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Recent Decisions

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RECENT DECISIONS

EVIDENCE — CONSTITUTIONAL LAW — SELF-INCRIMINATION — SOUND MOTION PICTURES OF INTOXICATED DRIVER TAKEN WITHOUT CONSENT SHORTLY AFTER ARREST ARE ADMISSIBLE IN EVIDENCE OVER OBJECTION THAT THEY VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION. — On April 6, 1963, Joe Lanford was arrested and charged with violating § 13-4-30 of the Colorado Revised Statutes[1] for driving under the influence of intoxicating liquor. He was taken to Denver police headquarters for further questioning and the administration of sobriety tests. A sound motion picture film was taken at the police station. This film, taken without Lanford's consent, showed his refusal to take designated coordination tests. At his trial in the Superior Court of the City and County of Denver, the motion picture was admitted into evidence. Lanford was found guilty of driving while intoxicated, sentenced to 30 days in jail and fined $200.00 plus costs. On appeal, Lanford argued that introduction of the motion picture in evidence violated his constitutional right against self-incrimination because it was taken without his consent and showed his refusal to submit to coordination tests. The Supreme Court of Colorado, in affirming his conviction, *held:* moving pictures and their sound, which are relevant and which allegedly show the demeanor and condition of a defendant charged with driving under the influence of either alcohol or drugs, taken at the time of arrest or shortly thereafter, are admissible in evidence even though they show defendant's refusal to take sobriety and coordination tests, when properly offered to show defendant's demeanor, conduct, and appearance, and to show why sobriety and coordination tests were not given. *Lanford v. People,* 409 P.2d 829 (Colo. 1966).

The litigation of "drunk driving" cases often presents interesting legal problems. These problems arise out of the nature of the procedures utilized by law enforcement agencies in gathering evidence to support a conviction for driving under the influence. In an effort to stem the rising tide of traffic accidents attributable to intoxicated drivers, opinion evidence based upon visual observations by police officers has taken a back seat to the utilization of a variety of scientific devices. Modern drunk driving litigation has witnessed the introduction in evidence of the results of such devices as blood tests, urine tests, and a variety of breath tests, all aimed at establishing intoxication.[2] The use of these devices raises important questions as to whether their introduction in evidence violates a defendant's federal and state constitutional rights.[3]

1 COLO. REV. STAT. § 13-4-30 (1953) provides:

> Driving under the influence — penalty. — Any person under the influence of intoxicating liquor or narcotic drugs, or who is a habitual user of narcotic drugs and who shall drive any vehicle upon any highway within this state, shall be guilty of a misdemeanor, and punished by imprisonment in the county jail for not less than ten days nor more than one year, or by a fine of not less than twenty-five dollars nor more than one thousand dollars, or both such fine and imprisonment, if and when found guilty by a court of competent jurisdiction or by a jury.

2 Among the more commonly used scientific methods of substantiating the charge of driving under the influence of alcohol are "breathilizers," "drunkometers," "alcometers" and "intoximeters." RICHARDSON, MODERN SCIENTIFIC EVIDENCE ch. 13 (1961).

3 The three main constitutional arguments are that the tests violate due process; constitute illegal searches and seizures; and are contrary to the privilege against self-incrimina-

For years, law enforcement agencies have sought a simpler means of ascertaining a suspect's intoxication. Such a device would have to strike a proper balance between the protection of an individual's constitutional rights and the reasonable needs of law enforcement agencies in protecting the public. A number of cities have seized upon the device of taking sound motion pictures of suspected intoxicated drivers.[4] Such motion pictures are then offered in evidence to aid the court in determining whether or not an accused was under the influence of alcohol at the time of his arrest. It was believed that the exhibition of such motion pictures was the most positive method of supporting an arresting officer's testimony, consistent with the accused's rights to procedural fairness. Thus, in *Lanford,* sound motion pictures were permitted in evidence to show the demeanor and condition of a defendant charged with driving under the influence of alcohol.

In general, the basic principles which govern the admissibility of photographs into evidence apply to motion pictures.[5] Hence, when they are relevant, material, and have been properly authenticated, motion pictures may be received in evidence. Motion pictures have been used as an evidentiary tool in both civil and criminal trials for a numbr of purposes.[6] In keeping with the policy of courts to enlist every possible aid for the ascertainment of the truth, motion pictures serve a distinct purpose as a "constructive adjunct to the fact-finding process."[7] Thus, there would appear to be a sound legal basis, amply supported by precedent, for admitting sound motion pictures of alleged intoxicated drivers in D.W.I.[8] cases.

However, the particular type of motion pictures introduced in Lanford's trial for driving under the influence raises peculiar constitutional problems. The film was taken at the police station shortly after Lanford's arrest. It was taken

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tion. *Compare* Rochin v. California, 342 U.S. 165 (1952), where the Supreme Court, on due process grounds, excluded evidence obtained by a forcefully administered emetic, *with* Breithaupt v. Abram, 352 U.S. 432 (1957), where evidence of a blood test taken while a suspect was unconscious was admitted because such means did not "shock the conscience." See Goff, *Constitutionality Of Compulsory Chemical Tests To Determine Intoxication,* 49 J. CRIM. L., C. & P.S. 58 (1958); Roth, *Drunk Driving: Selected Problems of Procedural Due Process,* 14 HASTINGS L.J. 399 (1963). The due process and search and seizure problems are beyond the scope of this article and will be discussed only inferentially.

4 *E.g.,* Fresno, California; Waterloo, Iowa; Sioux City, Iowa; San Bernardino, California; and Denver, Colorado (where the instant case arose). Tuttle and Conrad, *Motion Pictures of Intoxicated Drivers,* Finger Print and Identification Magazine, April, 1963, p. 3, at 7.

5 See SCOTT, PHOTOGRAPHIC EVIDENCE § 624 (1942) and Annot., *Use of Motion Pictures as Evidence,* 62 A.L.R.2d 686 (1958).

6 *E.g.,* Civil Cases: Lehmuth v. Long Beach Unified School Dist., 53 Cal. 2d 544, 348 P.2d 887, 2 Cal. Rptr. 279 (1960) (motion picture depicting condition of personal injury victim); McGoorty v. Benhart, 305 Ill. App. 458, 27 N.E.2d 289 (1940), (motion pictures admissible to discredit the testimony of a personal injury claimant by showing activity inconsistent with alleged injury); Sparks v. Employers Mut. Liab. Ins. Co. of Wis., 83 So. 2d 453 (La. Ct. App. 1955) (motion picture admissible to show condition of a person, place, object, or activity). *E.g.,* Criminal Cases: People v. Hayes, 21 Cal. App. 2d 320, 71 P.2d 321 (1937) (sound motion picture of confession held admissible); People v. Dabb, 32 Cal. 2d 491, 197 P.2d 1 (1948) (sound pictures of re-enactment by defendants of a crime). See 1 CONRAD, MODERN TRIAL EVIDENCE § 753 (1966 Supp.) for a collection of cases; Tuttle and Conrad, *Motion Pictures of Intoxicated Drivers,* Finger Print and Identification Magazine, April, 1963, p. 3, at 15-17.

7 RICHARDSON, *op. cit. supra* note 2, § 16.23 at 425. See People v. Hayes, 21 Cal. App. 2d 320, 71 P.2d 321 (1937).

8 "Driving while intoxicated."

without his consent and it showed his refusal to submit to requested coordination tests. Because of these two factors, Lanford asserted that the introduction of such motion pictures in evidence at his trial violated his constitutional rights against self-incrimination under both the Colorado Constitution[9] and the Fifth Amendment to the United States Constitution.[10] The case was one of first impression in Colorado. In fact, only one other jurisdiction, Texas, had addressed itself to this precise issue.[11] In view of the increasing number of law enforcement agencies that are adopting this new method for securing convictions in D.W.I. cases, and in the absence of any general rule as to the constitutional validity of admitting such motion pictures in evidence, the significance of the *Lanford* decision is at once apparent.

The Colorado Supreme Court reviewed the only two decisions directly on point, both of which were decided by the Texas Court of Criminal Appeals. In *Housewright v. State,*[12] motion pictures of a person charged with driving while intoxicated were taken while the defendant was being booked at the jail. These motion pictures were shown to a jury over defendant's objection that he was being compelled to testify against himself in violation of his constitutional rights. In affirming his conviction, the Texas court adopted the reasoning of the ancient maxim that " one picture is worth a thousand words" when it stated:

> Evidently the witnesses could delineate the peculiarities of appellant at the scene of the alleged offense and his demeanor and actions in order to give a basis of their opinion as to his intoxicated condition; and it seems to us to be but a clearer delineation of what they saw and described to the jury if such a scene could thus be shown by a series of pictures taken immediately after his apprehension instead of the eyewitnesses testifying only from memory.[13]

In the other Texas case, *Carpenter v. State,*[14] the defendant was convicted of murder in causing the death of a pedestrian while driving in an intoxicated condition. The court, citing *Housewright,* held that motion pictures taken of a defendant charged with being drunk at the time were admissible over the objection that their introduction compelled the defendant to give evidence against himself. Although the *Housewright* and *Carpenter* decisions appear to be on all fours with the facts in *Lanford,* there is one significant distinction. In *Housewright,* the court noted that no objection was made by the defendant at the time the movies were taken.[15] *Carpenter* was silent on whether the defendant objected to the original taking of the movies.[16] Thus, *Lanford* may be distin-

9 COLO. CONST. art. II, § 18 reads: "No person shall be compelled to testify against himself in a criminal case. . . ."

10 The pertinent part of the fifth amendment reads: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

11 Carpenter v. State, 169 Tex. Crim. 283, 333 S.W.2d 391 (1960); Housewright v. State, 154 Tex. Crim. 101, 225 S.W.2d 417 (1949).

12 154 Tex. Crim. 101, 225 S.W.2d 417 (1949).

13 225 S.W.2d 417, 418 (1949).

14 169 Tex. Crim. 283, 333 S.W.2d 391 (1960).

15 225 S.W.2d 417, 418 (1949).

16 Lanford v. People, 409 P.2d 829, 831 (Colo. 1966).

guished by the absence of any consent on the part of the defendant to taking the motion pictures.

The Colorado Supreme Court rather summarily dismissed Lanford's self-incrimination argument. The court noted that Colorado follows the orthodox view of Dean Wigmore that the privilege against self-incrimination is specifically limited to *testimonial* compulsion.[17] The majority of American jurisdictions adhere to Wigmore's narrow view of the privilege, drawing a distinction between compulsory testimonial evidence and compulsory physical disclosure.[18] Under this view, it is held that the constitutional privilege against self-incrimination does not extend to the exclusion of a defendant's body or his mental condition as evidence even when such evidence is obtained by compulsion.[19] An accused may thus be compelled to make disclosure of his bodily condition, features, measurements, or other characteristics over which he has no power of control.[20] Such evidence as fingerprints, photographs, line-up identification, footprints, compulsory physical and psychiatric examinations, compulsory voice identification, and compelled exhibition in certain clothes, although they involve the person of the suspect in some manner, are generally held admissible, as non-testimonial evidence.[21]

Photographs play a vital role in the identification of an accused. In *Shaffer v. United States,*[22] a photograph of a person accused of homicide was taken while he was in custody. The use of this photograph at trial as a means of identification was held not to violate the accused's constitutional privilege against self-incrimination. The court stated:

> It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen, while in prison, by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mark [sic], in court, to enable witnesses to identify him as the party accused as that he could rightfully refuse to allow an officer, in whose custody he remained, to set an instrument and take his likeness for purposes of proof and identification. It is one of the usual means employed in the police service of the country, and it would be matter of regret to have its use unduly restricted upon any fanciful theory or constitutional privilege.[23]

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17 The *history* of the privilege . . . — especially the spirit of the struggle by which its establishment came about — suggests that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to *extract from the person's own lips* an admission of guilt, which would thus take the place of other evidence. That is, it was intended to prevent the use of legal compulsion to extract from the person a sworn communication of his knowledge of facts which would incriminate him. Such was the process of the ecclesiastical court. . . . Such was the complaint of Lilburn. . . .

In other words, it is not merely any and every *compulsion* that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial* compulsion. 8 WIGMORE, EVIDENCE § 2263, at 378-79 (McNaughton rev. 1961).

18 INBAU, SELF-INCRIMINATION — WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO? 73 (1950).

19 State v. Grayson, 239 N.C. 453, 458, 80 S.E.2d 387, 390 (1954) and cases cited therein.

20 MORGAN, BASIC PROBLEMS OF EVIDENCE 158 (1962).

21 See INBAU, *op. cit. supra note* 18; Mann and Thomas, *To What Extent Does The Privilege Against Self-Incrimination Protect An Accused From Physical Disclosures?,* 1 VAND. L. REV. 243 (1948).

22 24 App. D.C. 417 (1904), *cert. denied,* 196 U.S. 639 (1905).

23 *Id.* at 426. The court meant to use the word, "mask" rather than "mark."

Thus, photographs taken at a police station at the time of arrest are generally held to be a permissible part of the routine police identification process upon the same reasoning applied to fingerprints.[24] Extending this rationale a step further, sound motion pictures might likewise be held to fall outside the scope of the privilege against self-incrimination.

Implicit in the *Lanford* decision is the court's reluctance to deny itself the use of photographic evidence in trials of this nature. Motion pictures are superior substitutes for the verbal testimony of law enforcement officers. Hence, the Colorado Supreme Court readily analogized the use of motion pictures in D.W.I. cases to compelling defendants, during a trial for armed robbery, to have masks placed over their faces in open court to facilitate identification. Colorado had previously ruled that such a request did not violate an accused's privilege against self-incrimination, since testimonial compulsion was not involved.[25]

Although Lanford, in the strict sense, did not provide testimonial utterances against himself, he did involuntarily furnish evidence against himself, since the motion pictures of his condition subsequent to arrest were taken under circumstances in which consent was totally lacking. Although the privilege against self-incrimination has thus far been limited to compulsion to give testimony, there is some sentiment in favor of a more absolutist view of the privilege which would extend it to *any* evidence secured from an accused by compulsion. Under such a view, the photographing of an individual subsequent to arrest and the recording of his voice in the process might be regarded as violative of the policy behind the privilege against self-incrimination, on the ground that the compulsory extraction of real evidence from an accused without his consent is as undesirable as a coerced confession.

In the light of recent Supreme Court decisions, it is unlikely that the *Lanford* decision would withstand an attack through our federal court system.[26] Although the Supreme Court has in the past adhered to Wigmore's strict view of the privilege,[27] Justices Black and Douglas have argued for an absolutist view of the privilege, extending it to all manner of incriminating evidence.[28] This broader, more liberal interpretation of the privilege would make "compulsion" the essence of the privilege. Thus, any time an accused is compelled to furnish

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24 United States v. Amorosa, 167 F.2d 596, 599 (3d Cir. 1948).

25 Vigil v. People, 134 Colo. 126, 129, 300 P.2d 545, 547 (1956).

26 This opinion was expressed by Lanford's counsel, M. Keith Singer in a letter to the NOTRE DAME LAWYER, March 31, 1966, on file in the office of the NOTRE DAME LAWYER. However, no appeal was taken in the instant case.

27 *E.g.*, in Holt v. United States, 218 U.S. 245 (1910), it was held that forcing a suspect to try on a bloody shirt to see if it fits did not violate his right against self-incrimination. Justice Holmes stated: "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence. . . ." *Id.* at 252-53.

28 In their dissenting remarks in Breithaupt v. Abram, 352 U.S. 432 (1957), Justices Black and Douglas stated that they would not

> draw a line between involuntary extractions of words from . . . [a suspect's] lips, the involuntary extraction of the contents of his stomach, and the involuntary extraction of fluids of his body when the evidence obtained is used to convict him. Under our system of government, police cannot compel people to furnish the evidence necessary to send them to prison.

Id. at 443.

any evidence which might aid in establishing his guilt, this amounts to a violation of his constitutional privilege against self-incrimination.[29]

A review of United States Supreme Court decisions during the past few years reveals significant changes in the Court's attitude toward the rights of a criminal defendant in a state court proceeding. Especially significant is the Court's opinion in *Escobedo v. Illinois*[30] in which the Court held that when the process of police investigation shifts from the investigatory to the accusatory stage — when its focus is on the accused and its purpose is to elicit a confession — where the suspect has been taken into police custody, and the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the police must effectively warn the suspect of his absolute constitutional right to remain silent. If this is not done, no statement elicited by the police during the interrogation may be used against the accused at a criminal trial. Following the *Escobedo* rationale, all drunk drivers are immediately suspected when they are arrested while in an allegedly intoxicated condition. When sound motion pictures are taken of a suspect at the police station, without his consent, such movies are more than a mere part of the identification process. Because of the hybrid character of sound movies, statements made by an accused and recorded on the sound track of a motion picture camera are orally incriminating evidence tantamount to a confession. Statements made at the police station will come back to haunt an accused at his trial. In such a case, a defendant has been forced, without his consent, to give evidence that will be used against him at a later proceeding before he has been apprised of his constitutional privilege not to say anything that will incriminate him. Since the obvious purpose of photographing drunk drivers is to elicit incriminating evidence of both an oral[31] and visual nature, it is unlikely that the Supreme Court would allow sound motion pictures in evidence should they have occasion to re-examine the privilege against self-incrimination in a case such as *Lanford*. Thus, two recent commentators have stated:

> It is quite evident to us that the Wigmorian orthodox view of the privilege against self-incrimination will in the future be closely re-examined by the United States Supreme Court and that nontestimonial compulsion, through the use of finger printing and photography, may undergo a great change beginning at the moment when the accused becomes a suspect, rather than at the moment he is arrested. Identification people must prepare for such eventuality.[32]

29 See Apodaca v. State, 140 Tex. Crim. 593, 146 S.W.2d 381 (1940). *Cf.* Chief Justice Belt's dissenting remarks in State v. Cram, 176 Ore. 577, 604-05, 160 P.2d 283, 293 (1945).

30 378 U.S. 478 (1964).

31 In People v. Young, 224 Cal. App. 2d 420, 36 Cal. Rptr. 672 (1964) a tape recording of conversations had with defendant, accused of manslaughter in driving a motor vehicle while intoxicated, was held to have been properly admitted in evidence to establish defendant's alleged intoxicated condition at the time of the accident, through the tone, pronunciation, and slurred speech of defendant's statements.

32 Tuttle and Conrad, *More On Filming Persons Arrested For Driving While Intoxicated,* Finger Print and Identification Magazine, September, 1965, p. 3, at 14. The authors suggest:

> As to future drunken driving movies, the law enforcement people should inform the accused that:
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> 1. He has a right to secure counsel immediately.
> 2. He has a constitutional privilege not to say anything that will incriminate him.

That state courts are prepared to reach this result is evident in *State v. Merrow*,[33] where the Supreme Court of Maine held that the failure of the trial court to make a finding of fact as to the voluntariness of defendant's consent to the taking of a blood sample before submitting the question to the jury was reversible error. The court stated that

> Under the circumstances . . . the voluntariness of a confession and the rules of trial procedure pertaining to the finding of the element of voluntariness are analogous to the question of voluntary consent in cases prosecuted under the statute prohibiting the operation of motor vehicles while intoxicated.[34]

Still another recent Supreme Court decision re-examining the scope of the fifth amendment's privilege against self-incrimination casts considerable doubt upon the decision reached in *Lanford*. Colorado law does not make it mandatory for a person to submit to any chemical tests for intoxication.[35] However, some jurisdictions have held that it is permissible to introduce evidence of a defendant's refusal to take a sobriety test because such refusal relates to his conduct, demeanor, statements, attitude, and relation to the crime charged.[36] The Colorado court noted that in the states which follow this rule, an analogy is drawn between the admissibility of a defendant's refusal to take a sobriety test and the right in the particular state to comment on a defendant's failure to testify.[37] However, the Supreme Court has recently held in *Griffin v. California*,[38] that a state rule permitting comment on a defendant's failure to testify in a criminal trial violates the privilege against self-incrimination. This decision followed the lead of *Malloy v. Hogan*,[39] decided a year earlier, which held that the fifth amendment's privilege against self-incrimination is one of those rights protected against state infringement by the due process clause of the fourteenth amendment. The rationale of the *Griffin* decision is thus inconsistent with the reasoning of the Colorado Supreme Court that sound motion pictures which show the demeanor and condition of a defendant charged with driving under the influence of alcohol, taken at the time of arrest or soon thereafter, are

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3. Whatever he says may or may not be used against him in the same or subsequent proceedings.

It is our suggestion that all of these warnings be recorded both on the film and the sound track. *Ibid.*

33 208 A.2d 659 (Me. 1965).

34 *Id.* at 661.

35 COLO. REV. STAT. § 13-5-30 (3) (1963).

36 *E.g.*, State v. Durrant, 188 A.2d 526 (Dela. 1963); State v. Nutt, 78 Ohio App. 336, 65 N.E.2d 675 (1946).

Other states forbid testimony relating to refusal to take the tests. Such evidence is held to constitute reversible error. See *e.g.*, People v. Knutson, 17 Ill. App.2d 251, 149 N.E.2d 461 (1958); Duckworth v. State, 309 P.2d 1103 (Okla. Crim. 1957).

It is interesting to note that although Texas allows sound motion pictures of intoxicated drivers to be admitted in evidence, the same Texas court has held that it is reversible error to introduce evidence of a defendant's refusal to take a sobriety test. Cardwell v. State, 156 Tex. Crim. 457, 243 S.W.2d 702 (1951). Thus, Texas has drawn a line between the use of movies alone as an evidentiary tool and the use of testimony showing the refusal to take sobriety tests. The Colorado Supreme Court acknowledged this distinction but failed to follow Texas' practice.

37 Lanford v. People, 409 P.2d 829, 831-32 (Colo. 1966).

38 380 U.S. 609 (1965).

39 378 U.S. 1 (1964).

admissible in evidence even though they show the defendant's refusal to take sobriety and coordination tests.

In the final analysis, the problem resolves itself into a matter of striking a proper balance between the protection of an individual's constitutional rights and the reasonable needs of law enforcement agencies to protect the public against the menace of intoxicated drivers. It can be argued that an absolute prohibition of the use of sound motion pictures would severely and unrealistically impede a court in its fact-finding process. The value of sound motion pictures to law enforcement agencies cannot be underestimated. Conviction rates soar[40] while court costs plunge[41] in jurisdictions which use sound movies as an evidentiary tool in driving while intoxicated cases. It is further contended that such evidence, while valuable to the prosecution, is just as helpful to the defendant.[42] Persuasive arguments can thus be made that sound motion pictures of intoxicated drivers are the fairest, most economical way of presenting a jury with a record of the condition and behavior of a person as well as his ability to drive a car at the time of his arrest.[43]

Counterbalancing these arguments as to the obvious value of sound motion pictures to law enforcement agencies are considerations of an individual's constitutional right not to be compelled to give incriminating evidence against himself. The privilege against self-incrimination reflects our preference for an accusatorial-adversary system as opposed to an inquisitorial system.[44] Documentary evidence has made significant inroads on the privilege against self-incrimination. However, it is doubtful that the United States Supreme Court will allow sound motion pictures of an intoxicated driver, taken at a police station shortly after arrest, to be admitted into evidence at his trial unless the procedure was attended with significant safeguards. Procedural due process achieved new dimensions with the Supreme Court's decision in *Escobedo*. In all significant respects, Joe Lanford was in the same position as was Danny Escobedo. Since the demeanor of an alleged intoxicated driver is so inextricably an element of the offense charged, Lanford should not have been compelled to give any incriminating evidence against himself prior to his being apprised of his right to secure counsel

40 In all of the cities where motion pictures are being made in driving while intoxicated cases, there has been a tremendous increase in the number of convictions which have been obtained. In Denver, the conviction rate jumped from 65% the year before sound motion pictures were instituted to 93.7% four years later. The rate of guilty pleas went from an anemic 27% to 84.3% in the same time. Tuttle and Conrad, *Motion Pictures of Intoxicated Drivers*, Finger Print and Identification Magazine, April, 1963, p. 3, at 11.

41 *Id.* at 8. In the vast majority of the cases where such movies have been taken, the defendant is allowed to view them prior to trial. "Nine times out of ten, the sight of himself wobbling through the tests is enough to convince the driver that he ought to plead guilty." Time, Nov. 22, 1963, p. 61. This results in saving the cost of trial and several adjournments, all to the savings of the taxpayer.

42 A Municipal Court Judge from Sioux City, Iowa, reported:

> It is the opinion of this Court that the use of sound motion pictures in the trial of OMVI [operating a motor vehicle while intoxicated] cases has been one of the greatest advancements made in obtaining justice for a defendant. While it is true that some cases have been lost because the picture did not convince the jury that the man was intoxicated; this is, nevertheless, justice in its truest sense.

Tuttle and Conrad, *Motion Pictures of Intoxicated Drivers, Finger Print and Identification Magazine*, April, 1963, p. 3 at 13.

43 *Id.* at 7.

44 See, *e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964).

and remain silent. It is to be hoped that law enforcement agencies in the future will use sound motion pictures of suspects in driving while intoxicated cases in a manner consistent with the teachings of *Escobedo*. Once the requisites of procedural due process have been satisfied, there is no reason why the camera may not then roll.

Stephen R. Lamantia

CONSTITUTIONAL LAW — EVIDENCE — FEDERAL RULE PROHIBITING USE OF "MERE EVIDENCE" IS NOT A CONSTITUTIONAL STANDARD AND CALIFORNIA MAY ALLOW SEARCH, SEIZURE AND USE IN EVIDENCE OF PHYSICIAN'S OFFICE RECORDS. — A physician and his office assistant were convicted of submitting false and fraudulent claims for medical services rendered to those whose medical care was paid for by the Bureau of Public Assistance and of conspiracy to submit such claims. For each patient, the doctor submitted a "medical care statement," certifying the performance of services and seeking his payment. The state sought to prove billing for unperformed services and for services charged to others. It introduced into evidence both the "medical care statements" and corresponding medical care records taken from the doctor's files under a search warrant. When compared, the cards from the doctor's files indicated fewer visits or different treatments from those shown on the cards submitted to the Bureau. The doctor's employees testified that these were the cards used to prepare the records for the Bureau of Public Assistance and that Dr. Thayer had instructed them to bill for non-rendered services. Dr. Thayer, insisting that the records were not contraband, instruments, or fruits of a crime, contended that the medical statements taken from his files were "mere evidence" of the commission of a crime. He claimed protection under the fourth and fifth amendments as guaranteed by the fourteenth amendment to the United States Constitution.[1] On appeal by the state, the California Supreme Court reversed, vacated the opinion of the court of appeal, and *held:* the federal rule prohibiting the seizure of "mere evidence" is not a constitutional standard and the records were properly seized in accord with the California statute permitting such seizure. Even if the "mere evidence" rule were a constitutional standard, it would not require the exclusion of these records since they were instrumentalities of a crime. *People v. Thayer,* 47 Cal.Rptr. 780, 408 P.2d 108 (1965).

Chief Justice Traynor had dual aims in *People v. Thayer:* to establish "mere evidence" as an object of lawful search and, consequently, an admissible object at trial; and, to demonstrate the conflict between the California statute which allows the seizure of "mere evidence" and the federal rule which prevents it as an example of the differing approaches to evidence problems that have developed in our federal system.[2] The underlying question was the same resolved in *Mapp*

1 People v. Thayer, 47 Cal.Rptr. 780, 781, 408 P.2d 108, 109 (1965).

2 Chief Justice Traynor previously examined this problem in *Mapp v. Ohio At Large In The Fifty States,* 1962 DUKE L. J. 319. He surveyed the federal rule excluding objects of mere evidentiary value and found only "explanations in the dark." He concluded "should any state court in its right mind risk losing it in the pursuit of learning whatever the total message is of a federal rule of such elaborate obfuscation?" He believed "freedom from entangling alliances with confusing federal rules that have no clear constitutional basis" is by far the preferable approach. *Id.* at 330, 331.

v. Ohio:[3] to what extent and in what circumstances are interpretations of federal constitutional guarantees mandatory upon a state court in a similar situation? How free are states to develop their own rules of evidence where they touch upon the Bill of Rights?[4]

The rule prohibiting searches for "mere evidence" was most clearly enunciated in *Gouled v. United States*.[5] Gouled was convicted of conspiring and defrauding the United States by means of contracts to furnish clothing for the Army. Under a search warrant, the Government seized an unexecuted form of a contract, a written contract and an attorney's bill. This evidence was excluded and the conviction reversed. The Supreme Court held:

> [T]hey [search warrants] may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but . . . may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.[6]

The rule, thus established, requires that a man's private papers, unless they are stolen property or were used to commit a crime, cannot be taken by search warrant. They are "mere evidence" of an event which the state may attempt to prove was a crime. Explanations and evaluations of this rule are, at best, divergent.[7]

The Constitution of the United States is the foundation of the rule that "mere evidence" is not a proper object of search and seizure. The fourth amendment provides:

> The right of the people to be secure in their persons, 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 person or things to be seized.

The fifth amendment, in part, provides: "No person . . . shall be compelled in

3 367 U.S. 643 (1961).

4 See Collings, *Toward Workable Rules of Search and Seizure — An Amicus Curiae Brief*, 50 CAL. L. REV. 421 (1962) (contending that states should be free to develop their own rules governing the exclusion of evidence).

5 255 U.S. 298 (1921).

6 *Id.* at 309.

7 See, *e.g.*, MAGUIRE, EVIDENCE OF GUILT § 5.04, at 183 (1959) where he briefly treats the rule, finding its justification on "obscuredly implied grounds"; 8 WIGMORE, EVIDENCE § 2184a at 45 (McNaughton rev. 1961) follows Wigmore's classification of the rule as "unfortunate"; Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CAL. L. REV. 474, 477-479 (1961); Reynard, *Freedom From Unreasonable Search and Seizure — A Second Class Constitutional Right?* 25 IND. L. J. 259 (1950) (an excellent treatment of the rule as it fits into the historical development of search and seizure rules); Shellow, *The Continuing Validity Of The Gouled Rule: The Search For And Seizure Of Evidence* 48 MARQ. L. REV. 172 (1964) (traces developments in recent federal cases); Comment, *Limitations On Seizure Of "Evidentiary" Objects, A Rule In Search Of A Reason* 20 U. CHI. L. REV. 319 (1953) (probes the rationale of the rule); *Constitutional Problems In The Administration Of Criminal Law — Search And Seizure*, 59 NW. U. L. REV. 611, 624-628 (1964) (deals with the rules' application in light of recent Supreme Court cases).

any criminal case to be a witness against himself. . . ." It is important to understand the dual protection of the fourth amendment. The first is its protection against unreasonable searches and seizures; the second is the requirements which a valid search warrant must meet. This dual protection was the product of a deliberate plan to afford additional protection against a search and seizure that, even though authorized by warrant, was unreasonable.[8] The meaning of "reasonable" has been the source of both prolific and prolix comment, and has been the ambiguous term around which many a search problem has flared.[9] Where the subject of a search is a man's private papers, the unreasonable searches prohibited by the fourth amendment are defined in terms of the fifth amendment's protection against self-incrimination. In "the great case of *Boyd v. United States*,"[10] the Supreme Court, defining the objects of seizure, examined this relationship and found that the fourth and fifth amendments "run almost into each other."[11]

> We have already noticed the intimate relation between the two Amendments. 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. . . [W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.[12]

Reasonableness thus excludes self-incriminatory matter; seizures that would take a man's private books to be used in evidence against him are unreasonable. In *Boyd*,[13] the Court first studied James Otis' struggle against writs of assistance, the tools used by colonial revenue officers to conduct general searches for smuggled goods.[14] It also discussed the infamous general warrant used to search for sedi-

8 See Reynard, *supra* note 7 at 275-277. The author examines the debates on the fourth amendment and relates how Mr. Benson, substituting a draft the House had rejected, wrote a protection into the Constitution that had not been planned. He concludes "the Amendment's first clause prohibits a search for mere evidence even though the warrant authorizing it be valid." *Id.* at 276.

9 See Collings, *supra* note 4. Areas in which an element of reasonableness is part of the consideration include investigation, search prior to arrest, incident to arrest, and without a warrant. He says: "In my opinion, it would be impossible for the Supreme Court to lay down meaningful uniform standards of reasonable cause." *Id.* at 429-30. *Search And Seizure In The Supreme Court: Shadows On The Fourth Amendment*, 28 U. CHI. L. REV. 664 (1961).

10 116 U.S. 616 (1886). Mr. Justice Brennan in Malloy v. Hogan, 378 U.S. 1, 8 (1964).

11 116 U.S. 616, 630 (1886).

12 *Id.* at 633. This view has been severely criticized as being an incorrect analysis of history. WIGMORE, *op. cit. supra* note 7, at 381-84; MAGUIRE, *op. cit. supra* note 7 at 182. Maguire introduces his analysis by saying "Historically, the confusion is indefensible. Functionally, it has partial justification." *But see* Abel v. United States, 362 U.S. 217, 255 (1960). "This has been said to be erroneous history; if it was, it was even less than a harmless error; it was part of the process through which the Fourth Amendment, by means of the exclusionary rule, has become more than a dead letter in the federal courts." Brennan, J. dissenting.

13 116 U.S. 616 (1886). *Boyd* involved an action to compel the production of an invoice for cases of glass where it was contended the customs laws had been violated. If the invoice was not produced, the evidence sought would be deemed confessed. This was pursuant to a procedure authorized by an Act of Congress in revenue investigations. The Supreme Court held the Act of Congress unconstitutional. The great hesitancy of the Court to hold that a coordinate branch of government has exceeded the mandate of the Constitution amply demonstrates that it did not forbid the seizure of a man's papers for light or transient reasons. It was on this foundation, the protection against seizure of private papers, that *Gouled* built.

14 Paxton's Case, Quincy Rpts. 51 (Mass. 1761).

tious libel.[15] Justice Bradley, in *Boyd,* then turned to *Entick v. Carrington,*[16] the fountainhead of freedom from searches through a man's private papers. Entick sued the King's messengers in trespass for breaking into his quarters where they broke open his boxes and seized his papers. His offense had been to author an unlicensed book, sufficient in that day to be seditious libel. The messengers asserted Lord Halifax's warrant as a complete defense. Lord Camden's judgment, forbidding the search, gives the theoretical basis of the protection against such seizures:

> Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection. . . .
>
> . . . [I]t is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. . . .
>
> . . . [O]ur law has provided no paper-search in these cases [murder, rape or robbery — more atrocious than libeling] to help forward the conviction.[17]

Lord Camden's justification for this prohibition retains its validity into our own day:

> 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 should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.
>
> Observe the wisdom as well as mercy of the law. The strongest evidence before a trial, being only *ex parte,* is but suspicion; it is not proof.[18]

Property is the foundation of the right; but the rationalization, the enduring validity, is found in man's protection against self-accusation. The policy of the law designedly prevents the guilty man from being convicted out of his own mouth. Consequently, coerced confessions have no place in our system. However, the protection afforded also reflects an equally sacred principle — a man is innocent until proven guilty. To take a man's private books assumes they are forfeit because they have been used to commit a crime. Yet they are taken for the sole purpose of prosecuting him to prove this guilt. In this respect, they differ from stolen property or items like guns or knives designedly used in the commission of crime. If he is innocent, his books were not used to commit a crime; if he is guilty, their use to commit a crime is evident only after the verdict.

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15 Wilkes v. Wood, 19 How. St. Tr. 1153 (1763). Lest it be thought the general warrant had joined the Star Chamber in limbo, Stanford v. Texas, 379 U.S. 476 (1965), showed it is still a possible threat to liberty. A search warrant had issued for "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas." *Id.* at 477-478. The investigators took 14 cartons of innocent books and papers including a speech by Pope John XXIII and a dissenting opinion by Mr. Justice Black. The Court held it a "general warrant." *Id.* at 480, and ordered the return of the books.

16 19 How. St. Tr. 1029 (1765).

17 *Id.* at 1066, 1073.

18 *Id.* at 1073.

They cannot be used to prove the assumption under which they are taken.[19]

Having thus reviewed history, Justice Bradley gave judgment in *Boyd* and established the rule that governs in federal courts:

> The principles laid down in this opinion [Entick] affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitute the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . [I]t is the invasion of this sacred right which underlies and constitutes the essence of *Lord* Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime . . . is within the condemnation of that judgment.[20]

Personal liberty and security are violated by an invasion of a man's home to obtain his personal papers; the rationalization of this protection is freedom from compulsory self-accusation.

What is the scope of the protection afforded by this combination of freedom from unreasonable searches and freedom from self-accusation? *Gouled v. United States*[21] provided the answer for federal courts. In order to delineate that which is "mere evidence," the Court addressed itself to the permissible objects of a search and seizure:

> [A]t the time the Constitution was adopted stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling "and many other things of like character" might be searched for in home or office and if found might be seized. . . .[22]

These have been denominated the instrumentalities of crime and may be taken, even from the privacy of a home. The Court addressed itself to the distinguishing factor that made the "mere evidence" — a contract and an attorney's bill — immune from seizure while the instrumentalities were a proper object of search. Instrumentalities may be "seized for the purpose of preventing further frauds."[23]

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19 Lest it be thought that this view exalts logic so that it contradicts experience and unduly restricts the police, it should be understood that the underlying premise behind the "mere evidence" rule is one limiting it to a man's intellectual products, wholly inapplicable to the physical objects usually seized. See text accompanying note 56 *infra*.

20 Boyd v. United States, 116 U.S. 616, 630 (1886).

21 255 U.S. 298 (1921).

22 *Id.* at 308. See FED. R. CRIM. P. 41(b):

> Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property
>
> (1) Stolen or embezzled in violation of the laws of the United States; or
>
> (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
>
> (3) Possessed, controlled or designed or intended for use or which is or has been used in violation of Title 18 U.S.C. 957. [Property used in aid of a foreign government.]

23 *Id.* at 309.

The rationale is: that may be seized in which a man never had a right to possession as stolen property or the fruit of a crime; and, that may be seized in which a man has forfeited his right to possession because he intends to use it to commit future crime. Any other item is "mere evidence" of the commission of a past crime and cannot be seized when it is found among a man's private books and papers.

Federal cases have not been consistent. The problem is not with the admission of "mere evidence"; this has never been allowed. Rather, the difficulty arises in affixing either the "mere evidence" or the "instrumentality" label to an item. To the extent courts are willing to place the instrumentality label on an item, the practice "saps it [the rule] of all vitality."[24] The cases disclose the problem. *Marron v. United States*[25] followed *Gouled* and seemed to open the door to labelling any item an instrumentality. In *Marron,* a search warrant was obtained and a raid made on a building in which bootleggers were operating a speakeasy. From a closet and drawers, the revenue agents took bills for gas, electric lights and telephone services as well as a ledger used to record sales. The court placed these items in the instrumentality category, holding "they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on."[26] The next case, *Go-Bart Co. v. United States,*[27] took the opposite approach. In another speakeasy case, agents forced an employee to open a desk and safe, seizing keys, papers, and books. Emphasizing that no conspiracy was taking place in the officers' presence, the court said "it was a lawless invasion of premises and a general exploratory search in the hope that evidence of crime might be found."[28] *United States v. Lefkowitz*[29] gave force and vitality to the rule announced in *Gouled.* Bootleggers were the subject of a lawful arrest in their establishment. Their office, including desks and wastebaskets, was searched and bills and papers seized. The Court distinguished the *Marron* case as involving the seizure of items in plain view — although a closet was searched — whereas "here, the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime."[30] The "mere evidence" rule was stated in its full vigor:

> Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were.[31]

Since 1946, the Court seems more willing to classify an object as an instru-

24 People v. Thayer, 47 Cal.Rptr. 780, 784, 408 P.2d 108, 112 (1965).
25 275 U.S. 192 (1927).
26 *Id.* at 199.
27 282 U.S. 344 (1931).
28 *Id.* at 358.
29 285 U.S. 452 (1932).
30 *Id.* at 465.
31 *Id.* at 464.

mentality rather than as "mere evidence." *Davis v. United States*[32] involved an arrest without a warrant of one selling gasoline without collecting rationing coupons. A search was made of the office and rationing coupons were found. These were not "mere evidence" as "we are dealing here not with *private* papers or documents, but with gasoline ration coupons which never became the private property of the holder but remained at all times the property of the Government and subject to inspection and recall by it."[33] *Zap v. United States*[34] seemed to minimize the significance of the "mere evidence" rule and to exalt the instrumentality exception beyond all proportion. The F. B. I., auditing the books of one performing under government contract, requested and received a cancelled check that proved the government had been defrauded. The Court first noted that while there might have been an unlawful seizure of this evidence, there may have been a waiver since specific permission had been given to make this audit. Nevertheless, the Court said that "a warrant for it could have been immediately issued"[35] for the check and footnoted to the statute permitting seizure of that which is a means of committing a felony. Frankfurter, dissenting, upheld the "mere evidence" rule. The legality of the search did not legalize the seizure; and, he said "[to] seize for evidentiary use papers the possession of which involves no infringement of the law, is a horse of a different color."[36] In *Harris v. United States*,[37] a search warrant was issued for checks and other instrumentalities used to defraud an oil company. Pursuant to arrest, a search was made for these items. They were not found, but stolen draft cards were discovered and seized. The Court again adhered to instrumentality reasoning:

> Clearly the checks and other means and instrumentalities of the crimes charged in the warrants toward which the search was directed as well as the draft cards which were in fact seized fall within that class of objects properly subject to seizure. Certainly this is not a case of search for or seizure of an individual's private papers, nor does it involve a prosecution based upon the expression of political or religious views in such papers.[38]

The draft cards were found to be items that remain government property. The latest Supreme Court case on point is one, by its nature, susceptible of making bad law. In a prosecution for conspiracy to commit espionage, *Abel v. United States*[39] faced the problem of classifying forged birth certificates, graph paper containing a coded message, a hollowed out pencil, and a block of wood containing a cipher pad. All the seized articles were held to be either items aiding the commission of espionage or abandoned articles properly the subject of seizure.

Dipping into lower federal court cases, one finds like confusion over the meaning of "means of committing the crime" and "instrumentality" as con-

32 328 U.S. 582 (1946).
33 Id. at 588. Justice Frankfurter, dissenting, listed permissible objects of search in an appendix at 618-620.
34 328 U.S. 624 (1946).
35 *Id.* at 629.
36 *Id.* at 632-633.
37 331 U.S. 145 (1947).
38 *Id.* at 154.
39 362 U.S. 217 (1960).

trasted with "mere evidence." *Matthews v. Correa*[40] allowed seizure of seven address books and an account book of a bankrupt charged with concealing expenditures. The court recognized that it was difficult to distinguish between the "fruit of the crime" and "mere evidence" and suggested that the distinction turn "on the good faith of the search [rather] than the actual distinctions between the matters turned up."[41] In any event, "the articles in question are more than evidential; they are the very things withheld."[42] Yet, in a search incident to an arrest on a charge of harboring a fugitive, correspondence and papers including an address book, bills, photographs and an identification bracelet were held to be "merely evidentiary materials tending to connect the defendant with the crime for which he was arrested."[43] Following an arrest in an international conspiracy to import narcotics, money that might be used for travel and an airline ticket were found seizable as the means of committing a crime.[44] In a case where receipts of prostitutes' earnings were seized, they were held to be instrumentalities despite the dissent's remarks that "being merely records of illicit activities, and not the means by which they were done, these receipts are distinctly outside the category of items the law permits to be seized."[45] A case that has been criticized as "an example of the application of the means and instrumentalities rule at its worst"[46] is *United States v. Loft on 6th Floor of Building, etc.*[47] There, suppression was ordered of obscene materials as "the material sought to be seized under the warrant here was not the *means* of committing the crime of conspiracy . . . the affidavit stated that the property was intended for use *in* a conspiracy to commit the crimes charged. That is very different from use *as* the means of committing the crime."[48] *United States v. Stern*[49] involved a seizure incident to a lawful arrest on the charge of conspiracy to defraud the United States by falsifying and concealing material facts so that income tax was uncollectable. Various records were seized as well as a diary and notes on meetings. The court recognized that the distinctions between means of committing a crime and evidence of the crime are difficult and suggested a test of significance: "Although it is not necessary that the crime alleged could not have been committed but for the use of the articles seized, after a consideration of all the circumstances it must appear that the article played a *significant* role in the commission of the crime alleged."[50] The court excluded both the diaries and the notes of a meeting, but handwritten sheets containing information on the taxpayer's cost of living were admitted as "this form is the very document by which a revenue agent [the defendant] would falsely represent to the Government that the taxes were uncollectable."[51]

40 135 F.2d 534 (2d Cir. 1943).
41 *Id.* at 537.
42 *Ibid.*
43 United States v. Lerner, 100 F.Supp. 765, 768 (N.D. Cal. 1951).
44 United States v. Pardo-Balland, 229 F.Supp. 473 (S.D.N.Y. 1964), *aff'd.*, 348 F.2d 316 (2d Cir. 1965).
45 United States v. Boyette, 299 F.2d 92, 98 (4th Cir.), *cert. denied,* 369 U.S. 844 (1962).
46 Kaplan, *supra* note 7, at 478.
47 182 F.Supp. 322 (S.D.N.Y. 1960).
48 *Id.* at 324-325.
49 225 F.Supp. 187 (S.D.N.Y. 1964).
50 *Id.* at 192.
51 *Id.* at 193.

State experience with the "mere evidence" rule has been divergent. California, New York, Illinois, and Oregon have legislated to permit the seizure of "mere evidence," but statutory application has not been uniform. *People v. Thayer* applies California's statute[52] to violate the protection of a man's papers which lies behind the rule whereas New York and New Jersey have used their statutes to reach objects outside the rule's protection. Florida correctly applied the rule to exclude private papers from search and Texas reached a like result. However, Texas later fell into an excessively broad application by improperly excluding physical objects which were not private papers. Kentucky, in contrast, properly admitted like evidence. The Oregon experience illustrates how the problem develops. In a rape case, the Oregon supreme court, relying on *Gouled,* indicated that, in the future, items of "mere evidence" like beer bottles, bed sheets and pictures would not be admitted. In response to this decision, the Oregon legislature added to its laws a section allowing the seizure of property which would constitute "evidence of a crime."[53]

It should not be supposed that such statutes necessarily violate the constitutional protection which the "mere evidence" rule expresses. The New York and New Jersey applications should clearly be allowed. In New York, a shotgun and shells used in a murder were allowed in evidence despite a claim that they were in the "mere evidence" category. The court said: "It is clearly within the competence of the Legislature, under the state's police power, to extend the right of search and seizure to 'property constituting evidence of crime or tending to show that a particular person committed a crime.' "[54] In New Jersey, *State v. Bisacia*[55] provoked a similar response. There, a search with a warrant was made for shoes with distinctive heels connecting the wearer with the scene of a murder. The court was satisfied that the shoes were not "mere evidence" and explored the various theories used to explain the law of search and seizure. Most center around a property rationale and allow seizure of that in which a person has no property right. This is because the seized goods were stolen or were used to commit a crime. It properly rejected such theories. "The property thesis cannot explain government's authority to search. We know that what is seized is in fact taken primarily to be used against the accused rather than to deprive him of some property."[56] Moreover, the entire rationale of the "fruit

52 CAL. PENAL CODE § 1524 (Supp. 1965). "A search warrant may be issued upon any of the following grounds: . . . (4) When the property or things to be seized consist of any item or constitute any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony."

A critical comment claiming that the statute "would appear to be prima facie unconstitutional" if construed to allow the seizure of "mere evidence" appeared after recent Supreme Court decisions making the protections of the fourth and fifth amendments applicable to the states. Note, 2 SAN DIEGO L. REV. 101, 111 (1965). See ILL. REV. STAT. ch. 38, § 108-1(d) (1964).

53 The case was State v. Chinn, 231 Or. 259, 373 P.2d 392 (1962). The amended statute was OR. REV. STAT. § 141.010 (1961). The addition allowed a search warrant to issue "(2) when the property was used in the commission of, or which would constitute evidence of, the crime." A comment, 43 ORE. L. REV. 333 (1964), thought such a statute, in light of the federal decisions, unconstitutional.

54 People v. Carroll, 38 Misc. 2d 630, 632, 238 N.Y.S.2d 640, 642 (Sup. Ct. 1963). The statute is N.Y. CODE OF CRIM. P. § 792.

55 45 N.J. 504, 213 A.2d 185 (1965).

56 *Id.* at 508, 213 A.2d 185, 187 (1965). The New Jersey seizure was made under a rule of its supreme court. R.R. 3:2A-2(c).

of the crime" theory breaks down when it is realized that for it to be the "fruit" would "frequently depend upon the outcome of the very proceeding in which it is offered to prove guilt."[57] New Jersey would, however, not be ready to admit all objects against which the "mere evidence" objection would lie. It recognized its proper sphere of operation is in the protection afforded private papers, and recalled the condemnation and its limits as announced by Mr. Justice Bradley and Lord Camden: "What they denounced . . . was a search among private papers, and this because of the extraordinary regard the law has for the privacy that reposes in them."[58] Building its decision on this same foundation — the protection afforded a man's private papers — Florida in *State v. Willard*[59] reached a correct result. The case involved a search pursuant to a warrant for "private books and records 'for use as evidence.' "[60] The inquiry was one into gambling, and on the basis of the records and books obtained, the grand jury returned an indictment charging violation of the gambling laws. Citing *Gouled,* the court held: "an accused cannot be required to produce a document for use as evidence against himself that is not in his possession unlawfully."[61] It excluded the seized evidence as it was not within the category of contraband nor were the records required by law to be kept. A combined reading of the fourth and fifth amendments led to the decision to exclude the evidence. There is "no essential difference, in principle, in forcing an accused to speak against himself or produce records, and in forcing, by an unlawful search the contents of his home or premises to give evidence against himself."[62]

Texas also correctly applied the "mere evidence" rule to protect a man's private papers when in *Cagle v. State*[63] it excluded from evidence a book containing social security numbers seized in a gambling raid. The court concluded that it could only be used as mere evidence and was not part of the operation or development of a policy game. The later case of *LaRue v. State*[64] is an example of a mechanical application giving protection from seizure to items totally unconnected with the security afforded private papers. *LaRue* excluded from evidence blood stained clothing and grease stained pants which connected a suspect with the murder victim on the theory that the items were merely evidence. Kentucky, in a case were the defendant's pants and shoes had traces of insulation from a stolen safe, properly rejected such a mechanical broadening and saw no reason to exclude the items merely because they were the property of the accused.[65]

As Chief Justice Traynor recognized in *People v. Thayer,* there are inconsistencies in the federal practice and discordant approaches among the states.

57 *Ibid.*
58 *Id.* at 514, 213 A.2d 185, 190 (1965). *But see* Gouled v. United States, 255 U.S. 298 (1921), "there is no special sanctity in papers." *Id.* at 309.
59 54 So. 2d 179 (Fla. 1951).
60 *Id.* at 180.
61 *Id.* at 182.
62 *Ibid.*
63 147 Tex. Crim. 354, 180 S.W.2d 928 (1944).
64 149 Tex. Crim. 598, 197 S.W.2d 570 (1946).
65 Boles v. Commonwealth, 304 Ky. 216, 200 S.W.2d 467 (Ct. App. 1947). *But see* Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958) where a handkerchief of a victim of perversion was held not an instrumentality of the crime and, since evidentiary only, inadmissible.

But the conflict is more apparent than real. Four classes of evidence illustrate the problem. (1) Stolen property — there is no problem in its seizure. (2) Instrumentalities of or the means of committing a crime — likewise no problem has arisen here. (3) "Mere evidence" of a crime in the form of beer bottles, shotgun shells, shoes, blood stained clothing, and a handkerchief used in perversion. It is arguable that Federal Rule of Criminal Procedure 41(b)[66] requires federal courts to exclude such evidence. Prescinding from rationalizations and justifications of such an approach, such a protection would be required by no provision in the Constitution. The federal rule would have its authorization in the supervisory power of the Supreme Court over the inferior federal courts. Further, it is submitted that such an interpretation is unnecessary and undesirable. The necessities and practicalities of efficient law enforcement preclude such an approach. (4) "Mere evidence" of a crime found in the form of a man's private books and papers. This last class of items rightly should receive the fourth amendment's protection from unreasonable searches declared by *Boyd* to be within the fifth amendment's protection against self-incrimination. Writing is essentially speech; both are the intellectual product of man. For purposes of self-incrimination, it matters little whether the idea is expressed orally or through the medium of paper. The essential element is the turning of a man's thought into the vehicle of self-accusation. This is the meaning of the fifth amendment. Consequently, the result reached in *People v. Thayer* incorrectly analyzes the constitutional protection of the fourth and fifth amendments and essentially requires compulsory self-incrimination.

Chief Justice Traynor used *People v. Thayer* to illustrate the previously foreseen conflict[67] between federal and state rules where pre-*Mapp* decisions had arguably placed the federal rule on a constitutional foundation. He rightly contends that it had not been foreseen at the time that federal interpretations of the Bill of Rights would be applicable to the states.[68] It is, however, submitted that his contention that the "mere evidence" rule is not of constitutional dignity cannot be sustained. When limited to the protection of a man's private books and papers, the guarantee against seizure of "mere evidence" is one applicable to the states both under the standard test of a protection "implicit in the concept of ordered liberty,"[69] and also because the protections of the fourth and fifth amendments here involved have, in recent decisions, specifically been held applicable to the states.

Boyd traced the interaction of the fourth and fifth amendments as the source of a right to freedom from search for one's personal papers. Mr. Justice Frankfurter stated his view of the principle: "Private papers of an accused cannot be seized even through legal process because their use would violate the prohibition of the Fifth Amendment against self-incrimination."[70] The importance of this protection is constantly re-emphasized:

66 See note 22 *supra.*
67 See note 2 *supra.*
68 People v. Thayer, 47 Cal.Rptr. 780, 782, 408 P.2d 108, 110 (1965).
69 Palko v. Connecticut, 302 U.S. 319, 325 (1937). See the opinion of Mr. Justice Harlen in Pointer v. Texas, 380 U.S. 400, 408-409 (1965) where he discusses the difference between the two approaches.
70 Davis v. United States, 328 U.S. 582, 595 (1946) (dissenting opinion).

> [H]istory makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions . . . that the great battle for fundamental liberty was fought.[71]

Yet the full fruition of these protections has only recently been realized after having traveled a rocky road. In *Weeks v. United States*,[72] the use of unlawfully seized evidence was declared prohibited in federal prosecutions. *Wolf v. Colorado*[73] warned the states not to use such evidence and *Mapp v. Ohio*[74] put teeth in the federal exclusionary rule by making it applicable in state prosecutions. Squabbling still occurred[75] and it was not until *Malloy v. Hogan*[76] that all questions were put to rest. The court made clear its previous implications: "[T]he guarantees of the First Amendment . . . the prohibition of unreasonable searches and seizures of the Fourth Amendment . . . and the right to counsel guaranteed by the Sixth Amendment . . . are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect these personal rights against federal encroachment."[77] It then proceeded to make applicable to the states the fifth amendment's privilege against self-incrimination. Upholding the right of a witness to refuse to answer questions concerning the circumstances of arrest and conviction, the Court said: "Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth."[78]

Thus, the second contention of *People v. Thayer* fails in the face of the *Malloy* holding. Not only does the "mere evidence" rule express a fundamental freedom that no man may be convicted from his own mouth; it is further a federal interpretation of the Bill of Rights now made binding on the states.

Gerard K. Sandweg

CONSTITUTIONAL LAW — ADMINISTRATIVE SEARCHES — NO WARRANT REQUIRED BY FOURTH AMENDMENT FOR POST-FIRE INVESTIGATION. — In August, 1964, a fire was reported in a structure housing a printing plant and an apartment. After the fire was extinguished, an investigation into its cause and origin was commenced by the municipal fire chief and his associates pursuant

71 Frank v. Maryland, 359 U.S. 360, 365 (1959).
72 232 U.S. 383 (1914).
73 338 U.S. 25 (1949).
74 367 U.S. 643 (1961).
75 In Ker v. California, 374 U.S. 23 (1963), where the Court affirmed a state finding of probable cause to make an entry in a narcotics search, the Court spoke of "a mutual obligation to respect *the same fundamental criteria* in their approaches." *Id.* at 31 (echoing Elkins v. United States, 364 U.S. 206 (1960)). But, in the same decision, Mr. Justice Harlan, concurring, said: "Today this distinction in constitutional principles is abandoned. Henceforth state searches and seizures are to be judged by the same constitutional standards as apply in the federal system." *Id.* at 45. A few months later, in Fahy v. Connecticut, 375 U.S. 85 (1963), a state was not allowed to apply its harmless error rule to justify the inclusion of evidence. The dissent argued the Court was actually applying federal standards to the states, protesting: "Evidentiary questions of this sort are not a proper part of this Court's business, particularly in cases coming here from state courts over which this Court posesses no supervisory power." *Id.* at 92.
76 378 U.S. 1 (1964).
77 *Id.* at 10.
78 *Id.* at 8.

to statutory authorization.[1] Investigation was prolonged for a period of weeks during which the premises were re-entered several times. While no search warrant was requested or secured, there was nothing in the record to indicate that the defendant who owned an interest in the printing plant and lived in the apartment consented to the inspections. Based in part on evidence obtained through this investigation, the defendant was indicted by a grand jury for arson. Prior to trial, the accused moved to suppress the testimony of the fire chief and his associates relating to their investigation of his premises, alleging that the search was unconstitutional.[2] The trial court sustained the motion to suppress this evidence. On certiorari, the Supreme Court of Iowa *held:* a civil, post-fire inspection without a warrant pursuant to statutory authorization is not an unreasonable search as prohibited by the United States or Iowa Constitutions. *State v. Rees,* 139 N.W.2d 406 (Iowa 1966).

In *Rees,* the court concluded that the search in question fulfilled the essential requirement of the fourth amendment — reasonableness.[3] The inspectors gained entrance to the premises by virtue of a statute authorizing such an investigation. This statutory authority stamped their search as *reasonable.* Once there, any evidence discovered became the fruit of legally authorized search.[4] While conceding that *civil* inspections pursuant to statutory authorization may be undertaken without a search warrant, the dissent argued that the fire chief's inspection was unreasonable because at some point it became a search for incriminating evidence to be used in a criminal proceeding. Thus, it fell within the fourth amendment's prohibition of such searches without a warrant.[5]

The *Rees* court was faced with the necessity of balancing the individual's right to be secure from unbridled governmental invasion into his privacy with the state's interest in preserving the public welfare in a highly complex, urbanized society. Both the majority and dissent agreed that a warrant is unnecessary to conduct a civil search based on the police powers of the state, but that a warrant is required where the search could be characterized as *criminal* in nature. This distinction between criminal and civil searches relied upon so heavily by the Iowa court was thought to be in keeping with the traditional historical interpretation of the limits of fourth amendment coverage.

1 IOWA CODE ANN., tit. 5, ch. 100, § 100.2 (Supp. 1965): "The chief of the fire department . . . shall investigate into the cause, origin and circumstances of every fire . . . and determine whether such fire was the result of natural causes, negligence or design." IOWA CODE ANN., tit. 5, ch. 100, § 100.10 (1949): "The state fire marshal, and his designated subordinates, in the performance of their duties, shall have authority to enter any building or premises and to examine the same and the contents thereof."
§ 100.12 provides: "[T]he chief of the fire department aforesaid shall have authority to enter any building or premises and to examine the same and contents thereof . . ." and to order correction of any unsafe condition.

2 U.S. CONST. amend. IV, provides:

> "The right of the people to be secure in their persons, 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."

Since the Iowa Const., art. I, § 8 (1857) is almost identical, reference will only be made to the fourth amendment of the U.S. Constitution.

3 See United States v. Rabinowitz, 339 U.S. 56 (1950).

4 "Under the Fourth Amendment if the search is reasonable and lawful the fact that it becomes accusatory by the finding of incriminating evidence does not make it invalid." 139 N.W.2d 406, 413 (Iowa 1966). *Cf.* State v. Hagen, 137 N.W.2d 895 (Iowa 1965).

5 *Id.* at 419.

The genesis of the fourth amendment was a general reaction in England and colonial America to the abuse of executive power made possible through widespread use of search warrants. "The Crown saw in these new devices a most effective means of ferreting out seditious matter and of bringing the offenders to justice."[6] These general warrants were obtained without the necessity of showing probable cause that a crime was suspected and were usually issued without naming a specific suspect or place to be searched.[7] Popular distaste in England toward these practices culminated in *Entick v. Carrington*.[8] This was a trespass action against the King's messengers who, armed with a general warrant, searched a private dwelling for unspecified, seditious books and papers. In finding them guilty of trespass, Lord Camden dealt a lethal blow to the power of general warrants.[9] Colonial governments engaged in an equally odious practice. Writs of Assistance were issued to revenue officers allowing them to search anywhere for smuggled goods. James Otis referred to these warrants as the "worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English lawbook."[10]

Out of these sad experiences grew the fourth amendment's protection against unreasonable searches and seizures and judicial insistence on a limited, specific warrant.[11] The abuses which gave rise to the fourth amendment have been eliminated, but its *raison d'être* has not disappeared.[12] Historically, courts have dealt with the fourth amendment almost exclusively in the context of criminal proceedings, but its inherent logic does not demand such a restricted application.[13] Insistence on protecting the individual from unreasonable searches and seizures cannot be maintained in a vacuum, separated from the exigencies of urban living. Our forefathers may have lived where congestion, noise, health and safety hazards were at a minimum, but the rapid process of urbanization has thrown large populations together, generating health and safety problems of a complexity never faced in the past. To insure adequate protection against

6 Wood, *The Scope Of The Constitutional Immunity Against Searches And Seizures*, 34 W. VA. L. REV. 1, 3 (1927).

7 "Armed with their roving commission, they [King's ministers] set forth in quest of unknown offenders; and, unable to take evidence, listened to rumors, idle tales, and curious guesses. They held in their hands the liberty of every man whom they were pleased to suspect." 1 COOLEY, CONSTITUTIONAL LIMITATIONS 612 n.1 (8th ed. 1927). See Fraenkel, *Concerning Search And Seizure*, 34 HARV. L. REV. 361 (1921).

8 19 How. St. Tr. 1029 (1765). *Accord*, Boyd v. United States, 116 U.S. 616 (1886).

9 "The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license . . ." 19 How. St. Tr. 1029, 1066 (1765). This was followed by a House of Commons resolution prohibiting the issuance of general warrants in all but specifically provided for circumstances. *Id.* at 1074-75.

10 2 WORKS OF JOHN ADAMS 523-24 (1850).

11 2 STOREY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1902, at 648 (1891). See DAVIS, ADMINISTRATIVE LAW TREATISE § 3.05 (1958); MORELAND, MODERN CRIMINAL PROCEDURE 101-02 (1959). A good treatment of the history of Writs of Assistance may be found in Quincy's Mass. Rep., 469-82 (1761-1772).

12 "[A] principle to be vital must be capable of wider application than the mischief which gave it birth." Weems v. United States, 217 U.S. 349, 373 (1910). *Cf.* Nueslein v. District of Columbia, 115 F.2d 690, 692 n.5 (D.C. Cir. 1940).

13 See WOOD, *supra* note 6, at 12.

the menace of fire and disease, inspections of private premises are required. The *Rees* court accepted the fact that governmental police power has long authorized warrantless searches to promote health, safety, and welfare.[14] However, most of these early decisions involved public or quasi-public institutions rather than inspection of private dwellings.[15]

One of the first attacks on administrative searches into private premises was initiated in *District of Columbia v. Little*.[16] Little refused to admit a health inspector acting under statutory authority, thus subjecting himself to prosecution for interfering with an inspector in the exercise of his official duties. Judge Prettyman rejected the contention that civil inspections, unlike a search for evidence to be used in a criminal proceeding, may be effected without a warrant.[17] He saw the interest of the individual requiring protection in both civil and criminal searches as identical, and that it would be a "fantastic absurdity" to deny the right of privacy to a man not suspected of a crime and guarantee it to a man who is.[18]

The controversy was by no means resolved by Judge Prettyman in the *Little* decision. *Givener v. Maryland*[19] upheld the statutory authority of a fire inspector and health commissioner to enter private premises for an inspection. The *Givener* court, like the *Rees* court, reasoned that the abuses behind the fourth amendment were of criminal searches. Thus, where inspection is made to protect the general welfare, no warrant is required.[20] The criminal-civil dichotomy was again resorted to in *State v. Buxton*,[21] a case almost factually identical to *Rees*. After a fire had occurred in a restaurant, a deputy fire marshal and his associates entered the premises pursuant to statutory authorization. As the investigation progressed, evidence of arson became increasingly apparent. In an opinion similar to the *Rees* dissent, the court held that a search warrant was required. Though the search may have been civil when commenced, it took

14 In City of St. Louis v. Evans, 337 S.W.2d 948 (Mo. 1960), officials entered and inspected a boardinghouse for zoning and building code violations. The court held that fourth amendment does not prohibit inspections made pursuant to an exercise of police power. Keiper v. City of Louisville, 152 Ky. 691, 154 S.W. 18 (1913), upheld ordinances authorizing health inspector to enter any building where food products were stored or kept for sale. Also held valid was a statute empowering building inspector to enter a hotel without warrant to determine if it was of fireproof construction. Hubbell v. Higgins, 148 Iowa 36, 126 N.W. 914 (1910). See Sister Felicitas v. Hartridge, 148 Ga. 832, 98 S.E. 538 (1919); State v. Normand, 76 N.H. 541, 85 Atl. 899 (1913); CORNELIUS, THE LAW OF SEARCH AND SEIZURE § 35 (2d ed. 1930); Note, 72 HARV. L. REV. 504 (1959). Freund maintains, however, that administrative inspections do require issuance of a search warrant. FREUND, THE POLICE POWER § 47 (1904).

15 The court relied heavily on Dederick v. Smith, 88 N.H. 63, 184 Atl. 595 (1936). There, a state veterinarian entered a private barn to inspect animals for contagious diseases. A statute authorized such inspection as incident to state police power. Factually, a quasi-public institution was not involved here, but the decision hung on the necessity of *property rights* yielding to police power. The *Dederick* court never discussed the fourth amendment or right to privacy. *Rees* also involved a search of private premises. The record gave no indication that the investigations were restricted solely to the printing plant.

16 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

17 "The argument is wholly without merit, preposterous in fact." *Id.* at 16.

18 *Id.* at 17.

19 210 Md. 484, 124 A.2d 764 (1956).

20 The court stated, "Few rights are absolute. . . . Here the problem is one of personal privacy as against the protection of the public health and safety." *Id.* at 774.

21 238 Ind. 93, 148 N.E.2d 547 (1958).

on a criminal character when it became obvious to the inspectors that incriminating evidence might be discovered.[22]

In 1959, the Supreme Court fanned the controversy over administrative searches. Mr. Justice Frankfurter adopted the criminal-civil test in affirming the conviction of a person who refused entrance to a health inspector in *Frank v. Maryland*.[23] The fourth amendment was viewed as granting a twofold protection — the right to privacy and the right to be free from governmental invasions aimed at securing incriminating matter.[24] It was accepted that the purpose of the inspection was not to further a criminal prosecution, but merely to detect unsafe conditions which could thus be remedied. The dissenters in *Frank* did not emphasize the purpose of the search, but rather the unrestricted invasion of privacy which the search occasioned.[25] They concluded that the majority decision "greatly dilutes the right of privacy which every homeowner had the right to believe was part of our American heritage."[26]

The ink had hardly dried on the *Frank* opinion when, four weeks later, the Supreme Court agreed to hear *Eaton v. Price*.[27] There, the conviction of a person refusing to grant entrance to health inspectors was affirmed by an equally divided court.[28] The four *Frank* dissenters adhered to their earlier position, remarking that the majority decision was "the dubious pronouncement of a gravely divided Court."[29]

In *People v. Laverne*,[30] the New York Court of Appeals reversed a conviction for violation of a municipal zoning ordinance when evidence of such violation was obtained through a warrantless inspection. Distinguishing *Frank*, the court refused to label this investigation into zoning violations a civil search because its results were to be directly used in a criminal prosecution. The *Laverne* approach is only a stopgap solution to the problem of administrative searches.[31] The distinction between criminal and civil searches is an inadequate

22 *Id.* at 97, 148 N.E.2d at 551.

23 359 U.S. 360, *rehearing denied*, 360 U.S. 914 (1959).

24 Stressing the relationship between the fourth and fifth amendments, Justice Frankfurter narrowed application of the fourth to searches for incriminating evidence. *Id.* at 364-66. See 108 U. PA. L. REV. 265 (1959). *Contra*, Note, 44 ILL. L. REV. 845 (1950).

25 "It was not the search that was vicious. It was the *absence of a warrant issued on a showing of probable cause. . . .*" *Id.* at 379. The dissenters included Justices Douglas, Warren, Black, and Brennan.

26 *Id.* at 374. "[T]he protection of the Fourth Amendment has heretofore been thought to protect privacy when civil litigation, as well as criminal prosecutions, was in the offing." *Id.* at 375.

27 360 U.S. 246 (1959). Unlike *Frank*, the inspectors in *Eaton* were empowered to enter premises even where they had no reason to suspect a nuisance existed. 364 U.S. 263, 265 (1960).

28 Justice Stewart did not sit.

29 364 U.S. 263, 269 (1960), citing concurring opinion in Cooper v. Aaron, 358 U.S. 1, 24 (1958). It is noteworthy that today the *Frank* dissenters still sit on the Court, whereas Justices White and Fortas have replaced Frankfurter and Whittaker. It is not altogether certain that, given a *Frank*-type case, the Court would adhere to its position in *Frank*.

30 People v. Laverne, 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964).

31 This application of the fourth amendment is like closing the barn door after the horse has been stolen. If the right of privacy is an essential guarantee, refusing to convict a person on the basis of evidence obtained during a criminal search without a warrant still does not get to the heart of that guarantee. Validity of the search is predicated on its results. At that point privacy has already been invaded. See Note, 1965 DUKE L.J. 158.

basis on which to determine coverage of the fourth amendment.[32] Often the line separating criminal and civil proceedings is hazy.[33] Furthermore, such a categorization may make protection of privacy contingent on the inspectors' intent in making the search. This invites a "trial of the officers' purposes."[34] Under the criminal-civil test, if the search can be labeled *civil,* even though investigation fortuitously turns up evidence of criminal activity as in *Rees,* a warrant is not required. Does it matter to the individual whether a warrantless search of his premises is conducted pursuant to an administrative regulation or a criminal investigation? Professor Barrett asserts, "In each case his privacy has been invaded by an official authority which he is powerless to resist."[35]

If the criminal-civil distinction is abandoned, a search warrant would be required to conduct a civil search. Thus, it would be necessary for inspectors to show probable cause that a safety or health violation exists before they can obtain a warrant. This would not unduly hamper enforcement of statutes similar to the one found in *Rees* because the mere occurrence of a fire would itself be sufficient reason to grant a warrant. Unfortunately, though, many hazards are not evident until inspection is actually performed. In such situations, some contend that enforcement of safety regulations would be hampered if warrants were required before investigations were made.[36] Mr. Justice Frankfurter maintained that the power to inspect "would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts."[37] On the other hand, if courts tried to preserve the effectiveness of inspections by issuing warrants according to a relaxed standard of probable cause, the concept would be hopelessly diluted.[38] The *Frank* and *Eaton* dissenters did not view this as an insoluble problem: "The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought"; probable cause in civil searches "may have quite different requirements. . . ."[39] "To be sure, the showing that will justify a housing inspection to check compliance with health and safety regulations is different from that which would justify a search for narcotics. . . . To each specific warrant, an appropriate specific showing is necessary."[40]

32 For example, criminal sanctions may be imposed for failure to abate a code violation, or refusal to allow entrance to an inspector. Is the inspection civil or criminal? See 63 HARV. L. REV. 349 (1949); Comment, 44 MINN. L. REV. 513 (1960).

33 *In Re* Groban, 352 U.S. 330, 344 (1957) (dissenting opinion).

34 Abel v. United States, 362 U.S. 217, 254 (1960) (dissenting opinion). The majority opinion conceded if the purpose of the administrative inspection was to find criminal evidence, it would not be valid without a warrant. *Id.* at 230.

35 Barrett, *Personal Rights, Property Rights, and the Fourth Amendment,* 1960 SUPREME COURT REV. 46, 73. See 28 TEXAS B.J. 93 (1965).

36 Stahl & Kuhn, *Inspections And The Fourth Amendment,* 11 U. PITT. L. REV. 256, 273-75 (1950); 49 MINN. L. REV. 319, 323 (1964). See Note, 28 GEO. WASH. L. REV. 421 (1960). The argument is made that health and safety programs would be rendered impotent if reliance were placed primarily on the receipt of complaints before investigations were commenced. Administrative officials must be given power to initiate investigations. *Id.* at 430-31. See also Wolf & Lustig, *Ten Years Later: Illegal State Evidence In State and Federal Courts,* 43 MINN. L. REV. 1083 (1959). *Contra,* Comment, 44 MINN. L. REV. 513, 528-30 (1960).

37 Frank v. Maryland, 359 U.S. 360, 372 (1959), *denied.*

38 108 U. PA. L. REV. 265, 277 (1959).

39 Frank v. Maryland, 359 U.S. 360, 383 (1959).

40 Eaton v. Price, 364 U.S. 263, 273 (1960). Contrapoised to this view is the objection that the kind of protection afforded by a warrant issued under these circumstances is not

Some suggest that the individual's right of privacy could even be protected without the formal necessity of showing probable cause to obtain a search warrant if certain safeguards were built into the statutes and ordinances authorizing inspections. They could provide that an inspection effectuating the police power could be conducted without a warrant only if reasonable notice was sent to the occupant, inspection was made at a convenient time, and harassment was avoided.[41] Of course, the question again arises as to whether this approach to administrative searches provides the requisite protection demanded by the fourth amendment.

If the right of privacy lies at the heart of the fourth amendment, no safeguards short of a validly issued warrant will fulfill its constitutional mandate. "[W]here one comes out on a case depends on where one goes in."[42] The constitutional prohibition against unreasonable searches and seizures is not aimed merely at the abuses of general warrants or of criminal searches, rather its protection pervades the entire area of governmental invasion into a citizen's privacy.[43] Unquestionably, this right has most frequently been enunciated and defended by courts in the context of a criminal proceeding.[44] However, the principle is broader[45] — the basis of the fourth amendment is the right to privacy.[46]

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as stringent as that envisaged by the Constitution. A flexible concept of probable cause would make it difficult to distinguish a capricious inspection resulting through blanket issuance of warrants from legitimate searches. Comment, 65 COLUM. L. REV. 288, 291 (1965). One author nonetheless insists:

> While the search warrant was not designed to deal with this type of entry by administrative officials, it is becoming increasingly evident that the right of privacy, which *inter alia* the warrant has always protected, should not go by default for want of legal machinery fashioned to accommodate the new situation. And, in lieu of such machinery, the availability of the warrant has seemed on some statutory occasions to be a small price to pay.

Waters, *Rights Of Enry In Administrative Officers,* 27 U. CHI. L. REV. 79, 93 (1959).

41 See Note, 28 GEO. WASH. L. REV. 421, 450-52 (1960). *Cf.* 49 MINN. L. REV. 319, 324 (1964).

42 United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Justice Frankfurter dissenting).

43 The Constitutional authors

> "recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the most valued by civilized men. To protect that right, every unjustified intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 478 (1928). *Accord,* Beaney, *The Constitutional Right To Privacy In The Supreme Court,* 1962 SUPREME COURT REV. 212, 214.

44 "The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society." Wolf v. Colorado, 338 U.S. 25, 27 (1949). *Cf.* Abel v. United States, 262 U.S. 217, 255 (1960) (dissenting opinion); United States v. Lefkowitz, 285 U.S. 452, 464 (1932); Adams v. New York, 192 U.S. 585, 598 (1904); State v. Shephard, 255 Iowa 1218, 1226, 124 N.W.2d 712, 717 (1963).

45 "[T]hese Amendments [fourth and fifth] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual deprecation' of the rights secured by them, by imperceptible practice of courts or well-intentioned but mistakenly over-zealous executive officers." Gouled v. United States, 255 U.S. 298, 304 (1921). *Accord,* Go-Bart Co. v. United States, 282 U.S. 344, 357 (1931).

46 50 CORNELL L.Q. 282, 288 (1965). The *Frank* dissenters asserted, "It was designed to protect the citizen against uncontrolled invasion of his privacy." 359 U.S. 360, 381 (1959), *rehearing denied,* 360 U.S. 914 (1959).

> "It is not the breaking of his doors, and rummaging of his drawers, that constitutes

"In view of the readiness of zealots to ride roughshod over claims of privacy for any ends that impress them as socially desirable, we should not make inroads on the rights protected by this Amendment."[47] In allowing the state to demand entrance into a private citizen's premises, we are giving the state a great deal of power which can be indiscreetly handled and abused. "History shows that all officers tend to be officious. . . ."[48] Unlike other exercises of state power, there exists little effective remedy against an unwarranted intrusion once the intrusion has occurred. Once privacy has been violated, even the exclusion of evidence thereby obtained does not fully satisfy the injury done to the citizen. Whether the individual's privacy must yield to the coercive power of the state to search should be a matter for determination by a disinterested magistrate. The fourth amendment's intent is to interpose a neutral party, the magistrate, between the citizen and the state.[49]

It is submitted that since privacy is the essential interest sought to be secured by the fourth amendment and that a disinterested judicial officer is in the best position to determine when individual privacy may be invaded by the state, the *Rees* holding falls short of constitutional requirements for an administrative search. The fact that a search is classified as *civil* does not stamp an imprimatur on everything the inspector may decide to undertake. In many cases, the distinction between civil and criminal investigations will be blurred. Furthermore, the fourth amendment does not respect such a distinction. The crux of the question is protection of privacy, not the purpose of the search.[50]

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the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . ." Boyd v. United States, 116 U.S. 616, 630 (1886). See Also, Joe V. Ullman, 367 U.S. 497, 550-52 (1961) (dissenting opinion).

47 Justice Jackson dissenting in Harris v. United States, 331 U.S. 145, 198 (1947). The possibility for abuse of administrative searches is great.

> "Harassment of unpopular minorities, political dissenters, and party opponents can occur with few, if any, means of protecting the individual. Many police departments will find it useful to set up close working relations with health inspectors, to be utilized where there is insufficient evidence to justify arrest or search and seizure."

Beaney, *supra* note 43, at 245. *Cf.* Abel v. United States, 362 U.S. 217, 242 (1959) (dissenting opinion); 17 U. CHI. L. REV. 733, 739-40 (1950). See also 10 HASTINGS L.J. 430, 435 (1959).

48 Frank v. Maryland, 359 U.S. 360, 382 (1959) (dissenting opinion), *rehearing denied* 360 U.S. 914 (1959). But see Harris v. United States, 331 U.S. 145, 155 (1947): "But we should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable"; *In Re* Groban, 352 U.S. 330, 336 (1957).

49 "[I]nformed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers. . . ."

United States v. Lefkowitz, 285 U.S. 452, 464 (1932). While this case involved a search for criminal evidence, the principle enunciated is of universal applicability. See Eaton v. Price, 364 U.S. 263 (1960); United States v. Rabinowitz, 339 U.S. 56, 82 (1950) (dissenting opinion); McDonald v. United States, 335 U.S. 451, 455 (1948); Harris v. United States, 331 U.S. 145, 162 (1947); District of Columbia v. Little, 178 F.2d 13, 16 (D.C. Cir. 1949); State v. Hagen, 137 N.W.2d 895, 900 (Iowa 1965). It should also be noted that a likely effect of a judicial demand for probable cause for administrative searches would be in the adoption of stricter standards by administrative officials themselves in their "daily practice." Comment, 44 MINN. L. REV. 513, 532 n.70 (1960).

50 It is quite probable, moreover, that even under the *Frank* holding the search in *Rees* was unconstitutional. The Iowa statute authorizes a search to determine if the fire was the "result of natural causes, negligence or *design*." IOWA CODE ANN., tit. 5, ch. 100, § 100.2

As far as the individual's interest is concerned, the object of the search is irrelevant. A due concern for civil liberties would not impose an undue burden in the *Rees* situation; demonstration of probable cause to search premises which fire has damaged or destroyed would not be an overly onerous burden for inspectors to bear.

The solution offered by the dissent in *Rees* is no more adequate than the majority's. It also accepts the validity of the criminal-civil search distinction, thus overlooking the pervasive character of the fourth amendment. Once privacy is invaded, it is of little consolation to the citizen that inspectors must obtain a warrant if they begin to seek criminal evidence.

Only caution in restricting application of the fourth amendment will prevent a gradual erosion of the civil liberties it protects. The needs of a complex society are many and new methods of fulfilling these needs should not be summarily rejected by the courts. The fourth amendment does not prohibit the type of inspections found in *Rees*. It only requires that a validly issued search warrant be obtained when the state desires to enter the premises of a nonconsenting individual. Privacy and efficient exercise of governmental police power can co-exist. However, we must recognize that today's greater need for preventive and investigatory inspections also presents a greater opportunity for creation of institutionalized procedures which sacrifice the sacred inviolability of the human person to the needs of an efficient administrative machine.

John Thomas Harty

WORKMEN'S COMPENSATION — REDEMPTIONS — MICHIGAN ALLOWS LUMP SUM REDEMPTION OF LIABILITY FOR MEDICAL BENEFITS. — On May 1, 1956, Robert Lee Young, while at work for his employer, suffered injuries from an accident arising out of and in the course of his employment. He began receiving workmen's compensation benefits at a rate later corrected to $34.00 per week. On August 1, 1956, Mr. Young was adjudged mentally incompetent by the Wayne County Probate Court, which appointed Betty H. Crooks as his guardian. The guardian, having obtained the authorization of the Probate Court, signed an agreement, dated August 8, 1957, to redeem the employer's liability for weekly compensation payments under § 22, Part II of the Michigan Workmen's Compensation Act.[1] The agreement was filed with the Workmen's Compensation Department for approval, and a redemption hearing was held on August 12, 1957 before referee James Broderick. On September 6, 1957, referee Broderick entered an order "that said agreement to redeem the employer's entire liability for weekly payments herein by the payment of $15,000 be approved."[2]

(Supp. 1965). (Emphasis added.) A literal reading of the statute indicates that one of the purposes for which fire inspection is conducted is to gather possible criminal evidence. Both the majority and dissent ignored this point, but under *Frank* the search could validly be labeled as criminal. Thus a warrant would be required.

1 MICH. COMP. LAWS § 412.22 (1948).
2 Wehmeier v. W. E. Wood Co., 139 N.W.2d 733, 734 (Mich. 1966).

On April 14, 1960, plaintiff as successor guardian, filed an application for a hearing and adjustment of claim for additional weekly payments and medical benefits. Defendants moved to dismiss the application on the grounds that the entire matter had been resolved by the approved redemption agreement. In a reply to the motion to dismiss, plaintiff withdrew his claim for weekly payments and opposed the motion on the sole basis that rights to medical benefits were not settled by the approved redemption agreement. Referee Broderick held "that the redemption ordered [sic] entered herein on September 6, 1957 had no affect [sic] on defendants' liability to provide medical care under section 4 of part 2 of the workmen's compensation act."[3] The defendant appealed to the Workmen's Compensation Appeal Board which held that rights to medical benefits were settled by the approved redemption agreement, and entered an order granting defendant's motion to dismiss.[4] On appeal to the Supreme Court of Michigan, the main question entertained by the court was: "did the commission board lack jurisdiction to make a lump sum settlement of medical benefits?"[5] The Supreme Court of Michigan, affirming the Appeal Board, *held:* the redemption provision of the Workmen's Compensation Act gives the Commission Board jurisdiction to make a lump-sum settlement of medical benefits. *Wehmeier v. W. E. Wood Co.,* 139 N.W.2d 733 (Mich. 1966).

Today every state has a workmen's compensation statute.[6] The theory of workmen's compensation was expressed in the slogan attributed to David Lloyd George: "The cost of the product should bear the blood of the workman."[7] The workmen's compensation movement

> was a revolt from the old common law and the creation of a complete substitute therefor, and not a mere improvement therein. It meant to make liability dependent on a relationship to the job, in a liberal, humane fashion, with litigation reduced to a minimum. It meant to cut out narrow common-law methods of denying awards.[8]

The workmen's compensation law in Michigan was

> adopted to give employers protection against common-law actions and to place upon industry, where it properly belongs, not only the expense of the hospital and medical bills of the injured employee, but place upon it the burden of making a reasonable contribution to the sustenance of that employee and his dependents during the period of time he is incapacitated from work. This was the express intent of the legislature in adopting this law.[9]

To further this intent, the Michigan compensation act virtually did away with

3 *Ibid.*
4 Brief for Appellee, p. 3.
5 Wehmeier v. W. E. Wood Co., 139 N.W.2d 733, 734 (Mich. 1966).
6 PROSSER, TORTS 554 (3d ed. 1964).
7 *Ibid.*
8 HOROVITZ, WORKMEN'S COMPENSATION 8 (1944). See generally Sheppard v. Michigan Nat'l Bank, 348 Mich. 577, 83 N.W.2d 614 (1957); Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals,* 1963 WIS. L. REV. 57.
9 Lahti v. Fosterling, 357 Mich. 578, 585, 99 N.W.2d 490, 493 (1959). See also Harper v. Lowe, 272 Mich. 331, 262 N.W. 260 (1935).

common law theories of negligence, contributory negligence, negligence of a fellow employee, and assumption of risk in return for a program of speedy compensation to the injured employee and practically exclusive liability for the employer.[10]

A specific section of the Michigan act designed to speed compensation to an injured employee is the first provision of part 2, § 22 which is popularly known as the redemptions provision. It provides:

> Whenever any weekly payment has been continued for not less than 6 months, the liability therefor may be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of the compensation commission. . . .[11]

Under this section, instead of receiving weekly payments over an extended period of time, an employee can settle his claim for compensation against the employer by executing a redemption agreement calling for one lump sum payment. The agreement is subject to approval by the compensation commission to protect employees from making prejudicial settlements.[12]

Once a settlement has been entered into under the redemptions provision, it is considered a final redemption of the employer's further liability for weekly payments. This has been the Michigan court's view from the section's first interpretation[13] up to its most recent construction in *Wehmeier*. An illustrative

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10 Kotarski v. Aetna Cas. & Sur. Co., 244 F.Supp. 547, 552 (E.D. Mich. 1965). See also Pettaway v. McConaghy, 367 Mich. 651, 116 N.W.2d 789 (1962); Smith v. Pontiac Motor Car Co., 277 Mich. 652, 270 N.W. 172 (1936).

11 MICH. COMP. LAWS § 412.22 (1948). The second provision of this statute, not at issue in this case, is popularly known as lump sum advances. It provides:

> [S]aid compensation commission may at any time direct in any case, if special circumstances be found which in its judgment require the same, that the deferred payments due under this act be commuted on the present worth thereof at 5% per annum to 1 or more lump sum payments, and that such payments shall be made by the employer or the insurance company carrying such risk, or commissioner of insurance.

The test to see if a settlement falls within the first or second provision of the statute is given by Anderson v. Clark Equip. Co., 278 Mich. 492, 270 N.W. 761 (1936): "We have heretofore held that the line of demarcation between the two procedures is whether the settlement is made by approved agreement or by award on petition." *Id.* at 497, 270 N.W. at 763.

12 It has been uniformly held in Michigan that an unapproved settlement receipt is without force to stop compensation. *E.g.*, Sackolitz v. Mid-West Abrasive Co., 322 Mich. 666, 34 N.W.2d 468 (1948); Hurst v. Ford Motor Co., 276 Mich. 405, 267 N.W. 573, (1936); Grant v. Chevrolet Motor Co., 264 Mich. 510, 250 N.W. 293 (1933). If a compensation agreement is not warranted by the statute, the Department of Labor and Industry is without authority to approve it. Miller v. City Ice & Fuel Co., 279 Mich. 592, 277 N.W. 196 (1937).

> It is largely to the benefit of the workmen that the law demands specific compliance with the terms of the act under the supervision of the Department of Labor and Industry. Otherwise an unscrupulous employer could take advantage of the economic pressure on a disabled workman who, because of his great need, might be unable to withstand the temptation to accept an immediate offer of an inadequate amount, or a doubtful promise, in lieu of the compensation to which he would be entitled under the act.

McDonald v. Ford Motor Co., 268 Mich. 39, 45, 255 N.W. 378, 380 (1934). See also Dettloff v. Hammond, Standish & Co., 195 Mich. 117, 161 N.W. 949 (1917). Weekly compensation for injuries sustained is provided for by MICH. COMP. LAWS §§ 412.9, 412.10 (1948).

13 Doubtless under this provision when the parties make a valid agreement for a lump sum payment in full for all compensation under the act, and such payment so agreed upon has been authorized by the board and the payment made, the stage of weekly

case showing the relation of the redemption provision to the lump sum advance provision of the section is *Catina v. Hudson Motor Car. Co.*[14] It held:

> [A] direction by the board that deferred payments be commuted to one or more lump sum payments, under the second provision of . . . [§ 22] presents no obstacle to a further review of weekly payments upon a showing of change in condition. The order for the lump sum settlement in the instant case was also made under this second provision. Had there been a contract for a lump sum settlement entered into by the parties and approved by the board, in accordance with the first provision [redemptions] of this section, and payment made accordingly, all payments would have been redeemed and defendants discharged from further liability.[15]

A second case, heavily relied upon by the court in *Wehmeier,* is *Marks v. Otis Elevator Co.*[16] In *Marks,* the court addressed itself specifically to the redemptions part of the statute in saying:

> When a lump-sum settlement is made, in accordance with the first portion of section 22 . . . the employee has the advantage of a large immediate payment, and in this particular case, the furnishing of capital to conduct a business; on the other hand, the employer or his insurer is taking a certain risk. The employee may entirely recover from all disability, or he may die, or he may earn a much larger sum than his average weekly wage at the time of the injury, long before the lump sum would have been exhausted, had it been paid out in weekly payments. We do not find that the payment of such lump sum in final settlement of all liability is against public policy or the spirit of the act. The first portion of section 22 . . . provides for such settlement. It is necessary that such settlement be approved by the commission. As it was so approved in the instant case, it constituted a redemption from liability for all further payments.[17]

While there is no present doubt as to the finality of a settlement effected under this statute, the scope of the statute was at issue in *Wehmeier.* The statute itself, as well as the cases interpreting it, speaks in terms of settling *only* the liability for *weekly* payments. Since this is the only section of the compensation statute which provides for a lump sum settlement, it seems incongruous that the Workmen's Compensation Appeal Board and the court in *Wehmeier* could have held that the liability of the employer for medical benefits, due under a separate section of the act,[18] was also finally settled by the redemption agree-

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payments and review thereof has been passed. The liability has been redeemed. The right to compensation has been terminated.

Norbut v. I. Stephenson Co., 217 Mich. 345, 347, 186 N.W. 716, 717 (1922). See, *e.g.,* Thomas v. Campbell, Wyant & Cannon Foundry Co., 308 Mich. 17, 13 N.W.2d 190 (1944); Meyers v. Iron County, 297 Mich. 629, 298 N.W. 308 (1941); Marks v. Otis Elevator Co., 276 Mich. 75, 267 N.W. 790 (1936); Catina v. Hudson Motor Car Co., 272 Mich. 377, 262 N.W. 266 (1935).

14 272 Mich. 377, 262 N.W. 266 (1935).

15 *Id.* at 382, 262 N.W. at 268.

16 276 Mich. 75, 267 N.W. 790 (1936).

17 *Id.* at 78, 267 N.W. at 791.

18 MICH. COMP. LAWS § 412.4 (1948). In regard to medical expenses under the act in general, see McDaniel v. Campbell, Wyant & Cannon Foundry, 367 Mich. 356, 116 N.W.2d 835 (1962); Boyer v. Service Distribs., Inc., 366 Mich. 319, 115 N.W.2d 101 (1962); Tomes v. General Motors Corp., 318 Mich. 168, 27 N.W.2d 520 (1947).

ment.[19] What the court was called upon to do in *Wehmeier* was to construe § 22 to define "weekly payments" as used in the redemption statute, or more specifically, to decide what can be settled under the statute, the term "weekly payments" notwithstanding.

The problem of statutory construction facing the court in *Wehmeier* will be better explained by reviewing the legislative history of the redemptions and medical benefits sections of the act. In 1912, the date of the compensation act's enactment, medical and hospital care benefits were limited to the first three weeks following the date of the injury.[20] Subsequently in 1919, they were extended to 90 days,[21] and remained unamended until 1943. Thus before 1943, when they were extended to a duration of one year,[22] a final settlement under § 22 was literally a final settlement of all liability, since medical benefits expired after 90 days from the date of the injury and a settlement, by the terms of the statute, could not be entered into until weekly payments had been continued for six months. As a result, the only benefits remaining after six months, before the 1943 amendment extended medical care to one year, were weekly payments.

It was the 1943 amendment that created the conflict between the two statutes; the legislative and public policy in favor of a final settlement of liability under the redemptions section conflicting with the legislative policy in favor of providing extended medical and hospital care benefits to injured employees. By the time the court was called upon to delineate between these two statutes in *Wehmeier,* the medical section had been amended to provide for medical benefits for as long as they were needed,[23] the amendment having been held retroactive,[24] while the redemptions section "remained substantially intact, without amendment, from the date of enactment down to the present date."[25]

In trying to reconcile the legislative intent behind these two sections, opposed in purpose and language, the court was faced with two alternatives. It could construe the words, "weekly payment," in § 22 literally so that the liability which can be redeemed would not include medical benefits. Or, it could construe the words according to what they meant prior to 1943, as being inclusive of the employer's total liability.[26] To aid this task, the legislative policy in favor of settlements was examined: "In 1912 when . . . [the] legislature determined it would provide for regular weekly payments to the injured employee, it also recognized the fact that in certain cases a lump sum settlement would be more helpful to the injured employee."[27] But at the same time, compensation was

19 Of the three types of benefits available under the act, viz.: medical and other care services, MICH. COMP. LAWS § 412.4 (1948); death compensation, MICH. COMP. LAWS § 412.8 (1948); and weekly compensation for the injury sustained, MICH. COMP. LAWS §§ 412.9, 412.10 (1948) — § 22, under which the redemption was made, speaks only of weekly payments and not "medical and other care services." Brief for Appellant, p. 6.

20 Mich. Pub. Acts 1912, No. 10.

21 Mich. Pub. Acts 1919, No. 64.

22 Mich. Pub. Acts 1943, No. 245.

23 Mich. Pub. Acts 1955, No. 250, as amended, MICH. COMP. LAWS § 412.4 (1948).

24 Lahti v. Fosterling, 357 Mich. 578, 99 N.W.2d 490 (1959).

25 Wehmeier v. W. E. Wood Co., 139 N.W.2d 733, 739 (Mich. 1966).

26 Brief for the Auto Owners Ins. Co., Citizens Mut. Auto. Ins. Co., and Mich. Mut. Liab. Co. as Amicus Curiae, p. 3, Wehmeier v. W. E. Wood Co., 139 N.W.2d 733 (Mich. 1966).

27 Wehmeier v. W. E. Wood Co., 139 N.W.2d 733, 738 (Mich. 1966).

viewed not as a private matter between employer and employee, but as one in which the public was vitally interested. The compensation act's policy that the burden of employee injuries be borne by industry was effectuated by a provision for "frequent regular payments, weekly not monthly, or quarterly, or annually. It opposes payments in gross or in lump sum, except in certain 'special circumstances.' "[28]

Of the three amicus curiae briefs filed in *Wehmeier,* two differed as to whether public policy favored such settlement. The Michigan Chapter of the American Trial Lawyers Association, while agreeing with *Marks v. Otis Elevator*[29] that the payment of a lump sum in final settlement of all liability is not against public policy, pointed out that:

> As is well recognized, redemptions serve their most important function in allowing compromises of borderline or difficult cases. . . . Compromise is the lubricant that permits people to overcome inter-human frictions. . . . Almost all redemptions are compromises. . . . The compromise that extricates the plaintiff from a dangerous gamble, from the highly risky philosophy of "winner take all," is the redemption. . . . Public policy should favor elimination of risk and gamble in litigation.[30]

The International Union, UAW, did not share this view:

> The public policy is against lump sum payments and in favor of payment over a period of time. This presents a compelling justification for the legislative requirement that medical benefits be furnished when they are needed and that they cannot be redeemed in one lump sum.[31]

The court, while accepting the proposition that public policy actively encourages settlements, was influenced by the fact that if the rights to medical benefits could not be redeemed under § 22, the redemptions clause would be

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28 Harrington v. Department of Labor & Indus., 252 Mich. 87, 89, 233 N.W. 361, 362 (1930). As to the policy in favor of periodic payments as opposed to one lump sum payment, see generally Puchner v. Employers' Liab. Assur. Corp., 198 La. 921, 5 So. 2d 288 (1941); Ostegaard v. Adams & Kelly Co., 133 Neb. 393, 203 N.W. 564 (1925); Hutchinson v. Rufus Darrow's Son, Inc., 212 App.Div. 751, 209 N.Y.Supp. 527 (1925); Lauritzen v. Terry & Tench Co., 193 App.Div. 809, 184 N.Y.Supp. 683 (1920). For the policy in favor of medical benefits being paid over a period of time, see W. J. Newman Co. v. Indus. Comm'n, 353 Ill. 190, 187 N.E. 137 (1933). Fehland v. City of St. Paul, 215 Minn. 94, 9 N.W.2d 349 (1943); Lawrence v. New York Butchers' Dressed Meat Co., 266 N.Y. 425, 195 N.E. 137 (1934); HOROVITZ, WORKMEN'S COMPENSATION 292-97 (1944).

29 276 Mich. 75, 267 N.W. 790 (1936).

30 Brief for the Michigan Chapter of the American Trial Lawyers Assoc. as Amicus Curiae, pp. 3-4, Wehmeier v. W. E. Wood Co., 139 N.W.2d 733 (Mich. 1966).

31 Brief for the Int'l Union, UAW as Amicus Curiae, p. 7, Wehmeier v. W. E. Wood Co., 139 N.W.2d 733 (Mich. 1966). See cases cited note 28 *supra.* One observer has noted:

> Although compensation law produces a tremendous number of contested and litigated cases, it should never be forgotten that they represent but a small fraction — something like one-tenth to one-fifteenth — of the claims that are disposed of without contest. From the point of view of achievement of the everyday purposes of the legislation, it has been rightly observed that "the successful administration of a compensation law depends to a much greater extent upon the machinery adopted for disposing of the undisputed claim than upon the methods of procedure employed in the litigation of the contested case, important as the latter undoubtedly is."

2 LARSON, WORKMEN'S COMPENSATION LAW 338-39 (1961). See generally 8 SCHNEIDER, WORKMEN'S COMPENSATION chs. 36 & 37 (3d ed. 1951).

almost meaningless in effecting any type of liability settlement. As the chairman of the Workmen's Compensation Appeal Board had pointed out:

> To hold otherwise [to interpret the statute as not permitting redemption of liabiliy for medical benefits] is to say that the legislature only intended to permit a settlement of part of a compensation case while leaving the question of medical care unresolved. Such a monstrous result would rob the section of all meaning and usefulness. No one would ever think of entering into an agreement to redeem a case in part and leave open the possibility of future litigation over medical care.[32]

The court agreed with this view. The action of the legislature in enlarging the employee's rights to medical care in 1943 was not viewed as an expression of legislative intent denying referees and the appeal board the right to approve final settlements, including medical benefits. The court reasoned that if this had been the legislative intent, it would have been clearly and definitely expressed.[33]

Though the Michigan legislature failed to take action in the form of an amendatory provision to § 22 that would have expressed their intent to exempt medical benefits due under the act from § 22, their action in amending the medical provision in 1955 to allow for indefinite care would imply such an intention. Just as § 22 would be "robbed of all meaning" by saying medical benefits aren't redeemable, so too the spirit behind the 1955 amendment would be effectively nullified by saying they are subject to redemption. To allow employees the right to settle speculative amounts such as future medical benefits by a lump sum redemption six months after the date of injury seems opposed to the very idea of securing for injured employees the right to medical care as the need may arise. The uncertainties prevalent in the amount of medical care that may be needed are further shown by the fact that "sometimes operations become necessary months or years after the original injury."[34] The fact that an employee, while negotiating a redemption agreement as early as six months after he is injured, is certainly in no position to estimate what future medical care may be required for his injury again implies a legislative awareness that medical care should be provided over a period of time. This awareness was originally evidenced by the 1955 amendment to the medical benefits provision of the act.

A literal reading of the redemptions statute reveals that the:

> language of the statute is clear, and provides that with regard to any *"weekly payment,"* "liability *therefor* may be redeemed by the payment of a lump sum". Thus, § 22 by express terms is authority only for redemption of weekly compensation payments. Medical payments are not weekly payments and, therefore, there is no statutory authority for their redemption.[35]

32 Appendix of Brief for Appellant, p. 50a.
33 Wehmeier v. W. E. Wood Co., 139 N.W.2d 733, 739 (Mich. 1966).
34 HOROVITZ, WORKMEN'S COMPENSATION 296 (1944).
35 Wehmeier v. W. E. Wood Co., 139 N.W.2d 733, 742 (Mich. 1966) (dissenting opinion). The redemption order entered by the hearing referee provided: "[I]t is ordered that said agreement to redeem the employer's *entire liability for weekly payments* herein by the payment of $15,000.00 be: approved. . . ." (Emphasis added.) Appendix of Brief for Appellant, p. 16a.

However, the court's decision not to give effect to the literal terms of the statute by using the antithetical policies of allowing settlements and preserving the right to continuing medical benefits as a basis for its decision was affected to a great degree by the prior interpretations given § 22 by the various workmen's compensation agencies administering the act.[36] The Workmen's Compensation Department had consistently held since 1943 that a redemption operates to terminate the employer's liability for medical benefits.[37] This settled construction was further shown by the Department's action, pursuant to its statutory rule-making powers,[38] in promulgating a rule governing redemptions under § 22 which required that:

> Any agreement to redeem the liability of the insurer or self-insured employer must be submitted on form R.E.D. The agreement must be accompanied by a report from a licensed physician approved by the employee giving in detail the findings of a recent examination.[39]

This rule, and prior rules of the same import, had been submitted to the legislature,[40] but no action had been taken regarding it. Since no legislative action was taken, the defendant in *Wehmeier* argued that the legislature had, in effect, "silently amended § 22 to permit redemption of liability for medical benefits even while leaving unchanged the language which limits redemptions to weekly benefits."[41] Though the legislature might have inferred from the requirement that there be a medical examination of the employee in a redemption proceeding before the employer's liability for medical benefits would be terminated, it could also have assumed that there were other valid reasons for such a requirement.[42]

The court, over vigorous dissent,[43] was strongly influenced by:

36 The court stated that "in several decisions we have considered the construction of an act by those designated to enforce it as an important fact to be considered by us in our determination of legislative intent and construction of the statute." Wehmeier v. W. E. Wood Co., 139 N.W.2d 733, 740 (Mich. 1966). See, *e.g.*, People v. Holbrook, 373 Mich. 94, 128 N.W.2d 484 (1964); Lorraine Cab v. City of Detroit, 357 Mich 379, 98 N.W.2d 607 (1959); Wyandotte Savings Bank v. Eveland, 347 Mich. 33, 78 N.W.2d 612 (1956); Roosevelt Oil Co. v. Alger, 339 Mich. 679, 64 N.W.2d 582 (1954). *But see In re* Gay's Estate, 310 Mich. 226, 17 N.W.2d 163 (1945) where it was said: "Plain, unambiguous language in a statute leaves no room for judicial construction and must be given effect according to the plain meaning of the words." *Id.* at 230, 17 N.W.2d at 164.

37 Brief for the Auto Owners Ins. Co., Citizens Mut. Auto. Ins. Co., and Mich. Mut. Liab. Co. as Amicus Curiae, p. 6, Wehmeier v. W. E. Wood Co., 139 N.W.2d 733 (Mich. 1966).

38 MICH. COMP. LAWS § 413.3 (1948).

39 Wehmeier v. W. E. Wood Co., 139 N.W.2d 733, 738 (Mich. 1966).

40 MICH. COMP. LAWS §§ 24.78b, 24.78c (1948).

41 Wehmeier v. W. E. Wood Co., 139 N.W.2d 733, 744 (Mich. 1966) (dissenting opinion).

42 Other possible reasons could include:

> [T]o determine precisely questions such as the nature of a specific loss, or whether disability is partial, total, or total and permanent, all of which have a bearing on the benefits to which an employee is entitled, and all of which would, therefore, be of legitimate concern to the department in determining whether a redemption agreement should be approved.

Id. at 745. It was also urged that the profession had always considered the redemptions provision to allow parties to agree to settle all matters in a workmen's compensation case. Brief for appellees, p. 10.

43 This is a case where an administrative agency has acted contrary to ambiguous statutory language. It is our duty to uphold the law, and its continued violation by an agency of the State does not seem to me to mandate our departure from this course.

Wehmeier v. W. E. Wood Co., 139 N.W.2d 733, 744 (Mich. 1966) (dissenting opinion).

> The fact that repeatedly and consistently through the years, referees and appeal boards have construed the provision now under consideration in the same way as the present appeal board has so construed it in this appeal . . . .[44]

This fact, "coupled with the additional fact that through these years the legislature has not objected to that construction, but, to the contrary, has given assent by its silence"[45] disposed the court to assent to the interpretation given § 22 by the Appeal Board in *Wehmeier*.

It would have been in accord with the general policies of the Compensation Act for the court to have read § 22 consistently with other sections of the act by holding that medical benefits were not included under the redemption provision.[46] However, legislative inactivity in failing to clarify the conflict between the redemptions section and the medical benefits section made this task impossible since the Workmen's Compensation Department's construction of the section had consistently included medical benefits under the redemptions provision. While a claim for medical benefits had been held to be a claim for compensation and subject to the time requirements within which a claim for compensation must be made,[47] the Michigan court in *Lahti v. Fosterling*[48] observed "that such benefits are a form of compensation for some purposes but not necessarily for all."[49] This observation suggests that weekly payments and medical benefits are not necessarily one and the same insofar as statutory construction is concerned. If this were not true, there would have been no need for the court to transgress the literal words of the redemption statute in *Wehmeier*.

The Compensation Department's long-standing view of § 22 as encompassing medical benefits was undoubtedly a vital factor considered by the court. Perhaps the deleterious effects of narrowing the scope of § 22 after twenty-three years of treating it as though medical benefits were redeemable far outweighed the results of holding that medical benefits have been and will be redeemable under § 22. But if the hesitancy at opening a Pandora's box, through a narrow interpretation of § 22 was the main basis for following what had by now become the accepted construction of § 22, the court could easily have avoided some of the problems such a decision would present by enforcing its decision prospectively.[50]

While the effect of the court's holding in *Wehmeier* on future settlements of claims to weekly payments and medical benefits is not clear at this time, the

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44 *Id.* at 740.

45 *Ibid.*

46 The question presented relates to the proper interpretation of the clause of Act No. 122, Pub. Acts 1941, above quoted. The basic rule governing the matter is to ascertain and give effect to the legislative intent. . . . This requires that the clause in question shall be read in connection with other pertinent provisions of the act and that a meaning shall be given thereto consistent with the general purposes sought to be accomplished.

Roberts Tobacco Co. v. Dept. of Revenue, 322 Mich. 519, 530, 34 N.W.2d 54, 59 (1948). See also Gardner-White Co. v. Dunckel, 296 Mich. 225, 295 N.W. 624 (1941); City of Grand Rapids v. Crocker, 219 Mich. 178, 189 N.W. 221 (1922).

47 Dornbos v. Bloch & Guggenheimer, Inc., 326 Mich. 626, 40 N.W.2d 749 (1950).

48 Lahti v. Fosterling, 357 Mich. 578, 99 N.W.2d 490 (1959).

49 *Id.* at 584, 99 N.W.2d at 493.

50 See Parker v. Port Huron Hospital, 361 Mich. 1, 105 N.W.2d 1 (1960); Wilson v. Doehler-Jarvis Div. of Nat'l Lead Co., 358 Mich. 510, 100 N.W.2d 226 (1960).

logical result of this holding would seem to discourage settlements from the point of view of an injured employee. Now that the Compensation Act in Michigan provides for medical benefits to be paid by the employer to the injured employee as the need may arise,[51] no conceivable advantage in redeeming this claim exists. While the liability for weekly payments is a fixed sum which lends itself to computation for purposes of one lump sum payment in lieu of regular payments, the future liability for medical benefits is often impossible to estimate at any given time for purposes of a lump sum settlement. Would it be possible for an injured employee, under the authority of *Wehmeier,* to redeem only his weekly payments, leaving the liability for medical benefits unsettled? Or, must a redemption agreement, to be valid under the statute, include all his claims to weekly as well as medical benefits? Clearly, *Wehmeier* will present many unforeseen difficulties in applying the redemptions provision.

Thus, while the decision in *Wehmeier* was designed to implement the public policy in favor of a final settlement of liability for workmen's compensation claims, it may have indirectly impeded this policy. It now remains for the legislature of the State of Michigan, by an amendment to the redemptions provision clearly specifying its scope, to resolve the clash of values between the legislative policies in favor of settlements and those in favor of extended medical care so painfully demonstrated by the doubtful decision reached by the Michigan court in *Wehmeier.*

Clifford A. Roe, Jr.

DAMAGES — 'SUBSTANTIAL' PHYSICAL INJURY IS NOT REQUIRED TO AWARD DAMAGES FOR NERVOUS DISORDER IN AUTOMOBILE COLLISION CASE. — The young female plaintiff was injured in an automobile collision which caused over one thousand dollars damage to the vehicle in which she was a passenger and permanently put the defendant's Post Office Department truck out of commission. She was later found to be suffering from a serious case of hypertension. She went to a psychiatrist who diagnosed the case as psychiatric conversion.[1] Plaintiff, in this action for damages, alleged that she had suffered severe nervous and physical shock, lost time from her job, suffered periods of disability and was unable to engage in her usual pursuits, duties and occupation. The trial court found the collision resulted from the negligence of plaintiff's husband and a government employee. However, the court made no findings on the amount of damages plaintiff could recover because there was no substantial physical injury which could be the basis of an award of damages for consequent nervous disorders. On appeal, the Court of Appeals for the District of Columbia held: The district court erred in concluding that the law in the jurisdiction required "substantial" physical injury before an award for nervous disorder was possible.

51 MICH. COMP. LAWS § 412.4 (1948).

1 The principal psychiatric witness testified that: "[W]hen we talk about a conversion reaction, we mean there is some emotional problem which causes anxiety in a person; that anxiety is then precipitated or converts into some kind of a physical symptom." Brief for Appellee, p. 6, Parrish v. United States, 357 F. 2d 828 (D.C.Cir. 1966).

Case remanded for a determination of whether appellant's psychiatric disorders were a proximate result of the physical injuries she sustained. *Parrish v. United States*, 357 F.2d 828 (D.C. Cir. 1966).

This case presents an excellent example of the present state of confusion in the law dealing with mental disorders as they are related to tort actions. Some states allow recovery for mental distress or disorder in certain specific circumstances and deny it in others. The first situation arises where there is a negligently produced physical injury and accompanying mental pain and suffering. As it is common knowledge that nearly all physical injuries are accompanied by such suffering, it is not surprising that the majority of courts allow recovery in this situation.[2] An example of where common knowledge would assume that there would be accompanying mental pain and suffering following a physical injury is illustrated by disfigurement cases. Generally, mental pain in contemplation of permanent disfigurement is considered an element of damage,[3] though there are cases to the contrary.[4] Mental pain and suffering proximately resulting from a wrong which in itself constitutes a cause of action is a proper element of compensatory damages.[5] Upon proper allegations and medical proof as to causation, it is generally held that recovery will be allowed for emotional disturbances precipitated by physical injuries.[6] Damages for mental suffering are recoverable in tort actions for trespass, nuisance and breach of warranty accompanied by physical injuries.[7] Where allowed, such recovery is an element of actual or compensatory damages.[8] The difficulty of measuring damages for loss of enjoyment of life in terms of money does not constitute a bar to recovery of such damages.[9] The fact that the victim is a child likewise should not be a bar to recovery for mental suffering.[10] This, then, represents the general rule, although many jurisdictions have their own peculiar qualifications.

2 *E.g.*, Hamilan Corp. v. O'Neill, 273 F.2d 89 (D.C. Cir. 1959) (worry over drinking beverage containing glass particles); Nomey v. Great American Ind. Co., 121 So.2d 763 (La. App. 1960) (worry over unborn child); Caspermeyer v. Florsheim Shoe Store Co., 313 S.W.2d 198 (Mo. App. 1958).

3 *E.g.*, Erie R. Co. v. Collins, 253 U.S. 77 (1920); Dagnello v. Long Island R. Co., 289 F.2d 797 (2d Cir. 1961); Steele v. Brown, 43 Ill. App. 2d 293, 193 N.E.2d 352 (1963).

4 *E.g.*, Lake St. El. R. Co. v. Gromley, 108 Ill. App. 59 (1903); Spencer v. Webster, 305 Ky. 10, 202 S.W.2d 752 (1947); Halladay v. Ingram, 78 R.I. 464, 82 A.2d 875 (1951).

5 *E.g.*, Chavez v. United States, 192 F.Supp. 263 (Mont. 1961); Beaty v. Buckeye Fabric Co., 179 F. Supp. 688 (E.D. Ark. 1959); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal.2d 330, 240 P.2d 282 (1952); Ackerman v. Thompson, 356 M. 558, 202 S.W.2d 795 (1947).

6 *E.g.*, Kaufman v. Western Union Tel. Co., 224 F.2d 723 (5th Cir. 1955); Thacker v. Ward, 263 N.C. 594, 140 S.E.2d 23 (1965); Williamson v. Bennett, 251 N.C. 498, 112 S.E.2d 48 (1960) (damages denied because there were no actual physical injuries).

7 *E.g.*, Hamilan Corp. v. O'Neill, 273 F.2d 89 (D.C. Cir. 1959); Mack v. Hugh W. Comstock Associates, Inc., 37 Cal. Rptr. 466 (1964); Gay v. A. & P. Food Stores, 39 Misc.2d 360, 240 N.Y.S.2d 809 (Sup. Ct. 1963) (breach of implied warranty); Sawyer v. Dougherty, 286 App. Div. 1061, 144 N.Y.S. 2d 747 (1955) (trespass to person).

8 *E.g.*, Amos v. Prom, Inc., 115 F.Supp. 127 (N.D. Ia. 1953); Fontenot v. Magnolia Petroleum Co., 227 La. 866, 80 So.2d 845 (1955); Poledna v. Bendix Aviation Corp., 360 Mich. 129, 103 N.W.2d 789 (1960) (object of damages for injury to feelings is to make injured party whole rather than to punish the wrongdoer).

9 *E.g.*, State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal.2d 330, 240 P.2d 282 (1952) (administrative difficulties do not justify denial of relief for serious invasion of mental and emotional tranquility); Warfield Natural Gas Co. v. Wright, 246 Ky. 208, 54 S.W.2d 666 (1932); McAlister v. Carl, 233 Md. 446, 197 A.2d 140 (1964).

10 *E.g.*, Williams v. Jones, 26 Ga.App. 558, 106 S.E. 616 (1921); Illinois Cent. R.R. v. Williams, 144 Miss. 804, 110 So. 510 (1926); Gulf, C. & S. F. R. Co. v. Sauter, 46 Tex. Civ. App. 309, 103 S.W. 201 (1907).

One such qualification, utilized by the lower court in *Parrish,* is that the precipitating physical injury be of a substantial nature. The lower court based its opinion, in part, on *Perry v. Capital Traction Co.,*[11] one of its own prior opinions. There, the plaintiffs, as the result of an automobile collision, suffered from crying spells, headaches, stammering, sleeplessness, and inability to work up to their normal capacity. Since the nervous shock was not directly attributable to the physical injuries sustained, the court denied relief for mental pain and suffering caused by nervous shock or fright not traceable to the physical injuries. In explaining its action, the court stated that the justification for such rule was:

> [M]ere fright is easily simulated and difficult to disprove, and that impairment of the nervous system is of such an intangible character that there is no practical standard by which the extent of the impairment may be determined. Where there has been a substantial physical injury, medical testimony and common knowledge may furnish a guide for measuring the pain and suffering incidental to the injury; but when, as here, there has been no substantial physical injury, a jury ought not to be permitted to indulge in conjecture and speculation as to the effects of alleged nervous shock or fright.[12]

A similar qualification restricting recovery is the so-called "impact" rule. In the past many courts have felt that there was more certainty that a claim for mental anguish was legitimate if there had been some type of external impact with the claimant.[13] However, adherents to this rule have steadily declined in number due to its illogical infirmities.[14] This is demonstrated by the fact that many courts pay lip service to the rule but hold it satisfied by slight and trivial contacts which play no part in causing substantial harm. For example, such "impact" has been found in a slight blow,[15] the inhalation of smoke,[16] a speck of dust in the eye,[17] a trivial jolt or jar,[18] and a forcible seating on the floor.[19] Perhaps the most absurd finding of "impact" occurred where the defendant's horse "evacuated his bowels" into the plaintiff's lap.[20] As one commentator noted, "The magic formula 'impact' is pronounced; the door opens to the full joy of a complete recovery."[21]

However, an experience could be just as frightening and just as apt to cause mental anguish regardless of whether the victim suffers impact or narrowly escapes it. Thus, an increasing majority of the courts have repudiated the "impact" requirement and have regarded the physical consequences themselves or

11 32 F.2d 938 (D.C. Cir.), *cert. denied,* 280 U.S. 577 (1929).
12 *Id.* at 940.
13 *E.g.,* Spade v. Lynn & B. R. Co., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester R.R., 151 N.Y. 107, 45 N.E. 354 (1896); Huston v. Freemansburg, 212 Pa. 548, 61 Atl. 1022 (1905). See ANNOT. 64 A.L.R.2d 100, 134 (1959).
14 *E.g.,* Robb v. Pennsylvania R. Co., 210 A.2d 709 (Del. 1965); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961). See ANNO. 64 A.L.R.2d 100, 143 (1959).
15 Homans v. Boston Elev. R.R., 180 Mass. 456, 62 N.E. 737 (1902).
16 Morton v. Stack, 122 Ohio 115, 170 N.E. 869 (Ohio 1930).
17 Porter v. Deleware, L. & W. R. Co., 73 N.J. 405, 63 Atl. 860 (N.J. 1906).
18 Zelinsky v. Chimics, 196 Pa.Super. 312, 175 A.2d 351 (1961).
19 Driscoll v. Gaffey, 207 Mass. 102, 92 N.E. 1010 (1910).
20 Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928).
21 Goodrich, *Emotional Disturbance as Legal Damage,* 20 MICH. L. REV. 497, 504 (1922).

the circumstances of the validity of the claim.[22] Dean Prosser has stated that "so far as substantial justice is concerned, it would seem that it is possible to have equal assurance that the mental disturbance is genuine when the plaintiff escapes 'impact' by a yard."[23] In 1961, with the now-famous case of *Battalla v. State,*[24] New York joined in the repudiation of impact as a necessary requirement of recovery for mental disturbance. There, the defendant's employee failed to properly fasten the seat belt of an infant's ski lift chair, and on descending, the infant became hysterical, later suffering physical injuries. Recovery was allowed despite the plaintiff's inability to show physical impact. The trend is also observable in workmen's compensation cases,[25] typified by *Carter v. General Motors Corp.,*[26] where the plaintiff, continually berated by his foreman, feared layoff and suffered emotional collapse. In granting compensation, the court said that mental injuries are not to be treated as different from physical injuries, but the question is whether they are accidental and arise out of the employment. Mental disability, insanity, hysteria and its various manifestations, such as hysterical blindness, neuritis, paralysis and neurasthenia, caused by or attributable to an accident or injury are compensable.[27]

Courts are, however, in accord in some situations. Generally, damages are recoverable for an intentional tort although physical injury is not sustained. In such cases, mental suffering, including shame from indignities, is usually considered compensable.[28] There is the usual requirement, however, that compensable injury be the ordinary, natural and proximate consequence of the wrong sought to be redressed.[29] In *State Farm Mutual Auto. Ins. Co. v. Village of Isle,*[30] the Minnesota court said that damages for mental anguish or suffering cannot be awarded where there has been no accompanying physical injury, unless there has been some conduct on the part of the defendant, constituting a direct invasion of the plaintiff's rights, such as slander, libel, malicious prosecution, seduction or other similar wilful, wanton, or malicious conduct. This view

22 *E.g.,* Penick v. Mirro, 189 F.Supp. 947 (E.D. Va. 1960); Houston Elec. Co. v. Dorsett, 145 Tex. 95, 194 S.W.2d 546 (1946); Colla v. Mandella, 1 Wis. 2d 594, 85 N.W. 2d 345 (1957). As of 1964, twenty-three states had repudiated the "impact requirement. See PROSSER, TORTS 351 n.99 (3 ed. 1964). RESTATEMENT, TORTS 2D § 313 adopts this view.

23 PROSSER, *op. cit. supra* note 22, at 351.

24 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), overruling Mitchell v. Rochester R.R., 151 N.Y. 107, 45 N.E. 354 (1896) (denied recovery for miscarriage resulting from fright negligently induced by defendant).

25 See Lavorci, *Traumatic Neurosis: Is It Compensable?,* 44 CHI. BAR RECORD 330 (April 1963). See also, *Workmen's Compensation Awards For Psychroneurotic Reactions,* 70 YALE L. J. 1129 (1961).

26 261 Mich. 577, 106 N.W.2d 105 (1960).

27 Lavorci, *op. cit. supra* note 25 at 330.

28 *E.g.,* Skousen v. Nidy, 90 Ariz. 215, 367 P.2d 248 (1961); Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961) (solicitation of illicit intercourse); Browning v. Slenderella Systems, 54 Wash. 2d 440, 341 P.2d 859 (1959). See also RESTATEMENT, TORTS 2D § 46, which states that one who, without a privilege to do so, intentionally causes severe emotional distress to another is liable for such emotional distress as well as for bodily harm resulting from it.

29 *E.g.,* Kaufman v. Western Union Tel. Co., 224 F.2d 723 (5th Cir. 1955); *cert. denied,* 350 U.S. 947 (1956); Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930); Espinosa v. Beverly Hosp., 114 Cal.App. 232, 249 P.2d 843 (1953).

30 265 Minn. 360, 122 N.W.2d 36 (1963).

is shared by the majority of courts.[31] It precludes recovery for mere fright or shock, without accompanying physical injury.[32] Similarly, recovery is normally denied where the fright is caused by a wrong done to a third person.[33] An exception is made by some courts where the plaintiff is also in danger, though there is no physical "impact."[34] The general rule, however, is that in the absence of an allegation of malice or intent to do harm, there must be either an immediate physical invasion of the plaintiff's person or security or a direct possibility of such invasion in order that recovery may be had for mental anguish or distress of mind.[35]

While courts will normally allow recovery for the intentional infliction of mental pain and anguish unaccompanied by damage to the person or his purse, the majority refuse to allow damages for fright, shock or mental disturbance negligently inflicted where there are no such accompanying damages.[36] However, where the fright or shock produces some physical injury, a majority of courts will allow damages for such injuries and accompanying mental disturbance or anguish.[37] *Falzone v. Busch*[38] represents a typical holding on the subject. There the court said that where negligence causes fright from reasonable fear of immediate personal injury, which fright is adequately demonstrated to have resulted in substantial bodily injury or sickness, the injured person may recover if such bodily injury or sickness would be regarded as proper elements of damage had they occurred as the consequence of a direct physical injury rather than fright. The court held that the plaintiff could recover for any substantial bodily injury or sickness proximately resulting from the defendant's negligence in operating his car so close to the defendant as to put her in fear for her safety despite lack of physical "impact." Similarly, *Hopper v. United States*[39] held that a person who has suffered physical injury induced by nervous shock negligently inflicted is entitled to the opportunity to prove that such injury is genuine. This is the proper view to be taken.

31 *E.g.*, Skousen v. Nidy, 90 Ariz. 215, 367 P.2d 248 (1961); Barry v. Baugh, 111 Ga.App. 813, 143 S.E.2d 489 (1965); Towler v. Jackson, 111 Ga.App. 8, 140 S.E.2d 295 (1965); Barnett v. Sun Oil Co., 113 Ohio App. 449, 172 N.E.2d 734 (1961).

32 *E.g.*, Morgan v. Hightower's Adm'r, 291 Ky. 58, 163 S.W.2d 21 (1942) (such damages too easily simulated and difficult to disprove); Barnett v. Sun Oil Co., 113 Ohio App. 449, 172 N.E.2d 734 (1961); Cucinotti v. Ortmann, 399 Pa. 26, 159 A.2d 216 (1960).

33 *E.g.*, Rogers v. Hexol, Inc., 218 F.Supp. 453 (D. Or. 1962) (sympathy for suffering of another); Angst v. Great Northern Ry., 131 F.Supp. 156 (D. Minn. 1955) (fright due to wrong against third person; Duet v. Cheramie, 176 So.2d 667 (La. App. 1965) (one person cannot recover damages for worry, anxiety, depression, mental anguish, or other mental suffering as result of injuries to another). Some exceptions are made, however, as where the injury is malicious. See Bedard v. Notre Dame Hosp., 89 R.I. 195, 151 A.2d 690 (1959).

34 Robb v. Pennsylvania R.R., 210 A.2d 709 (Del. 1965); Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933). There is authority to the contrary, however. See Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959).

35 *E.g.*, Robb v. Pennsylvania R.R., 210 A.2d 709 (Del. 1965); Logan v. St. Luke's Hosp., 400 P.2d 296 (Wash. 1965); Murphy v. City of Tacoma, 60 Wash.2d 603, 374 P.2d 976 (1962). See RESTATEMENT, TORTS 2D § 46.

36 *E.g.*, Leatherman v. Gateway Trans. Co., 331 F.2d 241 (7th Cir. 1964); Soldinger v. United States, 247 F.Supp. 559 (E.D. Va. 1965); Floyd v. Stevens-Davenport Funeral Home, 110 Ga. App. 271, 138 S.E.2d 333 (1964).

37 *E.g.*, Mack v. Hugh W. Comstock Associates, Inc., 37 Cal.Rptr. 466 (1964); Slaughter v. Slaughter, 264 N.C. 732, 142 S.E.2d 683 (1965); Thacker v. Ward, 263 N.C. 594, 140 S.E.2d 23 (1965).

38 45 N.J. 559, 214 A.2d 12 (1965).

39 244 F.Supp. 314 (D. Col. 1965). *Cf.* Kirk v. Marshall, 247 S.W.2d 454 (Tex. Civ. App. 1952).

However, where mental pain and suffering are the sole bases on which recovery is sought, the majority of courts deny recovery of substantial damages.[40] *Cosgrove v. Beymer*[41] held that where negligent conduct results only in emotional disturbance and no bodily injury or sickness is present, there can be no recovery. That court said this rule includes such disturbances as fright, nervous shock and grief and is applicable even though these disturbances are accompanied by physical manifestations such as dizziness, headaches, nervousness and the like, so long as they do not result in bodily harm. The better rule is that given in *Sahuc v. U. S. Fid. And Guar. Co.*,[42] where the court held that recovery may be had for fright or nervous shock unaccompanied by physical injury evidenced by objective symptoms. Similarly, the court in *Rogers v. Hexol, Inc.*[43] held that recovery could be allowed for emotional distress incidental to and directly resulting from violation of a person's right to be free from personal hurt, his right of privacy or property and probably the right to be free from fear for his safety. Under proper circumstances, this is conducive to greater justice than a rule denying all recovery for mental anguish unless it is accompanied by either precipitating or resulting physical manifestations. There are two types of cases where there is a tendency to allow recovery solely for mental disturbance. An increasing minority allow recovery for the negligent transmission of messages which indicate on their faces that there is a special likelihood that mental distress will result.[44] The second special class of cases, now representing a majority view, allow recovery for mental distress resulting from the negligent mishandling of corpses.[45]

To discover which view is the most reasonable and productive of substantial justice, one must look to the various factors which must be balanced against each other. The essential interrelationship of the physical organism with the emotional or mental has been experimentally and clinically demonstrated. In view of modern psychosomatic discoveries, little doubt remains that emotions are accompanied and followed by definite and readily observable physical reactions.[46] There is, however, conflict as to the degree of stimuli required to produce a traumatic neuroses of the type complained of by the plaintiff in *Parrish*. It has been said that serious deleterious physical consequences are very unlikely to

40 *E.g.*, Solding v. United States, 247 F.Supp. 559 (E.D. Va. 1965); Gautier v. General Tel. Co., 44 Cal. Rptr. 404 (1965); Slaughter v. Slaughter, 264 N.C. 732, 142 S.E.2d 683 (1965).

41 244 F. Supp. 824 (D. Del. 1965).

42 320 F.2d 18 (5th Cir. 1963).

43 218 F.Supp. 453 (D. Or. 1962). Cf. Paul v. Rodgers Bottling Co., 6 Cal. Rptr. 867 (1960) (held error not to allow recovery for mental anguish where plaintiff discovered dead mouse in bottle from which he was drinking).

44 *E.g.*, Archer v. Continental Assur. Co., 107 F. Supp. 145 (W.D. Ky. 1952), Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930); Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681 (1943). But, the majority of state courts deny recovery in such instances. See Corcoran v. Postal Tel. Cable Co., 80 Wash. 570, 142 Pac. 29 (1917). The federal rule, which controls as to interstate messages, denies such recovery in the absence of resulting physical harm. See Kaufman v. Western Union Tel. Co., 224 F.2d 723 (5th Cir. 1955). See PROSSER, *op. cit. supra* note 22, at 348.

45 *E.g.*, Carey v. Lima, Salmon & Tully Mortuary, 168 Cal. App. 2d 42, 335 P.2d 181 (1959) (negligent embalming); Torres v. State, 34 Misc. 2d 488, 228 N.Y.S.2d 1005 (Sup. Ct. 1962) (unauthorized burial); Lamm v. Shingleton, 231 N.C. 10, 55 S.E.2d 810 (1949) (leaky casket).

46 Smith, *Relation Of Emotions To Injury And Disease,* 30 VA. L. REV. 193, 213 (1944).

result from a single, brief emotional experience, except where there is a predisposition for such a result.[47] Other authorities claim that the average person does not usually suffer injury from psychic stimuli such as fright and that psychic injury is usually the sign of a pre-existing disorder.[48] One view is that "[i]n some traumatic psychoneuroses, a sense of grievance, and even a desire for revenge, help to sustain the symptoms in some cases until compensation or some other satisfaction is obtained."[49] Such symptoms as the plaintiff allegedly suffered in *Parrish* are often an over-reaction to present danger. This "fright" psychoneurosis may not be manifest immediately following the causal experience, but may be repressed and the anxiety symptoms may not occur until after a latent period.[50]

In *Parrish,* the plaintiff also alleged an increase in blood pressure following the accident. Her psychiatrist testified that, in his opinion, the condition was caused by an emotional basis, and was of the type classified as a psychophysiologic cardiovascular reaction found in nervous cases.[51] In view of present psychiatric knowledge, there is no reason to dispute the fact that this condition could have been caused by the shock or fright of the collision. To flatly deny recovery for such condition, where the probability of its causation can be proven is to deny recovery for the invasion of a person's rights. Some commentators argue that since authorities are in some agreement that there usually is a predisposition or increased susceptibility to such traumatic neurosis or psychiatric conversion, recovery should be denied.[52] However, it is a recognized rule of torts that if an actor's conduct is negligent in creating unreasonable risks of injury to the average person, the fact that the plaintiff's unknown idiosyncrasy or subnormal resistance to such stimuli causes him to sustain excessive injury will neither defeat nor lessen the defendant's liability for damages.[53] Negligence having been properly established, a wrongdoer must take his victim as he finds him.[54] It has been suggested that it is legally erroneous and socially unjust to compensate such sufferers on the basis that the neurosis develops as a new and original condition, and that such cases should properly be regarded as instances of aggravation of pre-existing injuries and compensated accordingly.[55] No matter which view is taken, the fact remains that the injury does exist and the one who inflicted it should pay for the consequences of his acts.

Some contend that in such cases of mental disturbance, the necessary link between the negligent act and the psychic injury cannot be established to show

47. *Id.* at 225-26.
48 McNiece, *Psychic Injury And Tort Liability in New York,* 24 ST. JOHN'S L. REV. 1, 78 (1949).
49 Henderson and Gillespie, A TEXT-BOOK OF PSYCHIATRY 207 (8th ed. 1956).
50 *Ibid.*
51 Appellant's Reply Brief, p. 4, Parrish v. United States, 357 F.2d 828 (D.C. Cir. 1966).
52 Smith and Solomon, *Traumatic Neuroses In Court,* 30 VA. L. REV. 87, 90-91 (1943).
53 The defendant is liable when his negligence operates on a concealed existing physical condition. *E.g.,* Trascher v. Eagle Indem. Co., 48 So.2d 695 (La. App. 1950) (ruptured intervertebral disc); Heppner v. Atchison, T. & S. F. R.R., 297 S.W.2d 497 (Mo. 1956) (latent disease); Alexander v. Knight, 197 Pa. Super. 79, 177 A.2d (1962) (neurotic predisposition). See Smith, *op. cit. supra* note 46, at 256.
54 This doctrine originated in Dulieu v. White & Sons, 2 K.B. 669 (1901). See Williams, *The Risk Principle,* 77 L. Q. REV. 179, 193-97 (1961). See also, cases cited note 51 *supra.*
55 Smith and Solomon, *op. cit. supra* note 52, at 90-91.

causation.[56] Courts typically require that all damages must flow directly and naturally from the wrong and must be certain, both in their nature and in respect to the cause from which they proceed.[57] Expert testimony can show the probability of the causal link, and in such tort cases, the proof required is only a preponderance of the evidence, not proof beyond a reasonable doubt. The psychologist can be utilized to establish the fact of the injury and its causation.[58] Juries in such cases should be cautioned that "negligence is not proved unless it appears from a preponderance of the credible evidence that defendant's conduct created an unreasonable and forseeable risk of causing injurious psychic reactions in a person possessed of average health and resistance to injury by such stimuli."[59]

The question of damages for personal injuries is peculiarly one of fact for the jury.[60] Dean Prosser states that:

> It is now more or less generally conceded that the only valid objection against recovery for mental injury is the danger of vexatious suits and fictitious claims. . . . It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness in the circumstances of the case. . . . The very clear tendency of the recent cases is to refuse to admit incompetence to deal with such a problem, and to find some basis for redress in a proper case.[61]

Battalla v. State[62] enunciated the correct modern policy for suits to recover damages for mental disturbance. The New York court said that the fact that the proof may be speculative is no longer a bar to litigation. The court will look to the quality of the proof and will rely on its own ability, with that of the jury and the medical profession, to sift out dishonest claims. If a defendant has breached a forseeable duty owing to the plaintiff, he will be liable for the consequences directly traceable to the negligent act.[63] The fear that there will be a vast increase in vexatious litigation, without such requirements as "impact" or substantial physical injury, may be met by examining the Canadian experi-

56 *E.g.,* Justesen v. Pennsylvania R.R. 92 N.J.L. 257, 106 Atl. 137 (1919); Ward v. West Jersey & S. R.R., 65 N.J. 383, 47 Atl. 561 (1900); Mitchell v. Rochester R.R., 151 N.Y. 107, 45 N.E. 354 (1896).

57 *E.g.,* United States v. Goodman, 111 F.Supp. 32 (W.D. N.C. 1953); Baylor v. Tyrrell, 177 Neb. 812, 131 N.W.2d 393 (1964); Poser v. Gene Mohr Chevrolet Co., 377 S.W.2d 732 (Tex. Civ. App. 1964).

58 Lassen, *The Psychologist as an Expert Witness in Assessing Mental Disease or Defect,* 50 A.B.A. JOURNAL 239 (1964).

59 Smith, *op. cit. supra* note 46, at 305.

60 *E.g.,* Sinclair Refining Co. v. Butler, 172 So.2d 499 (Fla. 1964); Hylak v. Marcal Inc., 335 Ill. App. 48, 80 N.E.2d 411 (1948); Simmons v. United Transit Co., 208 A.2d 537 (R.I. 1965); Kink v. Combs, 28 Wis. 2d 65, 135 N.W.2d 789 (1965).

61 PROSSER, *op. cit. supra* note 22, at 347-48.

62 10 N.Y.2d 237, 176 N.E.2d 729 (1961).

63 *E.g.,* Holland v. St. Paul Mercury Ins. Co., 135 So.2d 145 (La. App. 1961) (breach of duty to warn parent of nature of poison taken by his child); Greenberg v. Stanley, 51 N.J. Super. 90, 143 A.2d 588 (1958); Frazee v. Western Dairy Prods. Co., 182 Wash. 578, 47 P.2d 1037 (1935). In Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941), the court said that the test is whether the ordinary man in the defendant's position, knowing what he knew or should have known, can anticipate the harm of the general nature of that suffered was likely to result. This, the court felt, was the ultimate test of whether a duty to use due care existed.

ence. In *Victorian Rys. Comm'rs v. Coultas,*[64] the "impact" rule was laid down and in *Dulieu v. White and Sons,*[65] it was repudiated. There has been no appreciable increase in such litigation in the Commonwealth.[66] The argument that recovery for psychic injuries would "open a Pandora's box" of endless litigation was echoed by a Pennsylvania court in the harsh decision of *Bosley v. Andrews.*[67] To this Prosser has replied:

> It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation"; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do.[68]

One competent authority has stated:

> Presence or absence of impact is not of much consequence in determining the merits of a claim for injury through psychic stimuli. It has only slight materiality unless courts require that the impact be substantial enough to increase the risk of nervous shock already created by the episode. That the impact was substantial enough to increase nervous shock is an issue which calls for testimony of competent medical men.[69]

However, with the increasing repudiation of the "impact" requirement and the finding of "impact" in any contact, courts have shown that their prior confidence in the "impact" requirement to minimize fraud and simulation in the litigation field has been misplaced. Similarly, the requirement of substantial physical injury, though its goal is meritorious, provides no adequate assurance of a bona fide claim, but does operate to deny recovery in meritorious claims where by chance, the claimant has suffered no substantial physical injury.

One who suffers loss by the negligence of another is entitled to such damages as will replace his loss and make him whole. The good faith of the wrongdoer in such a situation is irrelevant.[70] Mental suffering is no more difficult to estimate in financial terms and no less a real injury than "physical" pain.[71] "The loss of well-being is as much a loss as an amputation."[72] Where the guarantee of validity can be found and the mental distress is undoubtedly real and serious, there is no essential reason to deny recovery.[73] If our law is committed to the principle *Ubi Jus Ibi Remedium,* there is no wrong without a remedy, then in all justice it would seem that a negligent defendant should be required to pay for the injuries he has created, whether they be physical or mental, providing proof has been adduced to show causal relationship and forseeability or a duty owing to the plaintiff. As Prosser has stated in speaking of the "impact" re-

64 13 A.C. 222 (1888).
65 2 K.B. 669 (1901).
66 28 BROOKLYN L. REV. 180, 184 n.23 (1962).
67 393 Pa. 161, 142 A.2d 263 (1958).
68 Prosser, *Intentional Infliction Of Mental Suffering: A New Tort,* 37 MICH. L. REV. 874 (1939).
69 Smith, *op. cit. supra* note 46, at 299.
70 Woods v. Slocum, 179 So.2d 464 (La. 1965).
71 Goodrich, *Emotional Disturbance As Legal Damage,* 20 MICH. L. REV. 497, 509 (1922).
72 Corcoran v. McNeal, 400 Pa. 14, 21, 161 A.2d 367, 372 (1960).
73 See Note, 21 CORN. L. Q. 166 (1936).

quirement: "It is almost certainly destined for total extinction. . . . [I]n general, it seems clear that the courts which deny all remedy in such cases [lack of impact] are fighting a rear guard action."[74] The requirement for substantial physical injury, as required by the district court in *Parrish,* will meet a similar fate. The logic in both requirements is a rather sad commentary on legal reasoning. In rejecting the "impact" rule, the court in *Falzone v. Busch,*[75] stated that the impact rule meant that a tort-feasor would be liable if he negligently scratched his victim but not if he scared him to death. Such a result is far from a triumph of reason! More advanced courts are now reacting more reasonably as was seen in *Caposella v. Kelley,*[76] where the New York Supreme Court awarded damages to the survivors of a 53-year-old man who died of a heart attack from negligently inflicted fright when the defendant's auto cut across his lawn. He was frightened to death.

In *Parrish,* the trial court found by uncontradicted testimony that the appellant suffered from frequent headaches, inability to sleep and had changed from a normal, well-adjusted, happy person to an irritable, nervous and anti-social individual after the accident.[77] Yet, it denied damages for failure to show substantial physical injuries. While there may have been reasons for rejecting the accident as the cause of her hypertension, such as being overweight, it would appear that to unequivocally require serious physical injuries as a prerequisite for established mental disturbance is to work substantial injustice on those who have suffered an invasion of their right of well-being but have not suffered substantial physical injuries. In relying on past precedents such as *Perry v. Capital Traction Co.,*[78] decided in 1929 when psychiatry was in its infancy, the district court in *Parrish* ignored the tremendous scientific strides which have been made in the field of mental disturbances. The Court of Appeals takes a much more reasonable view, in remanding the case for findings on whether the appellant's alleged psychiatric disorders were a proximate result of the physical injuries she sustained in the accident. As aptly stated by Lord Wright:

> [A]n absolute assertion of the paramount importance of certainty in the law might well destroy the flexibility and sensitiveness to realism and facts and social values, which have been the pride of the common law. Great judges have said that the function of the common law was the perpetual quest for justice. I should be sorry if quest for certitude were substituted for quest for justice.[79]

John W. Nelson

74 PROSSER, TORTS 351-52 (3d ed. 1964). See alignment of states in ANNOT., 64 A.L.R.2d 100 (1959).
75 45 N.J. 559, 214 A.2d 12 (1965).
76 Appellant's Reply Brief, p. 10, Parrish v. United States, ... F.2d ..... (D.C. Cir. 1966) (caposella).
77 *Id.* at 11.
78 32 F.2d 938 (3d Cir.), *cert. denied,* 280 U.S. 577 (1929).
79 Note, 66 L. Q. REV. 454, 456 (1950).