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Article 7

Constitutional Law - Church and State - Validity of "Released Time" Program

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plaintiff. The Wisconsin test, which may well be called the "intent test," was put this way by Justice Wickhem:

> ". . . The test (for scope of employment) is whether the servant has stepped aside from the business of his principal to accomplish an independent purpose of his own, or whether he was actuated by an intent to carry out his employment and to serve his master."[10]

In the application of this test, an employee could, in fact have deviated from the route prescribed by his employer, and still be within the scope of his employment. There is the possibility that by applying this test to the case under discussion, a different result could have been possible. Assume that the driver of a car owned by his employer aids another employee in the completion of that other employee's duties. That might well be done with the intent to aid the employer, and yet in fact be a deviation from a prescribed route. This test, in application at least, does not automatically put an employee outside the scope of his employment for any deviation which would be the result from a strict application of the common law rule.[11] The Wisconsin rule appears to lend itself to wide application without strain or hardship on the parties.

A rule that puts an employee outside the scope of his employment where there is any deviation is a harsh one and should not be extended. The Restatement of Agency[12] states that if the servant is actuated by the purpose to serve his master's business to any appreciable extent, the master should be subject to liability. This rule would, it seems, give a result similar to the rules of Wisconsin and Washington. The Restatement rule would seem to be a better rule than the one applied in the instant case. Naturally, where there is a clear and certain deviation from the scope of his employment that is more than a slight deviation, and such deviation in no way benefits the employer, the employer should not be held.

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Constitutional Law — Church and State — Validity of "Released Time" Program — Petitioners, parents of public school children, brought this proceeding to compel the Board of Education of the City of New York to halt the released time program for religious education in the public schools of New York City. This program permitted parents to withdraw their children from the public school for one hour per week to receive religious instruction. Petitioners, who did not avail themselves of the program and were in no wise obliged to do so, challenged the constitutionality of the released time program on the

[10] Linden v. City Car Co., supra, note 9.
[11] *Supra*, note 3.
[12] RESTATEMENT, AGENCY, Sec. 236, Comment (b).

ground that it violated the First Amendment of the Federal Constitution[1] as made applicable to the states by the Fourteenth Amendment.[2] Lower court dismissed the proceedings.[3] *Held:* Affirmed. New York Court of Appeals and the Supreme Court of the United States found the program not violative of the Constitution. The principal case was distinguished from the *McCollum* case[4] on the facts. *Zorach v. Clauson, 303 N.Y. 161, 100 N.E. (2d) 463 (1951), affirmed, 72 S.Ct. ... (1952).*

The released time program has existed in New York for many years without express statutory authority.[5] It originated in Gary, Indiana, and was developed in response to the plea that public school children were receiving a "Godless" education.[6] By 1947 it had spread to some 2,000 communities[7] and had support of Catholics, Jews and Protestants alike.[8] A New York court held such a program unconstitutional in 1925 because the use of the school presses to print cards upon which parents authorized their children to participate in the program constituted state aid to religion.[9] However, the following year a released time program without that objectionable feature was upheld.[10] The court felt neither the Constitution nor the law discriminated against religion. Finally in 1940 the New York Legislature by statute authorized a program such as the kind upheld in the principal case.[11]

Released time programs have been found constitutional by several state courts.[12] Constitutional objections to the right of school authorities to release pupils for even so short a time have generally been made on three grounds: (1) It is a violation of the Constitutional provision respecting the establishment of religion; (2) It amounts to an unconstitutional use of public moneys for sectarian purposes, and (3) It violates the compulsory attendance statutes.[13] The plan's opponents

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[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. CONST., *Amend.* 1.
[2] Everson v. Board of Education et al., 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).
[3] Zorach v. Clauson, 198 Misc. 631, 99 N.Y.S. (2d) 339 (1950); Aff'd. 278 App. Div. 573, 102 N.Y.S. (2d) 27 (1951).
[4] Illinois ex rel. McCollum v. Board of Education of School District No. 71 et al., 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948).
[5] Principal Case, 100 N.E. (2d) 464 (N.Y., 1951).
[6] R. F. Cushman, *Public Support of Religious Education in American Constitutional Law,* 45 ILL. L. REV. 333 (1950).
[7] Illinois ex rel. McCollum v. Board of Education, *supra,* note 4, 333 U.S. at p. 225.
[8] *Supra,* note 6.
[9] Stein v. Brown, 125 Misc. 692, 211 N.Y. S. 822 (1925).
[10] Lewis v. Graves, 127 Misc. 135, 215 N.Y. S. 632 (1926); Aff'd. sub nom People ex rel. Lewis v. Graves, 219 App. Div. 233, 219 N.Y. S. 189 (1927); Aff'd. 245 N.Y. 195, 156 N.E. 663 (1927).
[11] NEW YORK EDUCATION LAW (1940), §3210-1-b.
[12] Gordon v. Board of Education, 78 Cal. App. (2d) 464, 178 P. (2d) 488 (1947); People ex rel. Latimer v. Board of Education, 384 Ill. 228, 68 N.E. (2d) 305 (1946); People ex rel. McCollum v. Board of Education, 396 Ill. 14, 71 N.E. (2d) 161 (1947).
[13] Note, 167 A.L.R. 1473.

have contended that the dismissal of public school children for religious instruction clashes with the "wall of separation" between Church and State;[14] if not in theory, then in practice.[15] An Illinois court could not see how a released time program violated the constitutional barriers and, while it approved the separation of Church and State, how there could be any conflict between religion and the state or any disfavor of religion as such.[16] No abuse of compulsory education laws was found because school authorities were vested with discretionary powers. Release from school for religious instruction has been upheld as no more unconstitutional than release to attend religious services[17] or no more violative of compulsory attendance regulations than release to take dancing lessons.[18] The California Court of Appeals upheld a released time program in 1947.[19] The justices rejected the contention that the program was violative of the provisions of the California Constitution guaranteeing free exercise and enjoyment of religious profession and worship, and prohibiting the appropriation of public money for the support of any sectarian doctrine, directly or indirectly, in the public schools of the state. The court also said that there was no violation of the Fourteenth Amendment to the Federal Constitution.

The validity of released time was argued before the United States Supreme Court for the first time in the famous *McCollum* case.[20] The Champaign, Illinois, program had been upheld by the Illinois Supreme Court[21] and upon appeal to the United States Supreme Court was found to be a violation of the First Amendment. That decision has made it necessary to review constitutionally all released time programs. Does the *McCollum* finding strike down all released time programs? The opinions of the justices in that case do not give us any definite answer. The concurring opinion of Justice Frankfurter is a basis for assuming that it does not.[22] However, Justice Reed, the lone dissenter, indicates that it might.[23] Several authorities have concluded that the decision does not intend that all released time programs be considered unconstitution-

[14] Everson v. Board of Education, *supra,* note 2.
[15] Note, 49 COL. L. REV. 836 (1949).
[16] People ex rel. Latimer v. Board of Education, *supra,* note 12.
[17] Principal Case, 100 N.E. (2d) 468 (N.Y., 1951).
[18] People ex rel. Lewis v. Graves, *supra,* note 10.
[19] Gordon v. Board of Education, *supra,* note 12.
[20] Illinois ex rel. McCollum v. Board of Education, *supra,* note 4.
[21] Illinois ex rel. McCollum v. Board of Education, *supra,* note 12.
[22] "We do not consider, as indeed we could not, school programs not before us, though colloquially characterized as 'released time,' (they) present situations differing in aspects that may well be constitutionally crucial." Illinois ex rel. McCollum v. Board of Education, *supra,* note 4, 333 U.S. at p. 231.
[23] "From the tenor of the opinions I conclude that their teachings are that any use of a pupil's school time, whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance, falls under the ban. . . . I can only deduce that religious instruction of public school children during school hours is prohibited." Illinois ex rel. McCollum v. Board of Education, *supra,* note 4, 333 U.S. at pp. 240-241.

al.[24] Their reasoning is based on the fact that the released time program involved in the *McCollum* case provided that: (1) The religious instruction would take place within the public school building and during regular class hours, and (2) The state tax-supported school system would provide pupils for religious classes through the use of the state's compulsory school attendance machinery.[25] The earlier state court decisions that upheld released time all involved religious instruction outside the public school buildings.

The *McCollum* case had left to the courts two approaches to released time: (1) All released time programs violate the First Amendment, or (2) Released time programs as such are not per se unconstitutional, but that the facts of each case must be considered to determine whether there is a violation of separation of Church and State. The principal case indicates that the New York courts have apparently elected to adopt the latter view.[26] Released time programs vary in many respects. Some of the most important differences are: (1) The amount of supervision by the public school of attendance and performance in religious class; (2) The amount of school time devoted to the operation of the program; (3) The extent to which school property and administrative machinery are involved; (4) The effect of the program on non-participants, and (5) The amount and nature of the publicity for the program in the public schools.[27] The petitioners in the principal case relied heavily upon the *McCollum* decision to invalidate this released time program. However, the majority observed that five justices expressly agreed in the *McCollum* case that released time as such is not unconstitutional.[28] Adopting the view that each program must be examined on its facts, they found that under this released time program the religious classes do not take place within the school, are not under the supervision of school authorities, are not publicized in the school and are not accompanied by a separation of religious groups within the school.[29] Therefore the principal case may be distinguished from the *McCollum* case on the facts. They point out that:

> "While extreme care must, of course, be exercised to protect the constitutional rights of these appellants, it must also be remembered that the First Amendment not only forbids laws 'respecting an establishment of religion,' but also laws prohibiting the free exercise thereof. We must not destroy one in an effort to preserve the other. . . . The right of parents to direct the rearing and

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[24] Feldman, *Separation of Church and State in the United States: A Summary View*, 1950 WIS. L. REV. 427.
[25] Note, 2 A.L.R. (2d) 1371.
[26] Lewis v. Spaulding, 193 Misc. 66, 85 N.Y.S. (2d) 682 (1948).
[27] Illinois ex rel. McCollum v. Board of Education, *supra*, note 4, 333 U.S. at p. 225, footnote 17.
[28] Principal Case, 100 N.E. (2d) 466 (N.Y., 1951).
[29] *Ibid.*, p. 465.

> education of their children, free from any power of the state to standardize children by forcing them to accept instruction from public school teachers only, is an unquestioned one."[30]

Since it is constitutional to release children from school on holy days set apart by their respective faiths, the majority feels that it is also constitutional under the circumstances in this case to excuse children of whatever faith for one hour per week for a similar religious purpose.[31] The dissent in the principal case maintains however that the vital point is not where the religious training is given, but is that the program secures its pupils through the instrumentality of the state and the machinery and momentum of the public school system.[32]

There is another means of giving religious instruction to public school pupils that has been adopted by some communities. It has been given the name "dismissed time." Under this plan, one school day each week is shortened to allow all children to go where they please. Thus those who desire to go to a religious school may do so.[33] Apparently this plan does not violate the First Amendment.[34] However, religious leaders have expressed doubt as to the plan's effectivenes and feasibility.[35]

There have been no decisions considering released time in Wisconsin. The State Senate of Wisconsin requested the opinion of the State Attorney-General on the following question:

> "Whether or not local school boards may release students during school hours for attendance at religious instructions conducted by religious groups outside the school."[36]

The Attorney-General, in view of the *McCollum* case, gravely doubted the validity of any plan which makes use of the school regulations to facilitate attendance at religious instructions, whether those instructions are given on public school property or not. If the children remain under the technical jurisdiction of the public school, the program was of doubtful constitutional validity according to him.[37] The Attorney-General points out that there is no statute authorizing or forbidding such released time programs. It appears to him that the requirement of compulsory attendance is the only statutory barrier to released time.[38] In 1926 the State Superintendent of Public Instruction was advised that a released time program violated the Wisconsin Constitution.[39]

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[30] *Ibid.*, p. 468.
[31] *Ibid.*
[32] *Ibid.*, p. 478.
[33] Illinois ex rel. McCollum v. Board of Education, *supra,* note 4, 333 U.S. at p. 230.
[34] A.G. 281 (Wis., 1949); Note 49 COL. L. REV. 836 (1949).
[35] Note 57 YALE L. J. 1114 (1948).
[36] Resolution No. 19, S. (1949).
[37] *Supra,* note 34.
[38] WIS. STATS. (1949), Sec. 40.70.
[39] 15 A.G. 483 (Wis., 1926).

On appeal to the United States Supreme Court, the principal case was affirmed on April 28, 1952, by a six to three decision. Justice Douglas in the majority opinion points out that:

> "No one is forced to go to the religious classroom, and no religious exercise of instruction is brought to the classrooms of the public schools. A student need not take religious instructions. He is left to his own desires as to the manner or time of his religious devotions, if any."[40]

The Constitution according to the majority opinion does not say that in every and all respects there shall be a separation of Church and State. The opinion declares:

> "Rather, it (Constitution) studiously defines the manner, the specific ways in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostil, suspicious and even unfriendly. We find no constitutional requirements which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral, when it comes to competition between sects . . . But it can close its doors to suspend its operations as to those who want to repair to their religious sanctuaries for worship or instructions. No more than that is undertaken here."[41]

Justice Jackson in his dissenting opinion feels that the New York released time program is unconstitutional because it is founded upon a use of the state's power of coercion. Another dissenter, Justice Black, maintains that the majority opinion abandons the state's historic neutrality in the religious sphere.[42]

The principal case presented an excellent opportunity to the Supreme Court to clarify the rather confused question of religious education for public school pupils. It seems to the writer that in view of wide practical differences in the many released time programs, the holding of the United States Supreme Court in the principal case has adopted the correct approach. The *McCollum* case did not strike down all released time programs as such, but only the program before it.

J. JOSEPH CUMMINGS

Negligence—Sharing of Expenses as Affecting the Host-Guest Relation Under the Automobile Guest Statutes—Plaintiffs, husband and wife, while on an extended vacation trip with the defendants, in an automobile owned and driven by the defendant husband, were injured

[40] 72 S.Ct.—(1952).
[41] *Ibid.*
[42] *Ibid.*