greater support for the position of the concurring judges in *Rosemont*. Their notion that the first amendment limits, in some way, the scope of copyright protection is perhaps best supported by analogy to recent Supreme Court decisions, involving actions for defamation and invasion of privacy, in which concern is expressed about the effect of potential liability on the free expression of ideas.

In *New York Times, Inc. v. Sullivan*,[32] the Court found that the public interest in broad and varied criticism of public officials required that damages for a defamatory falsehood not be awarded to a public official unless it is proved that the state-

---

by a common law rather than statutory copyright. Bobbs-Merrill Co. v. Straus, 147 Fed. 15, 18 (2d Cir. 1906); Estate of Hemingway v. Random House, Inc., 49 Misc. 2d 726, 729, 268 N.Y.S.2d 531, 535 (Sup. Ct. 1966); Phillip v. Pennell, [1907] 2 Ch. 577; DRONE, COPYRIGHT, 100-03 (1879).

31. See Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 514 (1945).

32. 376 U.S. 254 (1964).

ment was made with actual malice—with knowledge of its falsity or with reckless disregard of its truth or falsity The same test was extended to matters of public interest when, in *Time, Inc. v. Hill*,[33] it was held that the first and fourteenth amendments preclude a state from awarding damages for invasion of privacy in the absence of actual malice. The Court stated that "exposure of the self to others in varying degrees is a concommitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."[34]

The nature of the restraint on the freedom of speech imposed by the copyright law differs substantially from that feared by the Court in *Sullivan* and *Hill*. Copyright in no way limits the content of permissible speech or writing. It demands only that the specific sequence of words contained in a protected work not be copied. Therefore no actual restraint is imposed on the free exchange of ideas.

The assumption underlying the position of the concurring judges, that suppression of copyrighted material can effect a result contrary to the policies of copyright legislation and the first amendment, is unfounded. Suppression should not be recognized as a ground for denial of copyright protection.

33. 385 U.S. 374 (1967).
34. *Id.* at 388.