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Church-State--Religious Institutions and Values: A Legal Survey--1964--1966

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SURVEY NOTE

CHURCH-STATE — RELIGIOUS INSTITUTIONS AND VALUES: A LEGAL SURVEY — 1964-66

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I. Introduction

In this Survey, the *Notre Dame Lawyer* presents an analysis of the Church-State relationship in America. This is the fifth such analysis in a biennial series begun in 1958.¹ The purpose of this study is twofold. It first seeks to report completely the relevant judicial decisions and legislative enactments which have occurred during the previous two years; it then analyzes this activity in an attempt to determine both the recent developments the Church-State relationship has undergone and the trends presaged by this activity.

The first four studies in this series bear witness to the changing emphasis given to the many facets of this relationship. While the area is crossed by mighty rivers of decision which have long flowed within well-defined banks, it continually experiences a flow of new problems from previously uncharted springs. Sometimes the flow quickly dries. At other times it becomes a raging torrent cutting new channels in the law.

The volatile nature of the Church-State relationship continues to be reflected in the present Survey. The first section, Religious Institutions, treats of the direct conflicts which arise between Church and State, considered as juridical entities, when each seeks to "justify its rights against the asserted authority of the other."² Within this problem area, the law applicable to matters involving Church Property continues to be static. On the other hand, the area of Education continues to develop significantly with the passage of the Elementary and Secondary Education Act of 1965. Further consideration is also given to the *School Prayer Cases*.

In the second section, Free Exercise, an examination is made of the deference accorded to religiously motivated actions under the guise of free exercise.

¹ The four previous surveys are: *Religious Institutions and Values: A Legal Survey (1955-57)*, 33 NOTRE DAME LAWYER 416 (1958) [hereinafter cited as *1955-57 Church-State Survey*]; *Religious Institutions and Values: A Legal Survey (1958-60)*, 35 NOTRE DAME LAWYER 405 (1960) [hereinafter cited as *1958-60 Church-State Survey*, part I], 35 NOTRE DAME LAWYER 537 (1960) [hereinafter cited as *1958-60 Church-State Survey*, part II]; *Religious Institutions and Values: A Legal Survey (1960-62)*, 37 NOTRE DAME LAWYER 649 (1962) [hereinafter cited as *1960-62 Church-State Survey*]; *Religious Institutions and Values: A Legal Survey (1963-64)*, 39 NOTRE DAME LAWYER 427 (1964) [hereinafter cited as *1963-64 Church-State Survey*].

² *1955-57 Church-State Survey*, *supra* note 1, at 417.

The effect of the recent cases in this area is ambivalent. The long-awaited Supreme Court interpretation of the "belief in a Supreme Being" requirement applied to conscientious objectors was handed down in *United States v. Seeger*.³ The courts also furthered a spirit of accommodation by showing an increasing sensitivity for the religious rights of imprisoned Black Muslims. Finally, in *Schowgurow v. State*,⁴ the Maryland Supreme Court held unconstitutional a provision of the state constitution requiring jurors to affirm a belief in God. In contrast, a lack of sympathy for certain minority beliefs was evident in the Supreme Court's refusal to reevaluate Sunday closing law precedent, and in the actions of several tribunals in ordering the transfusion of blood to adult Jehovah's Witnesses.

The third section, Religious Values, deals with the broader problem of religious values seeking recognition before the legal tribunals of our country. Consideration is given both to instances of religion attaining the status of a legal value and to examples of the law invading the moral order. The section's peculiar concern is with the law's appraisal of religion and "religious" aims. Particular emphasis has been given to the field of Obscenity, as major evolutions have occurred culminating with the recent Supreme Court pronouncements in the *Ginzburg*,⁵ "*Fanny Hill*,"⁶ and *Mishkin*⁷ cases. The areas of Birth Control and Anti-Miscegenation have also seen developments, primarily in the *Griswold*⁸ and *McLaughlin*⁹ decisions.

The determination of the proper relationship between Church and State is an important one, affecting as it does, men's allegiance to two Sovereigns. From the birth of America to the present, its citizens have recognized this importance and, with an ardor that is found only where men's deepest ideological beliefs are in issue, have long sought the resolution of this question. And yet, agreement on what is the proper relationship has not been achieved. In the words of Justice Black,

Our insistence on "a wall between Church and State which must be kept high and impregnable" has seemed to some a correct exposition of the philosophy and a true interpretation of the language of the First Amendment to which we should strictly adhere. With equal conviction and sincerity, others have thought the . . . decision fundamentally wrong and have pledged continuous warfare against it.¹⁰

The American concept of Church and State, then, continues to develop. This Survey charts that development.

3 380 U.S. 163 (1965).

4 240 Md. 121, 213 A.2d 475 (1965).

5 *Ginzburg v. United States*, 86 Sup. Ct. 942 (1966).

6 *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 86 Sup. Ct. 975 (1966).

7 *Mishkin v. New York*, 86 Sup. Ct. 958 (1966).

8 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

9 *McLaughlin v. Florida*, 379 U.S. 184 (1964).

10 *Zorach v. Clauson*, 343 U.S. 306, 317 (1952) (dissenting opinion).

II. Religious Institutions

A. Church Property

1. Intra-Church Property Disputes — *Continuity with the Past.*

"A fundamental principle of American religious freedom is that secular courts have no jurisdiction over religious controversies and will not question any decision of a church tribunal relating to its internal affairs, in the absence of an interference with civil or property rights."¹¹ There are three reasons for this doctrine of nonintervention. The first is the constitutional principle of the separation of church and state;¹² the second is that those who join a church are deemed to have implicitly consented to submit to the authority of that church in ecclesiastical matters;¹³ and the third is that the courts recognize the greater expertise of ecclesiastical bodies in adjudicating religious disputes, which by their very nature are fraught with complexities.¹⁴

Where civil or property rights are involved, however, the civil courts are willing to enter the conflict.¹⁵ As would be expected, the courts have had difficulty in ascertaining the point at which an ecclesiastical dispute becomes one involving a civil or property right.¹⁶ The problems in this area are typified by the recent case of *United Kosher Butchers Ass'n v. Associated Synagogues*.¹⁷ Here plaintiff, an association of kosher retailers, was refused the certification of the defendant, a committee which certifies caterers as authentic purveyors of kosher foods. Plaintiff's products had long been deemed acceptable, and the refusal of certification was made without any complaint of departures from the strict regulations of the defendant. After this refusal, the defendant required that kosher caterers purchase only from retail stores which it supervised. Due to the resulting loss of its business, the plaintiff charged defendant with a restraint of trade and sought an injunction and damages. The court refused plaintiff's plea, explaining that "the background against which the plaintiff's prayer for relief is made, however, reveals that in any consideration of the merits of its case the crucial questions facing the court would be questions of religious law or practices."¹⁸ The necessary questions of criteria, authority and procedures for determining what food was kosher were "determinable only by reference to Jewish law, a domain into which the courts will not venture."¹⁹

Once property rights are found to be in dispute, however, the courts will venture into the conflicts of religious bodies. The standards which the courts employ in dealing with disputes over church property were proclaimed in 1871

11 TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 118 (1948).

12 *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871).

13 *Watson v. Jones*, *supra* note 12, at 729.

14 *Ibid.*

15 See generally PFEFFER, CHURCH, STATE, AND FREEDOM ch. 8 (1953); Duesenberg, *Jurisdiction of Civil Courts Over Religious Issues*, 20 OHIO ST. L.J. 508 (1959).

16 For statements of criteria utilized in determining jurisdiction, see 3 STOKES, CHURCH AND STATE IN THE UNITED STATES 387-89 (1950).

17 211 N.E.2d 332 (Mass. 1965).

18 *Id.* at 335.

19 *Ibid.*

in *Watson v. Jones*.²⁰ These standards quickly found favor with the courts and have been determinative since that time.

Watson divided these disputes into three divisions, as follows:

1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.

3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization.²¹

Each division has its own rule of decision. In cases within the first division, the donor's intent will prevail.²² In the second division, the courts will follow the will of the majority of the congregation.²³ In the third division, the decision of the supreme ecclesiastical body will be controlling.²⁴

In considering the first division, note must be taken that it governs only express trusts. It does not encompass the implied trust theory, which was developed prior to the *Watson* decision.²⁵ Under the implied trust theory, the courts viewed giving property to a religious organization as analogous to giving property in trust, and said that while no express trust had been imposed on the property, it should be treated as though it were subject to a trust. The purpose of the trust was sufficiently defined when the name of the denomination was included in the gift. Then it was implied that the property was given in trust for the support of the ecclesiastical body in the form in which the body existed at the time the gift was made.²⁶ Mr. Justice Miller in *Watson* did not share the view that property given to a named denomination was subject to a trust. He distinguished "property acquired in any of the usual modes for the general use of a religious congregation"²⁷ from "property devoted forever by the instrument which conveyed it, or by any specific declaration of its owner, to the support of any special religious dogmas, or any peculiar form of worship . . ."²⁸ Thus, only property acquired by the latter means—by express

20 80 U.S. (13 Wall.) 679 (1871).

21 *Id.* at 722-23.

22 *Id.* at 723.

23 *Id.* at 725.

24 *Id.* at 727.

25 See, e.g., Attorney General *ex rel.* Mander v. Pearson, 3 Mer. 353, 36 Eng. Rep. 135 (Ch. 1817). For an excellent historical analysis of the implied trust doctrine, see Note, 75 HARV. L. REV. 1142, 1145-54 (1962).

26 Hale v. Everett, 53 N.H. 9 (1868).

27 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 726 (1871).

28 *Ibid.*

trust — falls within the first division of *Watson*.

The second division of the *Watson* test governs the situation where the ecclesiastical organization is congregational in nature; that is, independent of any other ecclesiastical organization.²⁹ Here the courts will look to the wishes of the majority of the congregation in determining which faction shall be awarded control of the church property.³⁰ This test permits the beliefs of the congregation to change, and thus does not look upon a static, unalterable ecclesiastical organization as desirable. No intent to preserve a status quo is reflected in the second *Watson* approach.

Approval of this principle of majority control in congregational organizations is indicated in the current decisions. In *Barber v. Irving*,³¹ the members of an independent church decided to incorporate. Many members felt the resulting charter changed fundamental customs, and the majority of the congregation voted against accepting the charter. Nevertheless, a minority faction filed the articles of incorporation and caused the pastor to deed over the church property to it. The court was powerless to undo the incorporation, as it could only be attacked by the state attorney general, and not by private citizens. However, the court did look to the majority vote of the congregation and declared that the minority had committed a wrong by obtaining control of the church property. Therefore, it ordered the property returned to the control of the majority.

In *Austin v. Mt. Zion Primitive Baptist Church*,³² the court said it had previously found the Baptist Church groups involved to be congregational in form. It held that where a schism develops in the membership of a church congregational in form, the assets which are not subject to express trusts belong to the majority faction and are subject to its control.

In *Rowland v. Wilkerson*,³³ the church's form of government did not provide for an appeal to any higher ecclesiastical authority. Based on this form, the court upheld the decision of the majority of the congregation entitled to vote, on the question of whether or not to dispose of church property.

Similarly, the court in *Camp v. Durham*³⁴ held that it was proper for the disputing factions in a church congregational in form to settle their rights to the church property by settling the congregation's internal dispute as to faith and doctrine by a majority vote of the congregation.

The major exception to the *Watson* standards, an exception to this second rule, is termed the *fundamental change rule*. It states that a majority may not use the church property in support of a doctrine fundamentally different from the doctrine which was originally characteristic of the congregation and which is still followed by a minority.

The fundamental change rule continued to find application in the cases reported within the period covered by this Survey. In *Mills v. Yount*,³⁵ a local

29 *Id.* at 722.

30 *Id.* at 725.

31 226 Cal. App. 2d 560, 38 Cal. Rptr. 142 (Dist. Ct. App. 1964).

32 165 So. 2d 412 (Fla. Dist. Ct. App. 1964).

33 389 S.W.2d 627 (Ark. 1965).

34 219 Ga. 543, 134 S.E.2d 598 (1964).

35 393 S.W.2d 96 (Mo. Ct. App. 1965).

church had a "connective thread of submission"³⁶ to a supreme organization. Normally, disputes in such a situation would be controlled by the third rule of *Watson*. In *Mills*, however, the court said the local congregation was not bound by the decision of the supreme tribunal. Having determined this, the court then considered the dispute only as it affected the local congregation. The court found that a new doctrine was being promulgated which was inconsistent with and repugnant to the established doctrine of the congregation. The will of the majority of the congregation had not been tested, so the court was unable to tell whether a majority or minority favored the new doctrine. The court ruled, however, that the faction adhering to the fundamental doctrines and established practices of the faith which existed before the schism was the group entitled to the property.

Similarly, in *Cantrell v. Anderson*,³⁷ a minority faction brought suit against the majority over the right to use church property, contending that the majority had departed from the fundamental doctrines of the church. The minority was awarded the property as a result of the application of the rule that when a schism occurs in a congregational church, the group that adheres to the fundamental doctrines of the church as advocated and practiced at the time of its organization is entitled to possession of the property as against those who have departed or deviated from the fundamental doctrines.

This fundamental change rule can be viewed as a modern statement of the implied trust doctrine. There seem to be two justifications for the modern rule: (1) to protect the church's body of doctrine; and (2) to protect those who have contributed to the church in reliance on its being dedicated to the continued promulgation of its basic doctrine.³⁸ The rationale underlying the first justification is that the rights of a minority can be unjustly harmed where the doctrine is radically changed. "It is clear that, if a majority should spring up in a Protestant congregation in favor of the Roman Catholic or Mohammedan religion . . . the liberties and rights of the minority which adheres to the Protestant faith would be grossly violated."³⁹ Under the second justification, the reasoning is that it would be unfair for an ecclesiastical organization to hold itself out as the advocate and protector of certain beliefs, thereby inducing believers to contribute money and services, and then adopt beliefs which differ substantially from those held by the contributors.⁴⁰ Doctrinal stability and reliance, then, comprise the most important justifications for the fundamental change rule.

The fundamental change rule faces, it seems, three counterarguments. The first counterargument has its basis in the premise that the civil courts are not qualified to intervene in disputes involving ecclesiastical structure and reli-

36 *Id.* at 103.

37 390 S.W.2d 176 (Ky. 1965).

38 See generally Note, 75 HARV. L. REV. 1142, 1167-68 (1962); Comment, 12 KAN. L. REV. 436, 437-40 (1964).

39 ZOLLMANN, AMERICAN CIVIL CHURCH LAW 154 (1917).

40 Analogously, the court in *Newhall v. Second Church and Society*, 209 N.E.2d 296 (Mass. 1965), said that while no express trust was created, silver vessels inscribed as dedicated "for the purpose of baptism" and "for use at the communion table" were given and received subject to a commitment as to their use, which effectively limited the power of the church to dispose of the vessels.

gious beliefs. The *Cantrell*⁴¹ case provides an illustration of some of the basic difficulties that courts can encounter. There, the majority defended themselves on the basis that they had not departed from the fundamental doctrines of the church, principally because the differences of opinion did not involve the fixed beliefs of the congregation or else involved matters of interpretation. The court then had to determine what the congregation's beliefs were and whether they differed from the original fundamental beliefs.

Likewise, in the *Mills* case,⁴² the court was faced with the prospect of interpreting the meaning of an article of faith and then determining if it constituted a change from fundamental beliefs. The article read: "Entire sanctification is that second definite work of grace, subsequent to regeneration, whereby the heart of a justified person is cleansed from the original or Adamic nature, and is filled with the Holy Ghost."⁴³ The court approached the task of interpretation with an understandable lack of confidence, saying, "If we are able to interpret this addition (and we doubt our competency to do so but do our best from the evidence) . . ."⁴⁴ The premise that a civil court is not competent to interpret these ecclesiastical matters is the whole thrust of Mr. Justice Miller's reasoning in *Watson*. His concern is with setting out principles that will limit the court's involvement in this area. Only in the first division, where an express trust exists, is the court's competence admitted. In the second and third divisions, which involve the congregational and hierarchical organizations, the court is to follow the decision of the congregation or hierarchy respectively.

The second counterargument to the fundamental change rule is that when a church has adopted a congregational form of government, the favoring of a minority is an interference with the freedom of religion guaranteed by the first amendment, as this is an infringement of the freedom of the majority to govern their church by the form they have chosen. The third major counterargument is that courts which do investigate the doctrinal dispute and then favor the faction most closely adhering to the original practices of the church are favoring stability in doctrine rather than development in doctrine. Whether stability is to be less desired than change, thus making this argument a valid one, depends not on any legal criterion but on one's theological viewpoint.

When a dispute occurs within a church organization which is not congregational in nature, but rather, is subject to the dominion of a parent church organization, the third division set out by the *Watson* case becomes applicable. Here the rule is that the decision of the superior ecclesiastical tribunal will be controlling.⁴⁵

The first justification for such a rule lies in the principle of separation of church and state. Mr. Justice Miller stated in *Watson* that among the fundamental rights of a religious association is the right to create religious tribunals:

The right to organize voluntary religious associations to assist in

41 390 S.W.2d 176 (Ky. 1965).

42 393 S.W.2d 96 (Mo. Ct. App. 1965).

43 *Id.* at 99.

44 *Ibid.*

45 See note 24 and accompanying text *supra*.

the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.⁴⁶

If the secular courts could step in and reverse the decision of the religious body, it "would lead to the total subversion of such religious bodies. . . ."⁴⁷ Mr. Justice Miller concluded, then, that in order to protect the fundamental right of the religious association, its decision had to be final. "It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."⁴⁸

Another reason for ruling that the decision of the superior body is controlling over its members is that "all who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it."⁴⁹ A final reason for judicial deference to the ecclesiastical tribunal lies in its special competence in resolving the complexities presented by religious questions.

It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.⁵⁰

The final and controlling nature of the decision of the highest church tribunal in a hierarchical church was raised to constitutional standing in 1952 in *Kedroff v. St. Nicholas Cathedral*.⁵¹ The Supreme Court ruled that the decision of the supreme hierarchical authority was to be controlling. A state statute which interfered with the decision was held to conflict with the right of the free exercise of religion and of the separation of church and state guaranteed by the first amendment.⁵² The same issue was raised again in 1960 in *St. Nicholas Cathedral v. Kreshik*,⁵³ but the Supreme Court reaffirmed its *Kedroff* holding.⁵⁴

As would be expected, this third rule of *Watson*, so recently reaffirmed by the Supreme Court, has been adhered to in the current decisions. In *New York East Annual Conference of the Methodist Church v. Seymour*,⁵⁵ a will had left property to testator's son for life, with the remainder in fee to a local church. When the son died, the local church had by then been abandoned. The court recognized the claim of the plaintiff under the hierarchical church rules which

46 80 U.S. (13 Wall.) 679, 728-29 (1871).

47 *Id.* at 729.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 344 U.S. 94 (1952).

52 See generally FELLMAN, RELIGION IN AMERICAN PUBLIC LAW 62 (1965); *The Supreme Court 1952 Term*, 67 HARV. L. REV. 91, 109 (1953); 54 COLUM. L. REV. 435 (1954); 28 NOTRE DAME LAWYER 398 (1953).

53 7 N.Y.2d 191, 164 N.E.2d 687 (1959).

54 *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960).

55 151 Conn. 517, 199 A.2d 701 (1964).

provided that if a local church was abandoned, the property then became the property of the hierarchical organization.

*St. John's Greek Catholic Hungarian Russian Orthodox Church v. Fedak*⁵⁶ and *Cosfol v. Varvoutis*,⁵⁷ both involved the disposition of church property. In both cases, the court found the decision of the highest tribunal in the hierarchical organization to be controlling. Both relied on *Watson v. Jones* as precedent.

A very limited exception to the third rule of *Watson* was followed recently in the *Mills*⁵⁸ case, as the fundamental change rule was applied to a church having a hierarchical organization. In this case, the highest body itself had changed its fundamental doctrine. The court said that the church body could not reach a decision the "effect of which . . . [is] a departure from the essential denominational faith, and a diversion to another, different, and repugnant one, and by this means carry the property of one faith over to the other."⁵⁹ It ruled that members adhering to the established faith were entitled to the church building. The court succinctly stated its view, saying that "the right to religious freedom is not the right to steal churches."⁶⁰ It asked, "Is the local congregation 'automatically bound' by reason of having the connective thread of submission to ecclesiastical determination? We think not. This carries the theory of representative estoppel too far when a fundamental change in faith is involved."⁶¹

The impact of such a decision is further emphasized by a consideration of the question of church mergers. Normally there is no problem with the merging of hierarchical churches, as the courts follow the decisions of the highest ecclesiastical tribunal. However, there have been a few cases where it was held "that a local church does not have to go along with a denominational merger even though the denomination be one of hierarchical polity."⁶² Whether a decision utilizing the reasoning of *Mills* should now be reached is questionable. The well-reasoned view expressed in a recent commentary would seem analogously appropriate. It states: "Most cases, however, seem to require the local church to follow the higher authority into the merger, and it seems probable now, after the *Kreshik* case, that to absolve the local church from the duty to follow the hierarchical authority would be unconstitutional."⁶³

The ecumenical movement with its thrust towards unity may have great importance in the area of intra-church disputes. The most probable method of achieving unity will be through merger. As noted, there is normally no problem in the merger of hierarchical churches, as the courts usually follow the decisions of the highest ecclesiastical tribunal. In contrast, the problem of merger becomes real when the church organizations involved are congregational

56 89 N.J. Super. 65, 213 A.2d 651 (Ch. 1965).

57 419 Pa. 28, 213 A.2d 331 (1965).

58 393 S.W.2d 96 (Mo. Ct. App. 1965).

59 *Id.* at 100-01.

60 *Id.* at 101.

61 *Id.* at 102-03.

62 Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419, 460 (1964) citing *Bonham v. Harris*, 125 Tenn. 452, 145 S.W. 169 (1911), and *Landrith v. Hudgins*, 121 Tenn. 556, 120 S.W. 783 (1908).

63 Casad, *supra* note 62, at 460.

in form. As discussed above,⁶⁴ while the second rule of *Watson* applies to this area conferring court approval on decisions made by a majority of the congregation, it is subject to an important exception. This is the "fundamental change" rule whereby a majority may not use church property in support of a doctrine fundamentally different from the doctrine which was originally characteristic of the congregation and which is still followed by a minority. That such a recognition of minority rights effectively blocks unity through merger should be made clear to the courts.

The ecumenical movement is having an ever-widening effect in changing basic, longstanding notions about the importance of denominational distinctiveness. It is inducing changes in theories as to the nature and role of denominations and probably in notions of religious freedom as profound as the changes wrought by the labor movement in theories relating to freedom of contract. Unless the courts are made aware of these changes they are likely to go on applying to present-day problems rules of law developed to meet the needs of an older order, without realizing that in so doing they are casting themselves in a partisan role in a struggle between the old and the new, in which the state should really be neutral.⁶⁵

Thus, if the desire for unity proves a potent force, it may well in time weaken severely the fundamental change exception, thereby leaving the rules of *Watson* as the principal source of guidance to the courts.

The tripartite *Watson v. Jones* rule has been controlling and will in all likelihood continue to be the dominant source of guidance to the courts. The major exception to *Watson*, the fundamental change rule, faces a reappraisal if the ecumenical spirit does provide a significant thrust toward unity. The recent cases most definitely reflect the continuity of the past; they also hint at the problems that must be solved in the future.

2. Zoning — *Consistent Diversity*.

"Zoning is a separation of the municipality into districts, and the regulation of buildings and structures in the districts so created, in accordance with their construction and the nature and extent of their use."⁶⁶ The justification for this regulation is found in the police power of the state to enact laws for the safety, health, morals, or general welfare of the people.⁶⁷

The topic of the following discussion is the various ways in which this power has been exercised in relation to religious institutions, and the rationales underlying such exercises of this power. Zoning ordinances affecting churches have been classified into three types: (1) ordinances permitting churches in all residential districts, (2) ordinances permitting churches in residential districts

64 See discussion which begins with the paragraph preceding the text accompanying note 35.

65 Casad, *supra* note 62, at 426.

66 *Mansfield & Swett v. Town of West Orange*, 120 N.J.L. 145, 198 Atl. 225, 228 (Sup. Ct. 1938). *Accord*, *Antonelli Construction, Inc. v. Milstead*, 34 N.J. Super. 449, 112 A.2d 608, 612 (1955).

67 *Kennedy v. City of Evanston*, 348 Ill. 426, 181 N.E. 312 (1932); *Connor v. Township of Chanhassen*, 249 Minn. 205, 81 N.W.2d 789, 794 (1957).

only upon a special permit, and (3) ordinances that exclude churches often, if not usually, from districts where residential use is itself restricted to certain types of dwellings.⁶⁸ The majority of jurisdictions are controlled by ordinances of either type (1) or (2), while a minority follow type (3).⁶⁹

The enactment of the first type of ordinances, those permitting churches in all residential districts, is encouraged by three arguments. The first argument is that the first amendment, as applied to the states by the fourteenth amendment,⁷⁰ protects churches from ordinances which would exclude them. While this issue has been raised in the cases,⁷¹ no state court has based its decision directly on this ground, nor has the United States Supreme Court ruled directly on the merits of this issue.⁷² The second argument is utilized where an exclusionary ordinance which permits uses even less compatible than churches is in effect or has been proposed. The attack on such an exclusionary ordinance is that it discriminates unfairly, thus violating the rights to due process and equal protection of the laws.⁷³ The third and most common argument for allowing churches in all residential areas is that an ordinance excluding churches is not a proper exercise of the police power because it does not promote the health, safety, morals, or welfare of the community.⁷⁴ Underlying this argument is the belief that the very purpose of a church's existence is to promote the general welfare. The exclusionary ordinance, then, frustrates a major aim sought to be achieved by zoning—the promotion of the general welfare. Thus, it constitutes a taking of property without due process of law.⁷⁵ These three arguments seem to have been found acceptable in jurisdictions controlled by the first type of ordinance, as no case involving such an ordinance has been reported during the periods covered by this and the preceding Survey.⁷⁶

The second type of ordinances are those which permit churches upon a special permit. These ordinances classify churches as special exception uses. This means that churches are recognized as valid uses in residential areas, but for a particular church to be allowed in such an area, it must first obtain a permit from the zoning authority. This requirement is to insure that the use will meet the standards prescribed.⁷⁷ In special exception ordinances, the standards

68 *City of Englewood v. Apostolic Christian Church*, 146 Colo. 550, 362 P.2d 172, 175 (1961) (concurring opinion); *Milwaukee Co. of Jehovah's Witnesses v. Mullen*, 214 Ore. 281, 330 P.2d 5, 9 (1958); *State ex rel. Lake Drive Baptist Church v. Village of Bayside Board of Trustees*, 12 Wis. 2d 585, 108 N.W.2d 288, 293 (1961).

69 See generally II METZENBAUM, *THE LAW OF ZONING* ch. x-m-2 (2d ed. 1955); I RATHKOPF, *THE LAW OF ZONING AND PLANNING* ch. 19 (3d ed. 1964).

70 *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

71 *E.g.*, *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451 (Mo. 1959).

72 An appeal on the issue to the U.S. Supreme Court in *Corporation of Presiding Bishop v. City of Porterville*, 90 Cal. App. 2d 656, 203 P.2d 823 (1949), was dismissed for want of substantiality. 338 U.S. 805 (1949).

73 *State ex rel. Anshe Chessed Congregation v. Bruggemeier*, 115 N.E.2d 65, 70 (Ohio Ct. App. 1953). See *North Shore Unitarian Society v. Village of Plandome*, 200 Misc. 524, 109 N.Y.S.2d 803 (Sup. Ct. 1951).

74 *North Shore Unitarian Society v. Village of Plandome*, *supra* note 73.

75 *Diocese of Rochester v. Planning Board*, 1 N.Y.2d 508, 136 N.E.2d 827, 833-34 (1956). *State ex rel. Synod of United Lutheran Church v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515, 525 (1942); *City of Sherman v. Simms*, 143 Tex. 115, 183 S.W.2d 415, 416 (1944).

76 1963-64 *Church-State Survey*, *supra* note 1 at 427.

77 74 A.L.R.2d 377-411 (1960) lists various factors which have been considered by courts. Among the factors are: (1) traffic conditions; (2) effect on property values; (3)

that must be met are set forth in the statute, and all churches that meet the standards must be given the required permit. In some ordinances, the standards are set forth with such specificity that the zoning authority is somewhat restricted in its discretion;⁷⁸ in others, the standards are set forth in such general terms that there is little restriction of the zoning authority's discretion in determining whether or not the church should be granted a permit.⁷⁹ In jurisdictions in which the controlling philosophy is that a church is per se a furtherance of the public welfare, the courts will not look favorably upon findings of the local zoning board which deny a permit. "In these states the mere fact that a church is the subject of an application changes the ordinary rule as to burden of proof and places the burden squarely upon the administrative officials to justify the denial of the permit."⁸⁰ If, however, the state does not share in this philosophy, the burden of proof is upon the complaining church to show that the zoning authority acted arbitrarily and unreasonably in denying the special permit.

Two cases have arisen during the period of this Survey in which churches were regarded as special exception uses. In both of these cases, upon denial of the necessary permit, the burden of proof was determined to be on the church. In *Rogers v. Mayor and Aldermen*⁸¹ the burden was met. The court ruled that the objections of residents that the granting of the permit would devalue their property was not a proper basis for denying the church a building permit. Where the applicant meets the standards required by a special use permit zoning ordinance, the court said that a denial, unsupported by evidence justifying the denial, is an abuse of discretion. In *The Church of Our Lord Jesus Christ, Inc. v. Lower Merion Township*,⁸² the court held that the special exception statute did not interfere with the free exercise of a religion, and that the church had the burden of showing affirmatively that the board acted erroneously.

The third type of ordinance excludes churches, often, if not usually, from districts where residential use is itself restricted to certain types of dwellings. The underlying philosophy in the jurisdictions controlled by this third type of ordinance is that a church is not per se a furtherance of the general welfare. Rather, the church is looked upon as any other property use. Viewed in this manner, the exclusion of a church may be a furtherance of the general welfare due to the balancing of interests among uses that are all mere property uses.⁸³ Thus, churches can be totally excluded from a particular residential zone with no provisions for special exception use being made. Two states subscribe to

loss of tax revenue; (4) noise and other inconvenience; (5) the size of the congregation; (6) sanitary facilities; (7) setback requirements; and (8) the size of the building or area of the lot.

78 See, e.g., the ordinance controlling in *Milwaukee Co. of Jehovah's Witnesses v. Mullen*, 214 Ore. 281, 330 P.2d 5, 8 (1958).

79 See, e.g., the ordinance controlling in *Spieth v. Planning Comm'n* (1953) reported only as *Pomo C 1688* Superior Court, Los Angeles County. The provisions of this ordinance are quoted in I РАТНОКОВ, *op. cit. supra* note 69, ch. 19, at 11-12 n. 18.

80 I *id.* ch. 19, at 14.

81 110 Ga. App. 114, 137 S.E.2d 668 (1964).

82 34 Pa. D. & C.2d 239 (Dist. Ct. 1964).

83 See generally Comment, *Zoning for Churches*, 13 HASTINGS L.J. 367 (1962).

this view, and thus have adopted the third type of ordinance.⁸⁴ Wisconsin maintains a minority position in which it is recognized that churches may be totally excluded from a district on the basis of the furtherance of the general welfare, but balanced against this is the requirement that a consideration must be made of the resultant burden on the freedom of worship.⁸⁵ No cases have been reported in these minority jurisdictions during the periods covered by this and the preceding Survey.

The same arguments and controls that are applied in the zoning of churches are found in the area of parochial school zoning. "Church schools have been almost generally regarded as occupying the same status as churches, both by the courts which have granted them exemption from the restrictions of the zoning ordinance and by those which have not."⁸⁶ The courts even refer to cases dealing strictly with churches as precedent for their holdings in the parochial school cases.

In *Sisters of the Holy Cross of Massachusetts v. Town of Brookline*,⁸⁷ the zoning ordinance in question expressly declared that its provisions were not to be applied to any church or other organization having a religious purpose or any educational purpose which was religious or public. It was claimed that such a law was an arbitrary exercise of the police power and a denial of the equal protection of the laws. The court, however, upheld the zoning ordinance. It stated that the requirement of equal protection does not prohibit a state from making classifications which may result in the unequal treatment of various classes, but only precludes irrational discrimination between persons or classes. The court stated, "[W]e do not believe it irrational for the legislature to determine that educational and religious institutions, because of their unique locational requirements and because of their importance to society generally, may be exempted from the application of zoning laws."⁸⁸ The court also ruled that the zoning ordinance did not constitute an establishment of religion. It stated that even if the wording referring to "religious purposes" did constitute an establishment of religion, it was not open to argument that the exemption of educational institutions from zoning laws was such an establishment. The reason given was that the power of the legislature to exempt schools from the zoning laws may be applied to schools which are supported by sectarian or denominational interests. The court concluded, "Indeed, if the Legislature had attempted to exempt from zoning laws only schools with no religious affiliation, the constitutionality of such distinction would be subject to considerable doubt."⁸⁹

84 They are California, and Florida. *E.g.*, *Corporation of Presiding Bishop v. City of Porterville*, 90 Cal. App. 2d 656, 203 P.2d 823 (1949), *appeal dismissed*, 338 U.S. 805 (1949); *Miami Beach United Lutheran Church v. City of Miami Beach*, 82 So. 2d 880 (Fla. 1955).

85 *State ex rel. Lake Drive Baptist Church v. Village of Bayside Board of Trustees*, 12 Wis. 2d 585, 108 N.W.2d 288 (1961). For a discussion of this case, see 1960-62 *Church-State Survey*, *supra* note 1, at 656-60; Note, 1962 Wis. L. Rev. 358.

86 I RATHKOPF, *op. cit. supra* note 69, ch. 18, at 7.

87 347 Mass. 771, 198 N.E.2d 624 (1964).

88 *Id.* at 632.

89 *Id.* at 633.

In *Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus*,⁹⁰ a parochial school exemption was again upheld, this time by the court striking down an ordinance. The ordinance, which barred all schools from an exclusive residential district, had been passed as soon as the parochial school had made known its intent to build. The court declared that the ordinance was not discriminatory because of unequal treatment, as it treated both public and private schools alike. However, the public school needs of the borough had already been fully taken care of, and the court found that the ordinance had been passed because the borough did not now welcome a tax-exempt organization on the borough's remaining land. The court held that this was not a proper ground for zoning against a school and remanded the case on the issue of arbitrariness.

Zoning ordinances applicable to churches and schools, then, are quite diverse, with the ordinances reflecting the various jurisdictions' conceptions of the rights inherent in, and the community welfare promoted by, churches and parochial schools. There have been few cases involving the zoning of churches and schools reported during the past two years. Apparently, this indicates public satisfaction in each jurisdiction with the controlling laws and philosophies. The reported cases reflect the diversity of the zoning laws, but they are entirely consistent with the existing laws.

3. Tax Exemption — *Firmly Rooted*.

It has always been the general policy in the United States to grant tax exemptions to religious organizations.⁹¹ Although the basis for the exemptions is somewhat indefinite,⁹² the practice of granting the exemptions is not peculiar to the United States; it can be traced back to antiquity.⁹³ In the United States, the policy appears to stem from the nature of the relationship between the state and the church in the colonial period. The church, in its status as an "established" public institution, was an agency of the state, and it was considered financially unsound for the state to tax its own agency.⁹⁴ This historical basis, however, is not the entire explanation. When the church was disestablished, the exemptions did not cease. The reason, apart from sheer custom, seems to lie in the basically religious nature of the people. The practice of exempting church property was "so entirely in accordance with the public sentiment, that it universally prevailed . . ."⁹⁵ It became apparent, however, that the exemptions had little legal support, and so, appeals to the legislatures were made. The legislatures responded by promptly passing the exemption statutes or constitutional provisions demanded by public opinion.⁹⁶

The constitutional provisions adopted have been of two main types. The

90 42 N.J. 556, 202 A.2d 161 (1964).

91 FELLMAN, *RELIGION IN AMERICAN PUBLIC LAW* 44 (1965).

92 ZOLLMANN, *AMERICAN CHURCH LAW* § 343 (1933).

93 Instances of treatment favoring the established clergy are found in *Genesis* 47:26; *1 Esdras* 7:24. Exemption of churches and church property is based on European tradition dating from the fourth century, when Constantine the Great, after his conversion, gave the church this privilege. 3 STOKES, *CHURCH AND STATE IN THE UNITED STATES* 419 (1950).

94 TORPEY, *JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA* 171 (1948); Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461, 462 (1959).

95 *State v. Collector of Jersey City*, 24 N.J.L. 108, 120 (1853).

96 ZOLLMANN, *AMERICAN CIVIL CHURCH LAW* 240 (1917); Torpey, *op. cit. supra* note 94, at 171-72.

first type makes exemptions *mandatory*, while the second type *permits* exemptions to be made.⁹⁷ The statutes granting exemptions are of three types: (1) statutes exempting "places of worship"; (2) statutes exempting "property used for religious purposes"; and (3) statutes exempting property "owned by a religious organization."⁹⁸ Some states' statutes require a combination of these characteristics. The wording of the particular statute involved is the primary factor in explaining the diverse results which the opinions in this area traditionally reflect. While judicial predispositions as regards church-state relations may be present, the courts have responsibly adhered to the legislative policy expressed in the controlling statutes.⁹⁹ Thus, "the specific statutory language in which the exception is formulated has had a far greater influence upon decision than theoretical doctrines of interpretation."¹⁰⁰

In *Evangelical Covenant Church of America v. City of Nome*,¹⁰¹ the controlling statute granted an exemption to property used for religious purposes. The contention of the church was that its church-operated radio station which sold commercial air time was not subject to taxation on its profits. That the station's profits were used to support the operations of the church was the proposed justification for an exemption. The court denied that it is the use of the income that determines whether the institution is entitled to a tax exemption. The court stated that to rule otherwise would force taxed commercial businesses to compete with the commercial activities of institutions having a tax exempt status under the law.¹⁰²

A similar result was reached in *Board of Publication of the Methodist Church v. State Tax Commission*,¹⁰³ where the church's bookstore sold to the general public, with the profits going to the church. The court denied plaintiff's contention that the destination of the income rather than its source determines the right to an exemption. It considered the cardinal principles underlying its doctrine of exemption to be that the basis for the exception to the rule that taxes should be uniform is that churches provide such a service to the public that they are entitled to an exemption, and that property so occupied does not come in competition with the property of other owners. Therefore, after noting that these principles had permeated all of their decisions, the court ruled that "the competitive, commercial nature of its business precludes exemption to plaintiff."¹⁰⁴

In *Lincoln Woman's Club v. City of Lincoln*,¹⁰⁵ the question presented was whether property of a woman's club which included bible study among its many benevolent activities could be exempt as property used for religious

97 Van Alstyne, *supra* note 94, at 761.

98 See Van Alstyne, *supra* note 94, at 463-65.

99 Van Alstyne, *supra* note 94, at 465-66.

100 *Id.* at 504.

101 394 P.2d 882 (Alaska 1964).

102 *Id.* at 885. The court also determined that the exemption provision was broad enough to include the residence of the minister's assistant. For two other recent cases, considering the exempt status of ministers' dwelling places, see *International Missions, Inc. v. Borough of Lincoln Park*, 87 N.J. Super. 170, 208 A.2d 431 (1965); *City of Houston v. South Park Baptist Church*, 393 S.W.2d 354 (Tex. 1965).

103 239 Ore. 65, 396 P.2d 212 (1964).

104 396 P.2d at 214.

105 178 Neb. 357, 133 N.W.2d 455 (1965).

purposes. The court ruled that "the term 'religious' has been held to require neither the profession of a sectarian creed, nor the formal dedication or occupation of property to promote the objects and purposes of a faith thus expressed."¹⁰⁶ Applying this guideline, they ruled that the activity of the club came within the meaning of "religious" as used in the exemption statute. The court also reiterated the theme expressed in the immediately preceding two cases, declaring that it is the use of the property as distinguished from the use of the income from the property that determines if it is exempt.

A use tax was levied on a church's Communion wine, missals, rosaries and other property of that type in *State v. Toolen*.¹⁰⁷ Such an application of the tax was the result of the statutory language in question, as the statute exempted only real property from all taxes; personal property was exempt only from ad valorem taxation.¹⁰⁸ The question before the court was whether subjecting the property to a use tax violated the first amendment. The court distinguished precedent which released Jehovah's Witnesses from the obligation of paying sales taxes on the religious pamphlets which they sold.¹⁰⁹ There the pamphlet sales were protected as a form of religious activity, as this was the method followed by the sect to disseminate their tenets of faith. The court relied instead on precedent which declared that the taxation of personal property merely while it was stored was permissible. The property was not sufficiently in "the stream of worship"¹¹⁰ to come within the protection of the first amendment.

The meaning of the word "used" was the issue in *South Iowa Methodist Homes, Inc. v. Board of Review*.¹¹¹ The statutory exemption was granted to land and buildings used by religious societies. The court was faced with the problem of whether the land and buildings were being "used" while the building was in the process of construction. The purpose of exempting religious institutions, the court said, was to encourage such institutions because they benefited society and lessened the burden on the government. This purpose would not be served by adding to the building costs, so the court ruled that the property was being used in a manner that satisfied the requirements of the exemption statute.¹¹²

A widely watched suit, brought by well-known atheist Madalyn Murray, has produced the most complete and carefully reasoned opinion among the current cases in the area of tax exemption. In *Murray v. Comptroller of the Treasury*,¹¹³ the appellants contended that the exemption of church property from taxation was in violation of the first and fourteenth amendments to the

106 133 N.W.2d at 459.

107 277 Ala. 120, 167 So. 2d 546 (1964).

108 The term "ad valorem tax" means a tax or duty on the value of the article or thing subject to taxation estimated at a certain percent of the valuation of the property. *Pacific Fruit Growers Express v. Oklahoma Tax Comm'n*, 27 F. Supp. 279 (W.D. Okla. 1939).

109 *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

110 277 Ala. 120, 167 So. 2d 546, 551 (1964).

111 136 N.W.2d 488 (Iowa 1965).

112 At the opposite end of the spectrum, a church was able to claim an exemption after it had entered into an agreement to sell the property. The carefully worded agreement enabled the church to retain ownership, possession, and use until they occupied new quarters. *Maricopa County v. North Phoenix Baptist Church*, 409 P.2d 577 (Ariz. Ct. App. 1966).

113 216 A.2d 897 (Md. 1966).

United States Constitution, and also of the Maryland Declaration of Rights.¹¹⁴

The court first found that the appellant taxpayers had standing to sue on the basis of Maryland precedent. Once this was determined, the appellant taxpayers were then entitled to raise federal constitutional questions in this state court action. The first such question considered was that of the equal protection clause of the fourteenth amendment. The Maryland court looked to a pronouncement of the United States Supreme Court which declared that "inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation."¹¹⁵ The court then stated that since all organizations having beliefs in religion were treated uniformly as a class, the equal protection clause was not violated.

Finally, consideration was given to the crux of the case, the first amendment. The appellants contended that the first amendment prohibits the appropriation of public funds to support religious organizations; that exempting them from paying taxes is the same in effect as if direct grants had been made to them; that the "establishment" clause of the first amendment bars not only laws establishing a church, but any law respecting an establishment of religion; and that the Maryland tax exemption is such a law respecting an establishment of religion, because the state cannot do indirectly what it cannot do directly. The court did concede a basic contention of appellants in recognizing that "indubitably, religious organizations benefit from the exemption."¹¹⁶ Moreover, the court admitted that members of the general public pay higher taxes than they would if the exemptions were not granted. As to the appellants' reasoning, the court stated, "Logically, this argument is strong . . . [but] logic is a minion of the law, not its master."¹¹⁷ It then discussed the factors that made this logic less than inexorable.

One factor looked to by the court was history. The widespread presence of exemption laws suggested that the states' policies were the result of a "rationally conceived and deep-seated policy, and not an accidental or vestigial survival of outmoded practices."¹¹⁸ The court noted that the historical argument was not conclusive. Nevertheless, it took refuge in the words of Justice Holmes: "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . ."¹¹⁹

Next, the court noted that in granting the exemption, Maryland did not espouse acceptance of any or all religious bodies. Rather, the exemptions are extended to all property owned by any organization which has definite views about religious beliefs, including those not believing in a Supreme Being, as Buddhists, and even atheists.

The court then considered a general rule as to when a state may give aid without violating the principle of "separation":

114 This contention was rejected by the Court. *Id.* at 902-04.

115 *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937).

116 *Murray v. Comptroller of the Treasury*, 216 A.2d 897, 906 (Md. 1966).

117 *Ibid.*

118 *Id.* at 907, citing Kauper, *The Constitutionality of Tax Exemptions for Religious Activities*, *THE WALL BETWEEN CHURCH AND STATE* 95, 110 (Oaks ed. 1963).

119 *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

A state cannot pass a law to aid one religion or all religions, but state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited. If the primary purpose of the state action is to promote religion, that action is in violation of the Amendment, but if a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion.¹²⁰

With this general rule in mind, the court turned to a consideration of the reasons why the General Assembly of Maryland, acting within its discretion, could have reasonably determined that the exemption was for the general welfare, apart from any benefits that religious organizations derived from it.

Three main reasons were found. The first was that religious organizations, as a major part of their functions, "carry on activities secular in nature, of substantial benefit to the community"¹²¹ Examples given included aid to the poor and aged, day nurseries, and efforts to eliminate racial discrimination. These programs fill public needs, the court said, and save the state the expense of providing the same services. The court concluded that if no exemption were granted to religious organizations for the partial use of their properties for secular purposes, while charitable and other institutions did receive exemptions, serious questions of unconstitutional discrimination could arise.

The second reason that the court found could have motivated the General Assembly was its belief that to tax church owned property would run the risk of contravening the "free exercise" clause. Fear of constitutional restrictions, the court said, is a proper consideration in a legislative exemption.

The third reason, entirely secular in nature, was that the state was encouraging the building and maintenance of houses of worship in order to attract persons to communities to increase the general tax assessment base. The court noted instances of real estate developers donating sites to churches as part of their efforts to attract purchasers to their planned communities. Thus, to effect an increase in the tax base as a result of the building of houses by people attracted by a church is a governmental motive in no way connected with the support or establishment of religion, the court stated. The object sought could not be reasonably attained with equal effect without the grant of tax exemptions to houses of worship.

The Maryland court closed its opinion by stating that it did not decide whether taxation of church owned property would violate the "free exercise" clause of the first amendment. A consideration of that question was unnecessary, as the court held, for the reasons set forth, that the exemption did not violate the "establishment clause," and was constitutional.

The historical basis for the presence of tax exemptions in the United States has been shown.¹²² Modern justifications for exemptions have been developed.

120 *Murray v. Comptroller of the Treasury*, 216 A.2d 897, 906 (Md. 1966).

121 *Id.* at 907.

122 Text accompanying notes 91-100.

Many of these justifications are reflected in the current cases, especially in *Murray v. Comptroller of the Treasury*. Generally, they may be classified under two general theories, the "public burden" theory and the "public benefit" theory.¹²³ The approach taken by the proponents of the public burden theory is that religious institutions deserve to be exempt because they perform many of the burdens that would otherwise devolve upon the state. The theory analogizes to hospitals and other charitable organizations providing services otherwise the burden of the state. It is difficult, however, to see what public burden a church fulfills, as the state is expressly forbidden to propagate sectarian doctrine.¹²⁴ This theory has prompted rather extreme examples as justifications, such as the suggestion that as a result of a church's contribution to the moral standards of the community, the state is relieved of the burden of making excessive expenditures for reformatory and penal institutions.¹²⁵ Closely analogous to the public burden theory is the "humanitarian goals" concept. This concept, which is a justification for exemptions to "drama schools, women's clubs, labor temples, and temperance societies,"¹²⁶ is based on the notion that organizations furthering humanitarian goals deserve the gratitude of the state.¹²⁷

The more convincing justification would seem to be the public benefit theory. This theory states that religious institutions contribute greatly to the moral welfare of society.¹²⁸ Thus, aid to religious institutions enhances "the first element of good government . . . [which is] to promote the virtue and intelligence of the people themselves."¹²⁹

Among the criticisms of the policy of tax exemptions are charges that an exemption is in effect a utilization of public funds to aid religion;¹³⁰ that it places an unfair burden on nonchurch members,¹³¹ and even upon church members when the per capita value owned by one religious society is less than

123 See generally PFEFFER, CHURCH, STATE AND FREEDOM 183-90 (1953); 3 STOKES, *op. cit. supra* note 93, at 418-32; TORPEY, *op. cit. supra* note 94, at 171-97; ZOLLMANN, *op. cit. supra* note 96, at 236-84; Van Alstyne, *supra* note 94.

124 U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."; *Zorach v. Clauson*, 343 U.S. 306 (1952); *Everson v. Board of Education*, 330 U.S. 1 (1947).

125 This argument of the advocates of the public burden theory is cited by STOKES, *op. cit. supra* note 93, at 422.

126 Comment, 5 VILL. L. REV. 255, 268 (1959-60).

127 "The long and the short of it is, gentlemen, that the things that make it worthwhile to live in Massachusetts—to live anywhere in the civilized world—are precisely the things which are not taxed; the things exempted are the things which are in the highest degree profitable to the community, the colleges, museums, churches, schools Let nobody persuade you for a moment that these invaluable reservations from taxation are a burden on the public; they are what makes the common life worth living." From an address in 1906 by Charles W. Eliot, President of Harvard, reported in 3 STOKES, *op. cit. supra* note 93, at 423.

128 South Iowa Methodist Homes, Inc. v. Board of Review, 136 N.W.2d 488 (Iowa 1965); *YMCA v. Douglas County*, 60 Neb. 642, 83 N.W. 924 (1900).

129 MILL, REPRESENTATIVE GOVERNMENT 337 (Great Books of the Western World ed. 1952), noted in Van Alstyne, *supra* note 94, at 463.

130 E.g., Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROB. 144, 147 (1949) ("[T]here is no practical difference between making appropriations and failing to send a tax bill. In either event the church is given aid by the state."); *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 315 P.2d 394, 407 (Dist. Ct. App. 1957) ("A tax exemption is, obviously, an indirect subsidy.").

131 See, e.g., *Lundberg v. County of Alameda*, 46 Cal. 2d 644, 298 P.2d 1, *appeal dismissed sub nom.* Heisey v. County of Alameda, 352 U.S. 921 (1956) (dismissed for want of substantial federal question); *General Finance Corp. v. Archetto*, 176 A.2d 73 (R.I. 1961).

that owned by another;¹³² that the inequalities become more oppressive as the tax burden grows; and that tax exemptions give church-owned businesses a discriminatory advantage over privately owned businesses. Even churches¹³³ and churchmen¹³⁴ have joined in the criticism of exemptions.

It is conceivable that hostility to the exemptions could grow and result in their abolishment. A combination of an increasing dollar amount of tax-exempt property coupled with a rising cost of government could produce widespread dissatisfaction with both the amount and distribution of the tax burden.¹³⁵ That this will happen seems unlikely. The present cases exhibit no trend or recognition of the need for changes in the policies of exemption. As one authority has said, "Despite occasional doubts which have been voiced, and in the teeth of judicial acknowledgments that such exemptions are indeed a substantial form of economic assistance, there seems to be no ground for believing that an assault upon first amendment grounds would succeed today or in the foreseeable future."¹³⁶

The current decisions did refuse to grant exemptions to church-owned businesses which were in direct competition with other commercial enterprises. To ascertain whether this presages complete adoption of this view, which is already the majority view,¹³⁷ will require more decisions, particularly in those jurisdictions which now allow the exemption. In the main, it can be said that the recent decisions reflect no indications of dissatisfaction with the practice of granting tax exemptions to religious institutions, but rather, continue to be in the mainstream of the law. In the light of the current decisions, one can validly agree with Van Alstyne in saying, "[T]he church exemption has weathered the storms of criticism and is today more firmly rooted in American tax policy than ever before."¹³⁸

4. Tort Immunity — *No Longer the Rule*¹³⁹

It is now clear that the eventual demise of charitable immunity is inevitable in almost all jurisdictions.¹⁴⁰ A confusing array of qualifications and exceptions still

132 Comment, 5 VILL. L. REV. 255, 277 (1959-60).

133 The Central Presbyterian Church of Des Moines in 1963 voted to donate \$4,000 to the city, the amount approximately equaling the cost to the city of maintaining the congregation's share of the cost of streets, public safety, and sanitation. Reported in 80 CHRISTIAN CENTURY 1458 (1963). The First Presbyterian Church, Morrison, Illinois, ratified a budget calling for a payment of \$400 to be paid to the county treasurer as a gift in lieu of property taxes on the church manse. The action was in response to that part of the church-state report of the 175th General Assembly of the United Presbyterian Church in the U.S.A. which stated: "Congregations should be encouraged to make contributions to local governments in lieu of taxes, in recognition of services government provides." Reported in 81 CHRISTIAN CENTURY 229 (1964).

134 E.g., statements by Dr. Eugene Carson Blake, in Christianity Today, Aug. 3, 1959, p. 7, and in "Should Church Property Be Taxed," Together, April, 1962, at 28-30.

135 Comment, 5 VILL. L. REV. 255, 277-78 (1959-60).

136 Van Alstyne, *supra* note 94, at 461.

137 Evangelical Covenant Church v. City of Nome, 394 P.2d 882, 883-84 (Alaska 1964).

138 Van Alstyne, *supra* note 94, at 463.

139 It is not within the scope of this survey to examine the entire field of charitable immunity. Only its effect upon church-state relations is considered herein.

140 Only six states imposed full liability upon charitable institutions in 1942. Fisch, *Charitable Liability for Tort*, 10 VILL. L. REV. 71, 91 n.142 (1964). In that year, in the landmark case of President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942), Mr. Justice Rutledge refused to recognize the defense of charitable im-

exists in a number of states.¹⁴¹ At present, however, the only remaining bar to its total elimination from American jurisprudence appears to be the refusal of some states to overrule a doctrine that is so firmly embedded in their case law.¹⁴²

The exemption of charitable institutions from tort liability originated in the dicta of two nineteenth century English opinions.¹⁴³ Though the rule was discarded in England only a short time later,¹⁴⁴ Massachusetts, apparently unaware of this fact, imported charitable immunity into this country in 1876.¹⁴⁵ While several state courts did not adopt the doctrine,¹⁴⁶ it was accepted by the majority of American jurisdictions until quite recently.¹⁴⁷

During the past two years, two state supreme courts summarily rejected attempts to overthrow charitable immunity,¹⁴⁸ but decisions of other courts clearly demonstrate that the "movement toward uniformity through abrogation"¹⁴⁹ is still continuing.

In *Ball Memorial Hospital v. Freeman*,¹⁵⁰ while expressly refusing to rule on the present vitality of the doctrine of charitable immunity in Indiana, the Supreme Court of that state affirmed an award for a plaintiff who was injured when an improperly prepared anesthetic was administered to her while she was a patient in the defendant hospital. Charitable hospitals were held to be liable for injuries caused by the negligent use of instrumentalities employed

munity. Only twenty-three years later, in *Ball Memorial Hosp. v. Freeman*, 196 N.E.2d 274, 278-79 (Ind. 1964), the court noted that the doctrine has now been repudiated in thirty-two jurisdictions.

141 *E.g.*, liability has been recognized when a judgment does not have to be satisfied out of the charity's so-called "trust funds," *Michard v. Myron Stratton Home*, 355 P.2d 1078 (Colo. 1960); when the institution's officers or managing directors, rather than its employees, were negligent, *Bader v. United Orthodox Synagogue*, 148 Conn. 449, 172 A.2d 192 (1961); when the institution was negligent in hiring employees, *Williams v. Randolph Hosp., Inc.*, 237 N.C. 387, 75 S.E.2d 303 (1953); and when the charity negligently placed in the hands of its employees instrumentalities capable of inflicting injury, *Medical & Surgical Memorial Hosp. v. Cauthorn*, 229 S.W.2d 932 (Tex. Ct. Civ. App. 1949).

142 See *Fillipone v. Corporation of the Church of the Immaculate Conception*, 25 Conn. Supp. 242, 202 A.2d 152 (1964); *Harrigan v. Cape Cod Hosp.*, 208 N.E.2d 232 (Mass. 1965). Neither case discussed the merits of continuing to recognize charitable immunity. In response to the argument that only the legislature can abrogate charitable immunity, in *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 208 A.2d 193, 202, 205 (1965), Justice Musmanno replied as follows:

This Court fashioned it, and, what it put together, it can dismantle. . . . *Stare Decisis* channels the law. It erects lighthouses and flies the signals of safety. The ships of jurisprudence must follow that well-defined channel which, over the years, has been proved to be secure and trustworthy. But it would not comport with wisdom to insist that, should shoals rise in a heretofore safe course and rocks emerge to encumber the passage, the ship should nonetheless pursue the original course, merely because it presented no hazard in the past. The principle of *stare decisis* does not demand that we follow precedents which shipwreck justice.

143 *Fofoffes of Heriot's Hosp. v. Ross*, 12 Clark & Fin. 507, 8 Eng. Rep. 1508 (1846); *Duncan v. Findlater*, 6 Clark & Fin. 894, 7 Eng. Rep. 934 (1839).

144 *Mersey Docks Trustees v. Gibbs*, L.R. 11 H.L. 686 (1866).

145 *McDonald v. Massachusetts Gen. Hosp.*, 120 Mass. 432 (1876).

146 *E.g.*, *Durney v. St. Francis Hosp.*, 46 Del. 350, 83 A.2d 753 (1951); *Mulliner v. Evangelischer Diakonissenverein*, 144 Minn. 392, 175 N.W. 699 (1920).

147 Not until 1964 did the *Church-State Survey* announce that the doctrine of charitable immunity is no longer adhered to by a majority of American jurisdictions. *1963-64 Church-State Survey*, *supra* note 1, at 444.

148 *Fillipone v. Corporation of the Church of the Immaculate Conception*, 25 Conn. Supp. 242, 202 A.2d 152 (1964); *Harrigan v. Cape Cod Hosp.*, 208 N.E.2d 232 (Mass. 1965).

149 *1963-64 Church-State Survey*, *supra* note 5, at 448.

150 196 N.E.2d 274 (Ind. 1964).

in treating patients. The court's language is sufficiently broad, however, to suggest that Indiana hospitals would be imprudent to continue to rely upon *any* past exemptions from tort liability. A lengthy dissenting opinion supports this conclusion.¹⁵¹

Another hospital case, *Darling v. Charlestown Community Hospital*,¹⁵² prompted Illinois to abandon its modified acceptance of charitable immunity. The Illinois court held that the liability of charitable institutions is no longer limited to the amount of their insurance coverage. Justice Schaefer concluded that continued adherence to the court's previous rule would enable charitable corporations, by limiting their liability insurance, to determine effectively, not only the limits of their tort liability, but also whether they are to have any funds subject to a judgment at all. Recognizing the impact of its decision—the complete repudiation of the doctrine of charitable immunity—the court specifically held that its ruling is to be applied prospectively, giving previously immune institutions the opportunity to obtain adequate insurance protection.

In two very well-considered opinions, treating all arguments for and against exempting charitable institutions from tort liability,¹⁵³ both Pennsylvania and West Virginia refused to allow the defense against claims by hospital patients.¹⁵⁴ *Flagiello v. Pennsylvania*¹⁵⁵ marks a radical departure from Pennsylvania's firmly established rule of unqualified immunity.¹⁵⁶ While Justice Musmanno focused his argument on the self-sufficient nature of the modern hospital in holding such institutions liable for injuries suffered by paying patients, a scathing dissent by Chief Justice Bell insisted that the decision abrogates immunity for all charitable institutions.¹⁵⁷

In *Adkins v. St. Francis Hospital*,¹⁵⁸ the Supreme Court of West Virginia extended its previous exceptions which impose liability where hospital employees

151 Although the majority opinion purports "not at this time to express any opinion as to whether the charitable immunity doctrine is or is not the law of this state," as applied to charitable hospitals, it occurs to me that, under the facts stated in the majority opinion, it does, in effect, repudiate such doctrine.

Id. at 279.

152 33 Ill.2d 326, 211 N.E.2d 253 (1965).

153 Justifications for the doctrine of charitable immunity include the following: (1) charitable trust funds can be used only for charitable purposes; (2) the doctrine of respondeat superior is inapplicable because charitable organizations do not really benefit from the acts of their employees; (3) one who accepts the benefits of charity waives his right to damages for tortious conduct by the organization or its employees; (4) such organizations are quasi-governmental and, therefore, are entitled to the protection of governmental immunity; and (5) public policy requires that individuals bear the cost of a charity's torts to prevent the diminution of funds otherwise available for charitable purposes. For a succinct discussion of these arguments and their rebuttals, see 1963-64 *Church-State Survey*, *supra* note 1, at 445-46.

154 *Flagiello v. Pennsylvania*, 417 Pa. 486, 208 A.2d 193 (1965); *Adkins v. St. Francis Hosp.*, 143 S.E.2d 154 (W. Va. 1965).

155 *Flagiello v. Pennsylvania*, *supra* note 154.

156 *Michael v. Hahnemann Medical College and Hosp.*, 404 Pa. 424, 172 A.2d 769 (1961). This case was expressly overruled in *Flagiello v. Pennsylvania*, *supra* note 154, at 208.

157 By eliminating charitable immunity for non-profit, charitable hospitals, the majority opinion likewise abolishes it for Churches, schools and universities, homes for the blind, homes for the aged, homes for crippled or retarded or homeless children, . . . and in short for every other charity—small as well as large—and will undoubtedly jeopardize especially in small communities, the very existence of many of them which today, in spite of State and City aid and large charitable gifts, are barely able to make both ends meet.

Flagiello v. Pennsylvania, *supra* note 154, at 210.

158 143 S.E.2d 154 (W. Va. 1965).

are negligently selected¹⁵⁹ and where the plaintiff is a mere stranger or invitee of the hospital.¹⁶⁰ It held that hospitals are liable to all patients for injuries negligently inflicted by their agents or employees. Judge Caplan's opinion persuasively rebutted the basic arguments employed to support charitable immunity, portraying it as a legal anachronism. Despite the narrowness of the court's specific holding, this opinion is an eloquent denunciation of the doctrine generally. It is submitted that *Adkins* leaves the availability of the defense of charitable immunity in serious doubt under any circumstances in West Virginia.

The potential impact of *Flagiello* and *Adkins*, and possibly *Freeman*, becomes more apparent upon an examination of *Friend v. Cove Methodist Church, Inc.*¹⁶¹ In an earlier case, *Pierce v. Yakima Valley Memorial Hosp. Ass'n*,¹⁶² the Supreme Court of Washington rejected the defense of immunity against a claim by a paying hospital patient. Extending this holding, the court in *Friend* reversed the dismissal of a complaint in which the plaintiff sought recovery for injuries sustained on church property after attending a smorgasbord. Relying upon *Pierce*, the court unequivocally abandoned the doctrine of charitable immunity in its entirety. The specific holding of *Pierce* was identical to that of *Flagiello*. Likewise, the opinions in *Pierce*, *Flagiello*, and *Adkins* all contained much dicta attacking the whole concept of charitable immunity. Thus, considering the increasing disfavor with which courts are treating the doctrine, it is submitted that both *Flagiello* and *Adkins* are likely to be similarly extended.

As is apparent from the cases discussed herein, that the institution involved is church-related is of no significance in the judicial treatment of charitable immunity. Religious institutions are subject to the same rules of liability as are all other charities.

Only indirectly can religious institutions even hope to receive any special consideration. If holdings such as those in *Flagiello* and *Adkins* are narrowly construed, small religious corporations might receive the benefits of immunity because they have not yet achieved the same self-sufficiency as the modern hospital. This privilege would not be granted because of their religious affiliation, however. Instead, it would be afforded to all financially insecure charitable institutions that need such consideration because of their particular value to the community they serve. If recognized, such a privilege is likely to be a mere respite from the imposition of full liability for all tortious conduct. It is submitted, however, that such an exception, even if temporary, does not comport with fundamental justice and will not be made, especially in view of the availability of adequate insurance protection.

B. Education

1. Religion in the Schools — *Confusion*

Prior to the Supreme Court's decision in *Engel v. Vitale*¹⁶³ and *School*

159 *Roberts v. Ohio Valley Gen. Hosp.*, 98 W. Va. 476, 127 S.E. 318 (1925).

160 *Koehler v. Ohio Valley Gen. Hosp.*, 137 W. Va. 764, 73 S.E.2d 673 (1952).

161 396 P.2d 546 (Wash. 1964).

162 43 Wash.2d 162, 260 P.2d 765 (1953).

163 370 U.S. 421 (1962).

Dist. of Abington Township v. Schempp,¹⁶⁴ various religious exercises were conducted in a large number of American schools,¹⁶⁵ despite the tenuousness of the constitutional basis of such activities. These two decisions made it quite clear that most, if not all, of these exercises are unconstitutional.

In *Engel*, the Court invalidated a New York statute authorizing district boards of education to direct the opening of each school day with a brief, non-denominational prayer composed by the State Board of Regents.¹⁶⁶ Though no student was required to participate in the prayer or be present during its recitation, the Court held that such use of a public school system constitutes an establishment of religion in violation of the first amendment to the United States Constitution.¹⁶⁷

In *Schempp*, the Court held that state laws providing for Bible reading and recitation of the Lord's Prayer in public schools are unconstitutional. It was in this case that the Court elucidated its criterion for determining the validity of legislation under the establishment clause:

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.¹⁶⁸

The full import of this test cannot be appreciated without a consideration of the Court's definition of the word "religion." In *Torcaso v. Watkins*,¹⁶⁹ the Court unequivocally extended the religious guarantees embodied in the first amendment to non-theistic religious and philosophical beliefs:

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and *neither*

164 374 U.S. 203 (1963).

165 Shortly before the Court's decision in *Engel*, a nationwide survey of 2183 school principals and district supervisors was conducted. 87.92% of the school system observed religious holidays with some type of activity in their schools, 86.84% conducted baccalaureate services in connection with high school graduations, 42.74% permitted the distribution of Gideon Bibles in their schools, 41.74% allowed Bible reading to be conducted, and 33.16% held homeroom devotional services. *Hearings on Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools Before the Committee on the Judiciary of the House of Representatives*, 88th Cong., 2d Sess., ser. 9, pt. 3, at 2424, 2422, 2429, 2418, 2420 (1964) [hereinafter cited as *House Hearings on School Prayers*]. For a collection of 27 charts on various other religious practices in public schools and on the attitudes of school officials who responded to the survey, see *House Hearings on School Prayers*, pt. 3, at 2413-40.

166 In *Engel v. Vitale*, 370 U.S. 421, 422 (1962), the Court quoted the prayer as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

167 The first amendment to the United States Constitution reads in part as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Supreme Court applied the establishment and free exercise clauses to the states via the fourteenth amendment.

168 *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963).

169 367 U.S. 488 (1961).

*can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.*¹⁷⁰ [Emphasis added.]

In an accompanying footnote, the Court included within the class of non-theistic beliefs Buddhism, Taoism, Ethical Culture, Secular Humanism, "and others."¹⁷¹

Initial adverse reaction to the *School Prayer Cases* was widespread.¹⁷² A concerted campaign to overturn the Court's decisions reached its climax in April, 1964, when the House Judiciary Committee opened hearings on 154 proposed constitutional amendments.¹⁷³ By early June, however, the more prudent counsel of many very prominent legal scholars and religious leaders was heeded,¹⁷⁴ averting a favorable committee report on any of the proposals.

Agitation for a constitutional amendment has apparently subsided, and several states have insisted upon full observance of the law as enunciated in *Engel* and *Schempp*.¹⁷⁵ Nevertheless, there is evidence of a continued refusal by some states and local school authorities to comply.¹⁷⁶ During the past two

¹⁷⁰ *Id.* at 495.

¹⁷¹ *Id.* at n.11.

¹⁷² See Beane and Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, 13 J. PUB. L. 475 (1964). The House Committee on the Judiciary received numerous petitions for a constitutional amendment, some with as many as 120,000 signatures. *House Hearings on School Prayers*, pt. 1, at 253, 340, 400. Gallup Polls of a number of congressional districts indicated that between 80% and 90% of the general public favored an amendment between September, 1963 and April, 1964. *House Hearings on School Prayers*, pt. 2, at 988. On July 3, 1964, the Governors' Conference at Hershey Pa., unanimously voted their support for such an amendment, with only one abstention—Governor Rockefeller of New York. Beane and Beiser, *supra* at 481.

¹⁷³ These proposals are printed in full in *House Hearings on School Prayers*, pt. 1, at 1-59. The best known of these proposed amendments is the Becker Amendment, H.R.J. Res. 693, 88th Cong., 1st Sess. (1963). It is named after its staunchest supporter, Congressman Becker of New York, and is printed in *House Hearings on School Prayers*, pt. 1 at 22 as follows:

"SECTION 1. Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or biblical scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, or place.

"SEC. 2. Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.

"SEC. 3. Nothing in this article shall constitute an establishment of religion.

"SEC. 4. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress."

¹⁷⁴ On June 8, 1964, 223 law school Deans and teachers of constitutional law submitted a signed letter to the House Judiciary Committee urging "that Congress approve no measures to amend the first amendment in order to overrule these decisions." *House Hearings on School Prayers*, pt. 3, at 2483, 2484. In March, 1964, an ad hoc committee of Protestant and Jewish religious leaders and civil liberties groups was organized to oppose the Becker Amendment. By the end of the Hearings, both Protestant and Catholic leaders had moderated their previous adamant opposition to the Court's rulings. Beane and Beiser, *supra* note 172, at 484, 497-500.

¹⁷⁵ Beane and Beiser, *supra* note 172, at 489; 44TH ANNUAL REPORT OF THE AMERICAN CIVIL LIBERTIES UNION 36 (1964).

¹⁷⁶ Beane and Beiser, *supra* note 172, at 486-91. A survey conducted in Kentucky disclosed that only 61 of 177 school districts had discontinued prayer and Bible reading. 44TH ANNUAL REPORT OF THE AMERICAN CIVIL LIBERTIES UNION 36(1964). Another survey of 227 Indiana public school superintendents indicated widespread non-compliance in that state. As of April, 1964, Bible reading was still permitted or practiced in one-third of the districts, and about one-half permitted or practiced the recitation of the Lord's Prayer. Hill, *Religion and Public Schools: Policy and Practice in Indiana*, INDIANA UNIVERSITY SCHOOL OF EDUCATION RESEARCH BULLETIN No. 14 (April 1964).

years, however, decisions of federal and state courts, summarily invalidating legislation similar to that held unconstitutional in the *School Prayer Cases*, leave no doubt that full compliance with the Court's mandate is inevitable.¹⁷⁷

One recent case can only intensify the present controversy over the proper application of the *Schempp* test.¹⁷⁸ In *Stein v. Oshinsky*,¹⁷⁹ the plaintiffs sought a mandatory injunction to require school officials to afford their children the opportunity to pray in school.¹⁸⁰ Finding that participation in the prayers was completely voluntary and that the exercise was not prescribed by any law, the district court granted the injunction. On appeal, the Second Circuit reversed, directing a judgment dismissing the plaintiffs' complaint. While expressing serious doubts that even permitting the recitation of prayers in public schools is constitutional, the court held that New York is under no obligation to tolerate the practice: "After all that the states have been told about keeping the wall between church and state . . . high and impregnable, . . . it would be rather bitter irony to chastise New York for having built the wall too tall and too strong."¹⁸¹

The plaintiffs in *Stein* were relying upon the free exercise clause. In denying their claim, the court inadvertently sanctioned an establishment of religion under *Schempp*. If the Supreme Court has truly recognized Ethical Culture, Secular Humanism, and other non-theistic religions and philosophies as entitled to the full protection of the first amendment's free exercise guarantees, then these schools of thought are also subject to that amendment's proscription of their establishment. In prohibiting any manifestation of a theistic belief, New York arguably took affirmative action with the "purpose and primary effect"¹⁸² of advancing another religion, *i.e.*, Secular Humanism.¹⁸³

In holding as it did, the court expressly refrained from answering the question that should have been determinative of the case: did the religious exercises of the plaintiffs constitute an abridgement of the free exercise rights of non-participating school children? Since the children involved were in kindergarten and probably no more than five or six years of age, there is a definite

177 *Chamberlin v. Dade County Bd. of Pub. Instruction*, 377 U.S. 402 (1964) (per curiam); *Johns v. Allen*, 231 F. Supp. 852 (D. Del. 1964); *Adams v. Engelking*, 232 F. Supp. 666 (D. Idaho 1964); *Attorney Gen. v. School Comm.*, 347 Mass. 775, 199 N.E.2d 553 (1964); *Sills v. Board of Educ.*, 42 N.J. 351, 200 A.2d 615 (1964).

178 See text accompanying notes 168-171 *supra*.

179 348 F.2d 999 (2d Cir. 1965), *cert. denied*, 382 U.S. 957 (1966).

180 The Second Circuit quotes the two prayers that were recited as follows:

God is Great, God is Good and We
Thank Him for our Food, Amen!

Thank You for the World so Sweet,
Thank You for the Food We Eat,
Thank You for the Birds that Sing—
Thank You, God, for Everything.

Id. at 1000.

181 *Id.* at 1002.

182 Text accompanying note 168 *supra*.

183 In *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963), the Court recognized the possibility of state action constituting an establishment of secularism and specifically condemned such a result: "We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'"

possibility that the student-initiated prayers required active teacher participation. Any voluntary religious observation must be accompanied by safeguards to protect subtle infringements upon the rights of those children who do not adhere to the particular faith manifested. They must be free from any coercion to participate, no matter how subtle such pressure may be.¹⁸⁴ If the religious observances practiced in *Stein* are objectionable, it is because they were not accompanied by conscientious efforts to protect the rights of children having no desire to participate. However, if such rights were not infringed and if the prayers were truly initiated by the students, it is submitted that the Supreme Court's test in *Schempp* precluded the school officials from proscribing the prayers in *Stein*.¹⁸⁵

Sensitive to the above considerations, in *Reed v. Vanhove*,¹⁸⁶ one federal district court judge made a very carefully reasoned attempt to balance the strictures of the establishment clause with the demands of all children and their parents to be provided the protection of the free exercise clause. The plaintiffs sought to enjoin all religious activities conducted in the public schools attended by their children. Judge Fox resorted to the so-called "accommodation principle" of *Zorach v. Clauson*¹⁸⁷ in refusing to issue the injunction. He suggested a rather detailed plan designed to insure the neutrality of the school authorities with respect to religion while guaranteeing both the rights of school children wishing to manifest their religious beliefs and the rights of those wishing to refrain from any religious observances. The basic requirements of Judge Fox's proposal are the following: (1) Students desiring to pray or read Scripture before or after school begins should be allowed to meet in rooms other than their home rooms; (2) Such exercises should be completed at least five minutes before regularly scheduled classes or should not be given until at least five minutes after the completion of the regular school day; (3) No bells should

184 In a legal memorandum prepared at the request of former Representative John V. Lindsay of New York, the following observation was made:

Behavioral scientists have pointed out that children place great importance on how they are esteemed by their classmates. The urge to conform is extremely strong and the fear of being "different" is liable to cause them to emulate a majority that they are convinced are wrong.

House Hearings on School Prayers, pt. 3, at 2768. While teacher participation in prayers presents an establishment issue, more subtle pressures to conform raise the question of the State's affirmative obligation to protect its citizens' freedom of religion from infringement by other citizens. Though the holdings in *Engel* and *Schempp* were based on the establishment clause, the Court manifested a concern for any indirect compulsion upon non-participants to take part in a religious exercise. *Engel v. Vitale*, 370 U.S. 421, 431 (1962); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 221-22 (1963). Without passing on the question, Judge Friendly in *Stein* intimated that the plaintiffs' children were under indirect pressure to participate in the prayers. *Stein v. Oshinsky*, 348 F.2d 999, 1001 (2d Cir. 1965), *cert. denied*, 382 U.S. 957 (1966).

185 See note 183 *supra*.

186 237 F. Supp. 48 (W.D. Mich. 1965).

187 343 U.S. 306, 313-14 (1952). The principle was stated as follows:

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.

The present vitality of this principle is suspect in light of the Court's decisions in *Engel* and *Schempp*. However, the same type of accommodation between the establishment clause and the free exercise clause may be necessary if the Court is to implement the protections afforded by both. In *Reed*, Judge Fox is also seeking this latter type of accommodation, though he does not say so expressly.

be rung to indicate the beginning or ending of such periods; (4) The teachers' only function during the exercise of such rights should be to keep discipline.¹⁸⁸ The court also held that during the class day, historical documents may be read, patriotic songs sung, and the pledge of allegiance recited on a voluntary basis.¹⁸⁹ Judge Fox emphasized, however, that he was not making any final disposition of the case and that he would consider the issuance of an injunction if his proposals were not adhered to.

While the suggested accommodation in *Reed* scrupulously attempts to circumvent the likelihood of indirect pressure being exerted upon children who do not wish to join in the religious exercises of their classmates, it still relies upon teachers to keep order and allows the use of public school property. Judge Friendly suggested in *Stein* that such facts give rise to an inference of state approval of the particular religious exercise.¹⁹⁰ However, one might just as reasonably ask if the refusal to allow student-initiated prayers under the safeguards of the *Reed* plan does not just as readily give rise to an inference of state hostility toward religion.¹⁹¹ *Schempp* commands that the state refrain from inhibiting or advancing religion, and to the Supreme Court, religion includes what traditionally has been regarded as non-religion. Thus, in cases like *Reed* and *Stein*, unless the religious freedom of non-participants can be protected only by prohibiting the religious exercise that is challenged, the state must maintain a complete hands-off policy. Adopting this approach, which it is submitted is required by *Engel* and *Schempp*, only the results, not the reasoning, in *Reed* and *Stein* can be reconciled.

In addition to refusing *certiorari* in *Stein*, in *Lewis v. Allen*¹⁹² the Supreme Court similarly rejected another opportunity to clarify the confusion engendered by its *School Prayer* decisions. *Lewis* raised the problem of the extent to which those decisions require the state to remain neutral between religion and non-religion in matters other than prayers and Bible readings. Prior to *Engel*, the plaintiff had challenged a regulation by the New York Commissioner of Education authorizing the recitation of the pledge of allegiance in public schools. The plaintiff contended that the inclusion of the words "under God" was a violation of the establishment clause. The New York Court of Appeals affirmed a dismissal of the plaintiff's complaint without writing an opinion.

The Supreme Court's refusal to pass on this question has been interpreted by some to mean that its holdings in *Engel* and *Schempp* will not be extended.¹⁹³

188 *Reed v. Vanhoven*, 237 F. Supp. 48, 54-56 (W.D. Mich. 1965).

189 *Cf.*, in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963), the Court stated the following: "Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."

190 *Stein v. Oshinsky*, 348 F.2d 999, 1001 (2d Cir. 1965), *cert. denied*, 382 U.S. 957 (1966).

191 In *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), the Court stated the following: "But we find no constitutional requirement 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." Under *Schempp*, it is clear that not only *can* the government refrain from such activities, but it is constitutionally obligated to do so.

192 14 N.Y.2d 867, 200 N.E.2d 767, 252 N.Y.S.2d 80, *cert. denied*, 379 U.S. 923 (1964).

193 *Wall St. Journal*, Nov. 24, 1964, p. 2, col. 2. This article began with the following statement: "Although it didn't put anything in writing, the Supreme Court appears to have signaled that there are limits to its demand for separation of church and state."

It is clear, however, that the test in *Schempp* is violated by a congressional enactment¹⁹⁴ ordering the inclusion of "under God" in a pledge of allegiance. It cannot be seriously contended that such legislation had *any* purpose or effect other than the advancement of religion.¹⁹⁵ Very possibly, realizing that its previous decisions dictated a reversal of *Lewis*, the Court refused to review the decision because of a sensitivity to the adverse reaction to *Engel* and *Schempp*.¹⁹⁶

On their particular facts, the decisions in *Engel* and *Schempp* were consistent with the first amendment as it must be interpreted in light of the great diversity of religious beliefs and non-beliefs in our present pluralistic society.¹⁹⁷ Unfortunately, the test in *Schempp* provides the basis for eliminating many, if not all, of our public recognitions of man's dependence upon God. In his concurring opinion in *Engel*, Justice Douglas listed numerous public manifestations of a belief in God and unequivocally stated that they all are prohibited by the first amendment.¹⁹⁸ Concurring in *Schempp*, Justice Brennan denied that such a conclusion necessarily follows.¹⁹⁹ However, applying the test embodied in the majority opinion in *Schempp*, it seems clear that at least some of the practices enumerated by Justice Douglas are clearly proscribed under the Court's present criterion of constitutionality.²⁰⁰ Nevertheless, in affording the guarantees of the first amendment to non-theistic religions and philosophies, the Court can and must avoid the extreme of completely secularizing American public life.²⁰¹ Not only would such a result prove unpalatable to the vast majority

194 68 Stat. 249 (1954), 36 U.S.C. § 172 (1964).

195 See text accompanying note 168 *supra*.

196 See notes 172-74 and accompanying text, *supra*.

197 There are presently over 83 different religious denominations in this country with a membership in excess of 50,000. *House Hearings on School Prayers*, pt. 3, at 2217.

198 *Engel v. Vitale*, 370 U.S. 421, 439-41 (1962).

199 *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 303 (1963).

200 *E.g.*, the Act of Congress declaring "In God we trust" the national motto of the United States, 70 Stat. 732 (1956), 36 U.S.C. § 186 (1964); the Act of Congress ordering the President to set aside each year a National Day of Prayer "on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals," 62 Stat. 64 (1952), 36 U.S.C. § 185 (1964). Justice Douglas even suggested that the adoption of the Star Spangled Banner as our national anthem by Act of Congress, 46 Stat. 1508 (1931), 36 U.S.C. § 170 (1964), was among those activities that are unconstitutional under the establishment clause, *Engel v. Vitale*, 370 U.S. 421, 441 n.5 (1962). New York school officials recently banned the singing of the fourth stanza of "America" upon the complaint that it abridged the religious freedom of a sixteen-year-old high school student. *Chicago Sun Times*, Dec. 4, 1965, p. 4, col. 1. One legal brief submitted to the House Judiciary Committee in support of a constitutional amendment went to the extreme of suggesting that the logic of the *School Prayer* decisions requires that "we will have to abandon 'A.D.' appearing on most of our legal documents for the simple reason that this recognizes that it is done 'in the year of our Lord.'" *House Hearings on School Prayers*, pt. 1, at 299.

201 While it is difficult to see upon what legal grounds the Court refused to review and reverse *Lewis v. Allen*, 14 N.Y.2d 867, 200 N.E.2d 767, 252 N.Y.S.2d 80, *cert. denied*, 379 U.S. 923 (1964), attempts to invalidate the practices listed in note 200 *supra* present the serious obstacle of establishing standing to sue. The Supreme Court no longer insists that parties have some direct pecuniary interest in the litigation. *House Hearings on School Prayers*, pt. 3, at 2768-69. In *Schempp*, however, the Court emphasized that the "parties here are school children and their parents, who are *directly* affected by the laws and practices against which their complaints are directed." [Emphasis added.] *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 224 n.9 (1963). Thus, while the logic of the Court's decisions does reach such activities, absent some contention that the enactments *directly* infringe upon property rights or constitutionally guaranteed liberties, future attacks are likely to be summarily dismissed by the Court. In *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923), the Court made the following statement:

We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justifica-

of the nation,²⁰² but it would itself constitute the establishment of a religion in violation of the first amendment.

2. Aid to Parochial Education — *A New Era*.

In 1960, the Survey discerned a "growing favoritism toward providing the usual governmental services to . . . schools of . . . religious institutions."²⁰³ During the next four years, conflict over whether or not such aid should be provided constituted the major obstacle to the passage of any federal legislation for the benefit of primary and secondary school children.²⁰⁴ As a result, the 1964 Survey concluded that "the present disposition of Congress, in light of the constitutional uncertainty, is not conducive to a conclusive answer to the major question of the federal government's role in assisting parochial education."²⁰⁵ During the past two years, however, the recent shift in public opinion toward favoring equal treatment of all children, regardless of the schools they attend,²⁰⁶ has had an impact not only upon Congress but upon state legislatures as well.²⁰⁷

a. State Legislation

Some important legislation has already been lobbied. Efforts to obtain equal bus transportation have been the most successful.²⁰⁸ In addition, New

tion for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. . . . The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

The present vitality of this principle was recognized in *Schempp* wherein the Court distinguished *Doremus v. Board of Educ.*, 342 U.S. 429 (1952), which dismissed an appeal to an attack upon Bible reading because the plaintiffs no longer had children in the school. *School Dist. of Abington Township v. Schempp*, *supra* at 224 n.9. Concurring in *Engel*, Justice Douglas cited *Frothingham* as depriving taxpayers of standing to challenge certain religious activities in federal courts. *Engel v. Vitale*, 370 U.S. 421, 441 n.6 (1962).

202 See notes 172-73 and accompanying text *supra*.

203 1958-60 *Church-State Survey*, part I, *supra* note 1, at 418.

204 1963-64 *Church-State Survey*, *supra* note 1, at 453.

205 *Id.* at 457.

206 A 1961 Gallup Poll reported only 36% of the population in favor of federal aid to children attending church-related schools. By 1963, 49% favored such aid with 7% expressing no opinion. In the later poll, therefore, 53% of those expressing an opinion supported aid to children in parochial schools. BLUM, *FREEDOM IN EDUCATION: FEDERAL AID FOR ALL CHILDREN* 197 (1965). A recent survey of principals and directors of Jewish day schools indicated that 90% favored federal aid for secular subjects taught in church-related schools. BLUM, *op. cit. supra* at 203. For an indication of Protestant support for federal legislation that makes benefits available to children in parochial schools, see 111 CONG. REC. 5565 (daily ed. Mar. 24, 1965).

207 This transition in public opinion has been accompanied by the growth of organizations devoted to obtaining state aid for nonpublic school children. The most active and effective of these organizations has been the Citizens for Educational Freedom (CEF), which has been described as a "non-sectarian, non-partisan, non-profit civic organization whose purpose is to achieve freedom in education through the democratic process." BLUM, *op. cit. supra* note 206, at 204. As of October, 1965, the beginning of a new membership drive, CEF had over 16 state federations and over 1000 local chapters. *Freedom in Education*, Sept.-Oct. 1965, pp. 1, 3. Another organization with apparently the same basic philosophy is National Association for Personal Rights in Education (NAPRE). *School Prayer Hearings*, pt. 3, at 2368-70. Both of these groups are emphatic in their insistence that they do not seek governmental aid for any parochial schools. They do demand that such aid go to *all children*, not just those attending public institutions.

208 *E.g.*, Pennsylvania enacted a statute providing bus transportation for nonpublic school children along established routes to and from points most convenient to the schools they

York enacted a law enabling private elementary and secondary school children to borrow without charge textbooks approved for use in the public schools of that state,²⁰⁹ and Michigan passed a comprehensive "auxiliary services bill" which insures the availability of a number of educational services to all children in both public and private schools.²¹⁰

The constitutional validity of at least some of this legislation will not go unchallenged.²¹¹ The governor of Delaware vetoed one bus transportation bill²¹² after an advisory opinion by the Delaware Supreme Court held the bill violative of the state constitution,²¹³ which specifically proscribes the use of state funds to aid church, denominational or sectarian schools.²¹⁴ The effect of this decision, however, is likely to be overruled by a constitutional amendment that has already passed the Delaware legislature once by a substantial margin.²¹⁵

The obvious intent of such legislation is not to aid parochial schools but to guarantee that all school children are afforded a share in publicly financed welfare and educational services. It is based upon the so-called "child benefit" theory of *Everson v. Board of Education*²¹⁶ and *Cochran v. Louisiana State Board of Educ.*²¹⁷ In the former, the Supreme Court upheld a New Jersey statute providing bus transportation to public and parochial school children;²¹⁸ in the latter, it upheld a Louisiana statute providing them with free textbooks.²¹⁹ At

attend. Act of March 10, 1949, P.L. 30, art. XIII, § 1361, as amended, Act No. 91, H.B. 381, July 1, 1965. Ohio's new law provides bus transportation on an equal basis for all children attending schools meeting state educational requirements. OHIO REV. CODE ANN. § 3327.01 (Page Supp. 1965).

209 N.Y. EDUC. LAW § 701 (McKinney Supp. 1965).

210 Among the benefits provided are the following: National Defense Education Act testing, speech correction services, visiting teachers for delinquent and disturbed children, school diagnostician and teacher counselor services for all mentally handicapped children, remedial reading, and "such other services as may be determined by the legislature." MICH. STAT. ANN. § 15.3622 (Supp. 1965). During the same session, Michigan also passed "AN ACT to protect the public health of school children by providing health examinations and services on an equal basis to children attending public and non-public elementary and secondary schools." MICH. STAT. ANN. § 14.379(1) (Supp. 1965).

211 Suits challenging the Pennsylvania bus transportation statute, Act of March 10, 1949, P.L. 30, art. XIII, § 1361, as amended, Act No. 91, H.B. 381, July 1, 1965, have already been instituted. Comment, *The School Bus Law: Transportation of Parochial and Private School Pupils in Pennsylvania*, 27 U. PITT. L. REV. 71, 73 (1965).

212 Wilmington Morning News, Feb. 2, 1966, p. 1, col. 1.

213 Opinion of the Justices, 216 A.2d 668 (Del. 1966).

214 DEL. CONST. art. 10, § 3.

215 The amendment passed both houses of the Delaware legislature by December, 1965, and will become effective if approved by the General Assembly in 1967 or 1968. It provides that the existing constitutional ban on aid to parochial schools "shall not prevent the General Assembly from providing for the transportation of students of nonpublic elementary and high schools not operated for profit." Wilmington Morning News, Dec. 3, 1965, p. 16, col. 2.

216 330 U.S. 1 (1947).

217 281 U.S. 370 (1930).

218 Speaking for the Court in *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947), Justice Black stated the following: "[W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious beliefs."

219 In upholding the Louisiana statute in *Cochran v. Board of Educ.*, 281 U.S. 370, 374-75 (1930), the Court approvingly quoted the following statement of the Louisiana Supreme Court:

The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost,

present, these decisions represent the law regarding the constitutionality of aid to nonpublic school children. However, as the Delaware decision demonstrates, more formidable obstacles to such legislation are the provisions of many state constitutions which impose more rigid limitations on church-state relations.²²⁰ Since *Everson*, only two state supreme courts passing on the validity of similar legislation have rendered decisions favorable to nonpublic school children.²²¹ In contrast, six states have now invalidated such legislation on the basis of their state constitutions.²²²

b. Federal Legislation

By far the most significant recent development in the area of aid to nonpublic school children was the passage of the Elementary and Secondary Education Act of 1965.²²³ While there are numerous statutes authorizing federal expenditures for private school students and the institutions they attend,²²⁴ none has provided for such extensive and imaginative uses of federal funds, nor has any placed so much emphasis on the elementary and secondary levels.

Under Title I of the Act,²²⁵ over one billion dollars has been made available to help local school districts broaden and strengthen public school programs where there are concentrations of educationally disadvantaged children. The distribution of funds is based upon the percentage of low-income families in the area in question. Though the Act does not detail the uses that can be made of such funds, Congress has provided numerous suggestions.²²⁶ The following are a few: teacher aids and instructional materials; guidance services

whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them.

220 "State Law Relating to Transportation and Textbooks for Parochial School Students, and Constitutional Protection of Religious Freedom" and summary of state constitutions contained therein. *Hearings on H.R. 6074 Before the Ad Hoc Committee on Study of Shared-Time Education of the House Committee on Education and Labor*, 88th Cong., 2d Sess. 424 (1964) [hereinafter cited as *Shared Time Hearings*].

221 *Snyder v. Town of Newton*, 147 Conn. 374, 161 A.2d 770 (1960); *Quinn v. School Comm'n*, 332 Mass. 410, 125 N.E.2d 410 (1955).

222 *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961); *Opinion of the Justices*, 216 A.2d 668 (Del. 1966); *McVey v. Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (1953); *Board of Educ. v. Antone*, 384 P.2d 911 (Okla. 1963); *Visser v. Nooksack Valley School Dist.* No. 506, 33 Wash.2d 699, 207 P.2d 198 (1949); *State ex rel. Reynolds v. Nusbaum*, 17 Wis.2d 148, 115 N.W.2d 761 (1962).

223 79 Stat. 27 (1965) (codified in scattered sections of 20 U.S.C. Supp. 1965). Full treatment of this statute is beyond the scope of this survey. Only the three titles most relevant to church-state relations are herein considered. For a summary and explanation of all six titles, see U.S. Dep't of Health, Educ. and Welfare, *"The First Work of These Times . . ."*—A Description and Analysis of the Elementary and Secondary Education Act of 1965 [hereinafter cited as *Dep't of Health, Educ. and Welfare Summary*].

224 E.g., special milk programs, 68 Stat. 899 (1954), 7 U.S.C. § 1446(c) (1964); National Defense Loan Program, 72 Stat. 1583 (1958), as amended, 20 U.S.C. § 421 (1964); loans for scientific and language equipment, 72 Stat. 1590 (1958), as amended, 20 U.S.C. § 445 (1964); language centers, 72 Stat. 1593 (1958), as amended, 20 U.S.C. § 511(a), (1964); national school lunch program, 60 Stat. 230 (1946), 42 U.S.C. § 1751 (1964). For a list of approximately 40 similar federal provisions, see Rafalko, *The Federal Aid to Private School Controversy; A Look*, 3 Duq. L. Rev. 211, 219-22 (1965). For a listing of federal funds available to religious institutions generally, see *Shared Time Hearings* 32.

225 79 Stat. 27 (1965) (codified in scattered sections of 20 U.S.C.A. Supp. 1965).

226 For a specification of over 40 possible programs that can be financed under this title, see S. REP. No. 146, 89th Cong., 1st Sess. (1965), republished in 1965 U.S. CODE CONG. & AD. NEWS 1446, 1455-56 (1965); H.R. REP. No. 143, 89th Cong., 1st Sess. 6-7 (1965) [hereinafter cited as *House Report on ESEA*].

for pupils and families; supplemental health, psychiatric, and food services; provisions for books, shoes, and clothing where necessary; mobile learning centers; scheduling of concerts, dramas, lectures, and exhibits; school bus transportation; and dual enrollment or shared time programs.²²⁷ Local educational agencies may receive basic grants and special incentive grants to implement such programs if their applications are approved by their state educational authorities and if they meet certain conditions. One of these conditions is to insure that children enrolled in private elementary and secondary schools will be included in all special educational programs for which they are otherwise qualified. At the same time, however, a guarantee must be received from the local school authorities that all funds and title to all property derived therefrom will be kept in a public agency and will be administered by that agency. To provide the incentive for meeting these requirements, the Commissioner of Education is authorized to withhold funds from any state that fails to comply with all conditions.

The authorization of one hundred million dollars to improve library resources and to supply textbooks and other instructional materials is provided for in Title II.²²⁸ The same establishment safeguards found in Title I are also contained in this title. State agencies must retain ownership of all property purchased with federal funds. They must also provide assurances that such materials will be made available "on an equitable basis for the use of children and teachers in private elementary and secondary schools . . . which comply with the compulsory attendance laws of the State or are otherwise recognized by it through some procedure customarily used in the State."²²⁹ This condition is qualified to the extent that the distribution of such materials must be consistent with state law. As has been noted, some state constitutions have been interpreted to demand quite stringent prohibitions of any state assistance to nonpublic school children.²³⁰ Nevertheless, after exhaustive study of the problem, the House Report suggested that if the states employ central depositories for the distribution of instructional materials, all states should be able to administer this title in conformity with state law.²³¹ If for some reason a state does not make such materials available to all children, the Commissioner of Education is authorized to take appropriate measures to guarantee their equitable distribution. The cost of such additional machinery is to be deducted from that state's fiscal allotment.

Title III²³² provides one hundred million dollars for supplemental educational centers and services. A number of specific projects are suggested,²³³ but

227 For a list of over 60 programs suggested by local school superintendents of 8 selected states, see *Hearings on H.R. 2361 and H.R. 2362 before the General Subcommittee on Education of the House Committee on Education and Labor*, 89th Cong., 1st Sess., pt. 1, at 112-13 (1965) [hereinafter cited as *House Hearings on ESEA*].

228 79 Stat. 36 (1965), 20 U.S.C.A. §§ 821-827 (Supp. 1965).

229 79 Stat. 37 (1965), 20 U.S.C.A. § 823(a)(3)(B) (Supp. 1965).

230 See note 220 *supra*.

231 After stating that "the committee has taken care to assure that funds provided under this title will not enure to the enrichment or benefit of any private institution," *House Report on ESEA* 13, the committee suggested the establishment of such central depositories to be operated on approximately the same basis as the typical public library.

232 79 Stat. 39 (1965), 20 U.S.C.A. §§ 841-48 (Supp. 1965).

233 *E.g.*, guidance and counseling services; remedial instructions; physical education and

considerable flexibility is supplied by the authorization of "other specially designed educational programs."²³⁴ Additional proposals of the Department of Health, Education and Welfare include offering specialized instruction in advanced sciences, foreign languages, and other subjects, and employing such community cultural resources as orchestras, theaters, museums, and planetariums.²³⁵ A guarantee that all these services be made available to nonpublic school children on an equal basis is required before the Commissioner of Education can authorize any requested grant. Congress deliberately used the words "services" and "centers" to enable local educational agencies to meet this requirement imaginatively and without allowing the furnishing of equipment and personnel to "inure to the enrichment of any private institution."²³⁶

The intent of Congress to make the benefits of the Elementary and Secondary Education Act of 1965 available to all children is expressed quite unequivocally. Moreover, in a recent letter to Title I Coordinators, the Office of Education made it clear that this intent must be implemented in substance and not merely in form.²³⁷ Initial reluctance of some local educational agencies to provide the necessary assurances²³⁸ should subside in at least some areas as the growing drive to obtain welfare legislation for nonpublic school children gains momentum.²³⁹ Nevertheless, opponents of such measures, emboldened by the Supreme Court's recent decisions²⁴⁰ which seem to add height to the metaphorical wall separating church and state, are likely to challenge the Act as prohibited by the establishment clause of the first amendment.²⁴¹ While the Act contains specific provisions prohibiting its unconstitutional application²⁴² and while there appears to be a consensus that as written it does not violate the establishment clause,²⁴³ constitutional attacks will probably be presented

recreational services; psychological and social work services; dual enrollment (shared time) programs; modern educational equipment, including mobile services and television instruction. 79 Stat. 41 (1965), 20 U.S.C.A. § 843 (Supp. 1965).

234 79 Stat. 41 (1965), 20 U.S.C.A. § 843(b)(8) (Supp. 1965).

235 *Dep't of Health, Educ. and Welfare Summary* 6.

236 *House Report on ESEA* 17.

237 In this letter of February 14, 1966, on file in the *Notre Dame Lawyer* office, John F. Hughes, Director of the Division of Programs Operations, advised Title I Coordinators that proposals thus far submitted for approval lacked sufficiently detailed explanations of their provisions for the participation of private school children. The Coordinators were informed that such applications were to be treated as incomplete. In addition, they were instructed that services must meet the "comparability" factor both as to the type of program and the convenience of its availability.

238 *Ibid.* In late February, 1966, after a study of proposals submitted to the Office of Education under Title I, CEF Assistant Director Edward L. Goldman concluded that they completely lacked information as to what benefits will be available to nonpublic school children. Letter to the *Notre Dame Lawyer*, March 2, 1966.

239 See notes 206 and 207 *supra*.

240 See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

241 Since the Michigan "auxiliary services bill" so closely parallels the Elementary and Secondary Education Act of 1965, a recently initiated suit in a federal district court challenging the Michigan legislation solely on federal constitutional grounds has been interpreted as an attempt to challenge the federal statute as well. Letter from Edward L. Goldman to the *Notre Dame Lawyer*, March 2, 1966.

242 In addition to those described herein, Title VI of the Act provides that "nothing contained in this Act shall be construed to authorize the making of any payment under this Act, or under any Act amended by this Act, for religious worship or instruction." 79 Stat. 58 (1965), 20 U.S.C.A. § 885 (Supp. 1965).

243 See S. REP. NO. 146, 89th Cong., 1st Sess. (1965), republished in 1965 U.S. CODE CONG. & AD. NEWS 1446; *House Report on ESEA*. Testimony by representatives of many

in the context of particular programs initiated at the local level.²⁴⁴ That there is a danger of unconstitutional application seems indisputable. State and local educational authorities are granted broad discretion in the development of plans to allocate the funds granted. The Act is unclear on such problems as the extent to which public school teachers can conduct special classes on parochial school premises²⁴⁵ and as to the manner in which equipment owned by public agencies can be used in parochial schools on a loan basis.²⁴⁶ The constitutionality of such activities is suspect, but the act itself forbids its unconstitutional application. Thus, it will be for the courts to determine, on a case by case basis, which questionable programs result in institutional benefits, proscribed by the act, and which in child benefits, constitutional under *Everson* and *Cochran*.²⁴⁷

c. Shared Time

Of all the projects for which governmental funds have previously been supplied, only shared time or dual enrollment programs have been received with near universal approval by most opponents of state assistance to parochial schools or their pupils.²⁴⁸ Dual enrollment is specifically provided for in Title III²⁴⁹ and is suggested under Title I²⁵⁰ of the Elementary and Secondary Education Act of 1965. Such arrangements are not the same as released time programs which enable public school pupils to take time from their regular school day to receive religious instruction. Under some shared time programs, nonpublic school children take no more than one course in their local public

leading professional and religious organizations manifested agreement that there was no establishment problem, and the Justice Department advised that the Act is constitutional. 111 CONG. REC. 5558 (daily ed. Mar. 24, 1965).

244 A state may seek judicial review in the United States Court of Appeals in the circuit in which the state is located if it is dissatisfied with the Commissioner of Education's final action under Title I, 79 Stat. 33 (1965), 20 U.S.C.A. § 241(k) (Supp. 1965) and under Title II, 79 Stat. 39 (1965), 20 U.S.C.A. § 827 (Supp. 1965). There is no provision for judicial review under Title III.

245 Concerned about this possibility, Senator Dominick of Colorado proposed an amendment to prevent the Act from being construed to authorize "the hiring of teachers wherever there is religious worship or sectarian instruction." S. REP. NO. 146, 89th Cong., 1st Sess. (1965), republished in 1965 U.S. CODE CONG. & AD. NEWS 1446, 1481. Compare the confusion manifested in the House as to what courses under Title I could be taught under what circumstances by public school teachers in private schools, 111 CONG. REC. 5567-72 (daily ed. Mar. 24, 1965), with the unequivocal statement of former Commissioner of Education Keppel that public school districts could provide educational specialists to enter nonpublic schools to offer their services to the children of low-income families, *House Hearings on ESEA*, pt. 1, at 153.

246 Senator Dominick's proposed amendment would have also specifically prohibited the construction of facilities in any sectarian institution. S. REP. NO. 146, 89th Cong., 1st Sess. (1965), republished in 1965 U.S. CODE CONG. & AD. NEWS 1446, 1481.

247 See notes 216-19 and accompanying text *supra*.

248 While strongly opposing any aid to parochial school children, Pfeffer, *Federal Funds for Parochial Schools?* No. 37 NOTRE DAME LAWYER 309 (1962), the General Counsel of The American Jewish Congress made the following statement: "To the extent that shared time involving parochial school children is constitutional, it is because it is a benefit given to the children as children and not as students in the parochial school or as any aspect of the parochial school system." *Shared Time Hearings* 381. See the views expressed by public school administrators and religious leaders of the Catholic, Jewish, and Protestant religions in a symposium on shared time. *Shared Time Hearings* 590.

249 79 Stat. 41 (1965), 20 U.S.C.A. § 843(b)(3) (Supp. 1965).

250 See text accompanying note 227 *supra*.

schools.²⁵¹ Others involve the enrollment of students in sectarian institutions only for courses in religion and other so-called "value-content"²⁵² subjects. The rest of the day the students attend public schools in their area. While the Supreme Court has upheld the constitutionality of voluntary released time programs when the religious instructions are offered on a location other than public school premises,²⁵³ the validity of shared time arrangements has not yet been fully considered by the courts.²⁵⁴ The latter have been conducted on an experimental basis by only a few school districts.²⁵⁵ Implementation of the Elementary and Secondary Education Act, however, will undoubtedly engender greater experimentation with such projects.

d. *Tax Credits*

Those who criticize shared time proposals as failing to provide for a truly integrated education and who advocate equal educational benefits for all children are more strongly than ever seeking legislation that will provide tax credits for parents who send their children to nonpublic schools.²⁵⁶ The best-known of these proposals, originally introduced by Senator Ribicoff of Connecticut,²⁵⁷ has been defeated twice by very narrow margins.²⁵⁸ This measure would have permitted a direct tax credit up to a maximum of \$325 to persons paying tuition fees, and other expenses of college students.²⁵⁹ Other proposals are far more revolutionary, calling for similar tax credits for parents of children attending nonpublic elementary and secondary schools.²⁶⁰ While it is apparent that there is considerable support for such legislation, past failures provide little hope for its passage in the near future.

e. *Conclusion*

The traditional obstacle confronting any proposal to provide assistance to pupils of sectarian schools, or to the schools themselves, is the establishment clause of the first amendment. Admittedly, any assistance to children attending parochial schools provides some aid to the sectarian institutions operating the

251 *Shared Time Hearings* 322.

252 Most typically, these subjects include social studies, literature, art, and music.

253 *Zorach v. Clauson*, 343 U.S. 306 (1952). In *McCullum v. Board of Educ.*, 333 U.S. 203 (1948), the Court held that the first amendment prohibited a board of education from permitting religious teachers to hold classes in *public school buildings* on a released time basis.

254 In *Morton v. Chicago Bd. of Educ.*, 34 U.S.L. WEEK 2465 (Ill. App. Mar. 1, 1966), the court upheld a shared time program allowing parochial school children to take all their courses in public schools except English, social studies, music, and art. The court found that the plan violated neither the establishment clause of the first amendment nor the compulsory school attendance laws of Illinois.

255 As of February, 1964, only 3.8% of 7,410 responding school district superintendents indicated that they offered some type of shared time program for parochial school children. *Shared Time Hearings* 323.

256 See Educational Freedom, Spring 1965; BLUM, *op. cit. supra* note 206, at 202-03.

257 110 CONG. REC. 1699 (daily ed. Feb. 3, 1964).

258 The Senate first rejected Senator Ribicoff's bill by a vote of 48 to 45. 110 CONG. REC. 1758 (daily ed. Feb. 4, 1964). It was again defeated 47 to 37 earlier this year. 112 CONG. REC. at 5242 (daily ed. March 9, 1966). For an indication of continued support for Senator Ribicoff's determination to secure such legislation, see the Hartford Times editorial reprint. *Id.* at 5280 (daily ed. March 10, 1966).

259 For a detailed discussion of the plan, see 110 CONG. REC. at 1699-1709 (daily ed. Feb. 3, 1964).

260 E.g., H.R. Res. 6360, 89th Cong., 1st Sess. (1965). See generally Educational Freedom, *supra* note 256.

schools. That is, to the extent that it encourages more parents to enroll their children in such schools, assistance to parochial school children can be said to be an advancement of religion. Whether bestowing benefits so circuitously constitutes an establishment of religion within the meaning of the first amendment is highly questionable. Nevertheless, that such aid, no matter how indirect, cannot be tolerated under the establishment clause as interpreted in *School Dist. of Abington Township v. Schempp*²⁶¹ has been suggested.²⁶² However, it must be remembered that the prohibition of the first amendment is twofold, and in *Sherbert v. Verner*²⁶³ the Supreme Court held that public welfare benefits may not be denied because of a person's religion or lack of it without violating the free exercise clause.²⁶⁴ Not only does the exclusion of school children from the benefits of welfare legislation because of their enrollment in religious schools contravene the holding in *Sherbert*,²⁶⁵ to the extent that legislation enhances the attractiveness of public schools and correspondingly detracts from the practicability of attending parochial schools, it also imposes a financial burden, insuperable for some,²⁶⁶ on the acknowledged right of parents and children to select the school of their choice, free from the dictates of the State.²⁶⁷ This choice more clearly emerges as a con-

261 See notes 168-71 and accompanying text *supra*.

262 See the resolution of the National Association of Evangelicals (NAE) which contained the following statement:

That in the interest of preserving the integrity of the public school system free from religious or church control and preserving the rights of private schools to be free from the control of the state, the National Association of Evangelicals strongly opposes Federal aid to private elementary and secondary schools whether it is given directly to the institution in the form of categorical aid to improve its facilities or for the benefit of individuals for specific needs. [Emphasis added.]

Hearings on S. 370 Before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, 89th Cong., 1st Sess., pt. 5, at 2576 (1965) [hereinafter cited as *Senate Hearings on ESEA*]. Also see the statement by the director of the Washington office of the American Civil Liberties Union, *Id.* at 2893.

263 374 U.S. 398 (1963).

264 *Id.* at 410. The Court stated the following:

This holding but reaffirms a principle that we announced a decade and a half ago [*Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947)], namely, that no State may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."

265 *Id.* at 404. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions [for the purposes of this discussion, attendance at public schools] upon a benefit or privilege."

266 That this financial burden has inhibited the freedom of parents to send their children to parochial schools is demonstrated by the recent closings of lower grades by some Catholic school systems. In the Archdiocese of Cincinnati, dropping only the first grade shunted 10,000 pupils into the public schools. Wall St. J., Oct. 20, 1964, p. 1, col. 1. A more dramatic illustration is the increasing decline in the enrollment in private colleges and universities. In 1950 approximately 50% of American college students attended private institutions. That number has been reduced to 40% of the total and by 1985 is predicted to fall to 20% of all college students. Canavan, *Implications of the School Prayer and Bible Reading Decisions: The Welfare State*, 13 J. Pub. L. 439, 446 (1964).

267 See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), in which the United States Supreme Court held invalid an Oregon statute requiring all children to attend public schools. The law was found to be an unconstitutional abridgment of "the liberty of parents and guardians to direct the upbringing and education of children under their control." The Ecumenical Council of the Roman Catholic Church issued a "Decree on Education" that included the following statement:

Its [civil society's] function is to promote the education of youth in many ways, namely: to protect the duties and rights of parents and others who share in education and to give them aid; according to the principle of subsidiarity, when the endeavors of parents and other societies are lacking, to carry out the work of education in accordance with the wishes of the parents. . . . Parents who have the primary and

stitutional right when it is considered that in some cases it is compelled not merely by a deep religious conviction, but by a strict religious obligation as well.²⁶⁸

Moreover, to the extent that public schools are commanded to offer a secular education only, totally devoid of theistic content, governmentally established incentives to attend such institutions arguably constitute an establishment of secularism, also in violation of the first amendment.²⁶⁹ Thus, while indiscriminately providing welfare benefits to all school children concededly inures to the benefit of parochial institutions indirectly, refusing such assistance not only inhibits the exercise of religious freedom by those possessing a fixed religious belief, it also constitutes an establishment of secularism. The only escape from this dilemma necessitates a balancing of the prohibitions of the establishment clause with the guarantees of the free exercise clause. The former lacks a meaningful purpose if it is not to buttress the latter. What other reason can there be for proscribing an establishment of religion if it is not to guarantee religious freedom? It is submitted, therefore, that governmental aid to nonpublic school children is essential if the religious freedom of millions of school children is to be preserved and if the establishment of secularism as a state supported religion is to be avoided.

III. FREE EXERCISE

A. *Public Health, Safety and Welfare*

The legitimacy of state action to protect the general health and welfare of the citizenry has long been recognized.²⁷⁰ To the extent that a compelling state interest has been involved, governmental actions which admittedly interfere with religious convictions have traditionally been upheld. One author has stated:

In this area of vital public interest there are to be found many illustrations of the proposition that freedom of religion is not absolute, and that at some point even though the act arises from religious principle or is regarded as a religious right or duty, its religious character does not automatically put it beyond control by the state.²⁷¹

Hence, the critical issue to be discussed is: "to what extent does the guarantee of the free exercise of religion require deference to religiously motivated ac-

inalienable right and duty to educate their children must enjoy true liberty in their choice of schools. Consequently, the public power . . . must see to it . . . that public subsidies are paid out in such a way that parents are truly free to choose according to their conscience the schools they want for their children.

N.Y. Times, Oct. 29, 1965, p. 23, col 1.

268 CANONS 1372-74 of the Roman Catholic Church place Catholic parents under a "very grave obligation" to procure a religious and moral education for their children and forbid them to be sent to anti-Catholic or neutral schools except under unusual circumstances and accompanied by certain safeguards. Cortez, *Religious Liberty—The Rights of Parents in the Education of Their Children*, 11 CATH. LAW. 285, 294 (1965).

269 See notes 168-71 and accompanying text *supra*.

270 ANTIEAU, CARROLL & BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* 65 (1965). See PFEFFER, *CHURCH, STATE AND FREEDOM* 572-603 (1953).

271 FELLMAN, *RELIGION IN AMERICAN PUBLIC LAW* 18 (1965). In *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940), Mr. Justice Roberts stated: "Thus the [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

tion?"²⁷² That a given religious practice is not merely desirable but obligatory has not deterred state intervention once it has been determined that the public interest necessitates regulation. One of the earliest of the landmark cases which have upheld limitations on the free exercise of religion, *Reynolds v. United States*,²⁷³ sustained the constitutionality of an act of Congress which, as applied to Mormons, rendered their religiously constrained practice of polygamy illegal. While taking cognizance of the Jeffersonian concept of a "wall of separation between church and state," Mr. Chief Justice Waite stated: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."²⁷⁴ The passage of time since *Reynolds* has witnessed innumerable instances where the religious scruples of some have been compelled to yield to the interest of preserving public health, safety, welfare and morality. The scope of this section, then, will be confined to a consideration of those cases reported since the last Survey in which the courts have engaged in the delicate task of balancing legitimate state regulation with the demands of the first amendment.²⁷⁵

1. Vaccination

In *Wright v. De Witt School Dist. No. 1*,²⁷⁶ the appellants sought to enjoin the enforcement of a state health regulation which required all students to be vaccinated against smallpox as a prerequisite to attending school. It was contended that compulsory vaccination contravened appellants' freedom of religion and that an interference with their religious liberties could only be sustained upon a showing that a situation of imminent danger existed. The Supreme Court of Arkansas, citing the landmark decision in *Prince v. Massachusetts*,²⁷⁷ upheld the regulation as a "valid exercise of the police power of the state."²⁷⁸ In *Prince*, the Supreme Court sustained a Massachusetts child labor law over the objection that it impinged upon the religious liberties of the appellants. The Court stated:

And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.

272 TUSSMAN, SUPREME COURT ON CHURCH AND STATE xxiv (1962). It is to be noted that all of the states have constitutional provisions providing guarantees of freedom of religion. Many are similar to the provision in the federal constitution; some expressly limit free exercise. ANTEAU, CARROLL & BURKE, *op. cit. supra* note 270, at 66.

273 98 U.S. 145 (1878).

274 *Id.* at 164.

275 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

276 238 Ark. 906, 385 S.W.2d 644 (1965).

277 321 U.S. 158 (1944).

278 385 S.W.2d at 646. Appellants attempted to analogize their situation to those involved in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), and *Sherbert v. Verner*, 374 U.S. 398 (1963), where the Court "accommodated" the religious beliefs of the appellants after balancing the interest of the state and the religious liberties infringed upon. *Wright v. De Witt School Dist. No. 1*, 385 S.W.2d at 648. Another recent decision, which upheld the school board's authority to compel immunization, is *State ex rel. Mack v. Board of Educ.*, 1 Ohio App.2d 143, 204 N.E.2d 86 (1963).

Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.²⁷⁹

In another recent Arkansas decision,²⁸⁰ the authority of the courts to give a court appointed guardian custody of children whose parents objected to their being vaccinated was challenged on religious grounds. Specifically, the appellants claimed that the Constitution of Arkansas²⁸¹ exempted them from the law. The court held that this provision was not to be construed to mean that one may "engage in religious practices inconsistent with the peace, safety and health of the inhabitants of the State" or "that parents, on religious grounds, have the right to deny their children an education."²⁸²

A minister of the Miracle Revival Fellowship was convicted in *State v. Miday*²⁸³ of failure to vaccinate his child and of failure to send him to school. He contended that his religious beliefs qualified him for an exemption provided in the State statute.²⁸⁴ The Supreme Court of North Carolina, in reversing the conviction and ordering a new trial, held: "[I]t is not necessary for a religious organization to forbid vaccination in order for its teachings to come within the meaning of the statute and to authorize the exclusion sought . . ."²⁸⁵ In addition, the court stated that it was for the jury to determine whether the evidence with respect to the teachings of the Miracle Revival Fellowship justified the defendant's position against vaccination.

It is submitted that the court erred in its latter conclusion. That the function of the jury should be limited to a determination of the sincerity of the alleged beliefs and should not extend to a consideration of dogma or to the truth or falsity of religious doctrines has long been recognized.²⁸⁶ To propose that the jury consider the teaching of a given religion is to suggest that the views of twelve men concerning the dogma at issue be pitted against the interpretation that a member of a particular faith attaches to the doctrines of his religion. This result clearly contravenes the "spirit" underlying the decisions of the United States Supreme Court in *United States v. Ballard*²⁸⁷ and *United States v. Seeger*.²⁸⁸

279 321 U.S. 158, 166-67 (1944). Cf. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), where the constitutionality of a statute prescribing the authority of communities to compel the vaccination of residents against smallpox was upheld. Although the statute was not attacked on religious grounds, the Court, in *Prince*, cited *Jacobson* for the proposition that one may not impose religious grounds to justify a refusal to submit to compulsory vaccination.

280 *Cude v. State*, 237 Ark. 927, 377 S.W.2d 816 (1964).

281 ARK. CONST. art. II, § 24:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can, of right, be compelled to attend, erect or support any place of worship; or to maintain any ministry against his consent. No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience; and no preference shall ever be given, by law, to any religious establishment, denomination or mode of worship above any other.

282 377 S.W.2d at 819.

283 263 N.C. 747, 140 S.E.2d 325 (1965).

284 140 S.E.2d at 326.

285 *Id.* at 328.

286 *United States v. Ballard*, 322 U.S. 78 (1944); Fellman, *op. cit. supra* note 271, at 25-29.

287 "Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views." *United States v. Ballard*, *supra* note 286, at 87.

288 380 U.S. 163 (1965). 1963-64 *Church-State Survey*, *supra* note 1, at 483-85.

In *Kolbreck v. Kramer*,²⁸⁹ plaintiff sought to compel Rutgers University to classify him within the scope of a statutory exemption from vaccination requirements. In ordering the State University to admit the plaintiff despite his refusal to be vaccinated or subjected to other medical tests, the court held that the state or an instrumentality thereof could not deny plaintiff an exemption on the grounds that he was not a member of a recognized religious group.²⁹⁰ It may also be argued that once a state has granted an exemption founded on religious convictions, the rationale of *Seeger* should compel the same result.

2. Blood Transfusions

The proposition that parents cannot exercise the power of life or death over their children was upheld in *Application of Brooklyn Hospital*²⁹¹ where the court authorized transfusions of blood to treat a seriously burned five-year-old child. The religious objections of the parents were superseded by the court's application of the common law doctrine of *parens patriae*. "In this context, the Court has paramount rights to decide what is best for the infant even over that of the natural parents."²⁹² Thus, the typical attitude of the courts with respect to the administration of necessary medical care for children has reflected the oft-quoted statement of Mr. Justice Rutledge: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."²⁹³

State authority over the activities of children has been, for the most part, considerably broader than the control exercised over adults in analogous situations.²⁹⁴ It is submitted that the compelling state interest in the health and safety of children should not be extended to require an adult to submit to an involuntary transfusion of blood.

Thus far, the recent cases surveyed have involved restrictions on the religious freedom of those persons entrusted with responsibility for the lives and health of others. The determination of whether the state may constitutionally exercise authority to restrain an individual's right to religious liberty in order to protect *that person's* life or health presents a significantly different question.

Prior to 1962, litigation involving compulsory blood transfusions had been confined to those cases in which parents had objected to medical treatment rendered to their children.²⁹⁵ However, in *Erickson v. Dilgard*,²⁹⁶ the superin-

289 84 N.J. Super. 569, 202 A.2d 889 (Super. Ct. L. 1964), *judgment modified and preserved for declaratory value to plaintiff*, 46 N.J. 46, 214 A.2d 408 (1965).

290 202 A.2d at 893.

291 45 Misc. 2d 914, 258 N.Y.S.2d 621 (Sup. Ct. 1965). *Accord*, *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962), *cert. denied*, 371 U.S. 890 (1962).

292 258 N.Y.S.2d at 622.

293 *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

294 See Pfeffer, *op. cit. supra* note 270, at 578-80; Ford, *Refusal of Blood Transfusions By Jehovah's Witnesses*, 10 CATHOLIC LAW. 212, 220 (1964); 12 DE PAUL L. REV. 342, 345-46 (1963).

295 No "primary" authority dealing with whether or not it is an unconstitutional interference with freedom of religion to compel an adult to accept blood transfusions over his religious objections was discovered. The prevailing attitude was commensurate with a statement by Judge Cardozo in *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 105 N.E. 92, 93 (1914): "Every human being of adult years and sound mind has a right to determine what shall be

tendent of a hospital to which the patient had been voluntarily admitted applied for a court order authorizing the administration of a blood transfusion to this adult. The patient had refused to authorize an operation during which blood would be administered, notwithstanding his awareness that the chances of success without a transfusion were minimal. The court, knowing of "no precedent relating to adult patients,"²⁹⁷ denied the application in which it was argued that the patient's refusal to accept blood could be equated to the taking of his own life.

The genesis of the state's prerogative to compel such transfusions is the order of Judge J. Skelley Wright of the Circuit Court of Appeals for the District of Columbia in *Application of the President and Directors of Georgetown College, Inc.*²⁹⁸ The decision, which many consider to have grave implications, has inspired much commentary.²⁹⁹ Since *Georgetown*, three other decisions in which similar questions of law and fact were presented have been reported.³⁰⁰ The religious objection to blood transfusions was proffered in each of these recent cases by Jehovah's Witnesses, who interpret certain passages of the Holy Bible to obligate them to "abstain from blood."³⁰¹

The hospital's application in *Georgetown* sought a decree "in the nature of an injunction and declaratory judgment"³⁰² on the grounds that the patient, a 25-year-old mother of an infant son, *in extremis*, required immediate blood transfusions to save her life. After conferring with the patient, her husband, and physicians at the hospital, Judge Wright signed the order and the transfusion was administered. To justify judicial intervention, the court analogized the patient's condition to that of a "sick child"; accordingly it was argued that her being *in extremis* and "hardly *compos mentis*" rendered her unable to decide

done with his own body. . . ."

296 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962).

297 252 N.Y.S.2d at 706.

298 331 F.2d 1000, *rehearing en banc denied*, 331 F.2d 1010 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

299 E.g., Milhollin, *The Refused Blood Transfusion: An Ultimate Challenge for Law and Morals*, 10 NATURAL L.F. 202 (1965); Comment, *Unauthorized Rendition of Lifesaving Medical Treatment*, 53 CALIF. L. REV. 860 (1965); Note, 9 UTAH L. REV. 161 (1964); 10 CATHOLIC LAW. 260 (1964); 13 CATHOLIC U.L. REV. 188 (1964); 77 HARV. L. REV. 1539 (1964); 40 NOTRE DAME LAWYER 126 (1964); 60 NW. U.L. REV. 399 (1965); N.Y. Times, June 16, 1964, p. 33, col. 1.

300 United States v. George, 239 F. Supp. 752 (D. Conn.), *appeal dismissed*, No. 30014, 2d Cir., Oct. 5, 1965, *cert. denied*, 382 U.S. 1010 (1966); *In re Brooks' Estate*, 32 Ill.2d 361, 205 N.E.2d 435 (1965); Raleigh Fitkin—Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

301 WATCH TOWER BIBLE & TRACT SOCIETY OF PA., BLOOD, MEDICINE AND THE LAW OF GOD 5-8 (1961) specifies the following biblical passages:

Acts of the Apostles 15:28,29: "For the holy spirit and we ourselves have favored adding no further burden to you, except these necessary things, to keep yourselves free from things sacrificed to idols and from blood and from things strangled and from fornication. If you carefully keep yourselves from these things, you will prosper."

Leviticus 17:10: "As for any man of the house of Israel or some alien resident who is residing as an alien in your midst who eats any sort of blood, I shall certainly set my face against the soul that is eating the blood, and I shall indeed cut him off from among his people."

Genesis 9:3,4: "Only flesh with its soul—its blood—you must not eat."

Deuteronomy 12:23: "The blood is the soul."

See How, *Religion, Medicine and Law*, 3 CAN. B.J. 365, 367-70 (1960).

302 331 F.2d 1000, 1002 (D.C. Cir. 1964).

for herself.³⁰³ The state's concern, as *parens patriae*, also provided a second basis for ordering the transfusion. Namely, the state has an interest in preserving the life of the mother; to act otherwise would be to condone the abandonment of a child.

In further support of the order, the refusal of lifesaving medical assistance was likened to suicide. "Only quibbles about the distinction between misfeasance and nonfeasance, or the specific intent necessary to be guilty of attempted suicide, could be raised against this latter conclusion."³⁰⁴ An additional consideration was the possible liability of the hospital and doctors if they had failed to provide the patient with proper treatment. The efficacy of the offered release, in these circumstances, was placed in serious doubt. To conclude, Judge Wright expressed humanitarian concern and respect for the sanctity of life, stating:

The final, and compelling, reason for granting the emergency writ was that a life hung in the balance. There was no time for research and reflection. Death could have mooted the cause in a matter of minutes, if action were not taken to preserve the *status quo*. To refuse to act, only to find later that the law required action, was a risk I was unwilling to accept. I determined to act on the side of life.³⁰⁵

The decision in *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,³⁰⁶ authorizing "blood transfusions . . . if necessary to save her life or the life of her child, as the physician in charge at the time may determine"³⁰⁷ was handed down a short time after the petition for *certiorari* had been denied in *Georgetown*.³⁰⁸ The attending physicians, having diagnosed the complications accompanying the patient's pregnancy, suggested the probable necessity of blood transfusions to protect the lives of the mother and her unborn child. The fact situation afforded the New Jersey Supreme Court an opportunity to clarify the holding in *Georgetown*. The patient in *Anderson* was neither *in extremis* nor *non compos mentis*; it appeared probable that the court would address itself to the germinal issue of whether an adult may be compelled to submit to a blood transfusion to save her own life. However, the court, having "no difficulty in so deciding with respect to the infant child," found it unnecessary to answer the "more difficult question" because "the welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them. . . ."³⁰⁹ Serious doubts remain with respect to the

303 *Id.* at 1008. One author has suggested that it was not necessary for Judge Wright to rely on the children's cases to justify compulsory treatment of a person *non compos mentis*. Note, 9 UTAH L. REV. 161, 169 (1964).

304 331 F.2d 1000, 1009 (D.C. Cir. 1964). See Comment, *Unauthorized Rendition of Life-saving Medical Treatment*, *supra* note 299, at 869. *Contra*, Ford, *supra* note 299, at 225; Note, 9 UTAH L. REV. 161, 167 (1964).

305 331 F.2d 1000, 1009-10 (D.C. Cir. 1964).

306 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964). *Anderson* received widespread newspaper coverage. The daily coverage of the New York Times is illustrative. N.Y. Times, June 18, 1964, p. 1, col. 3; *id.*, June 19, 1964, p. 33, col. 7; *id.*, June 20, 1964, p. 26, col. 2; *id.*, June 26, 1964, p. 31, col. 1.

307 201 A.2d at 538.

308 377 U.S. 978 (1964).

309 201 A.2d at 538.

court's success in attempting to avoid the "more difficult question."³¹⁰ If the decision is interpreted as limiting the authority to compel blood transfusions to those instances where necessary to preserve the life of the child, *Anderson* can be classified as an extension of the state's *parens patriae* authority to protect the health and welfare of children. However, if *Anderson* is construed to support the legality of a transfusion to the mother after the child was born, the court, in effect, has answered the "more difficult question" and has extended the application of *Georgetown*.

In *United States v. George*,³¹¹ a case very similar on its facts to *Georgetown*, the court added a factor to those which Judge Wright had considered. Judge Zampano suggested that in deciding whether an order should issue, the "doctor's conscience and professional oath" must be "added to the scale."³¹² It is submitted that legal authority will not support the subordination of a patient's religious beliefs to the conscience of his physician.³¹³ It was unnecessary to further confuse the rationale of *Georgetown* to "justify" the transfusions in *George*.

The Supreme Court of Illinois refused to extend the holding in *Georgetown* to the authorization of transfusions to a competent adult, without minor children, who had steadfastly asserted her religious objections.³¹⁴ The opinion suggests that *In re Brooks' Estate* is "readily distinguishable" from *Georgetown*.³¹⁵ It appears that the emphasis *Brooks'* placed on the fact that the patient was neither *in extremis* nor the mother of minor children, in distinguishing the case from *Georgetown*, was unwarranted by the weight assigned to those factors in Judge Wright's opinion. The decision in *Brooks'*, specifically restricted by the court to the fact situation in issue, stated that no "overt or affirmative act" of the appellant presented any "clear and present danger to society" which would justify state "conduct offensive to appellant's religious principles."³¹⁶

Any attempt to reconcile the decision in *Brooks'* with the three cases upholding compulsory transfusions must consider the precious time factor involved. To emphasize the distinctions in the abstract is to lose sight of the fact that "lives hung in the balance" in each of the cases in which the transfusion was ordered. In contrast, the relief sought in *Brooks'* was the expungement

310 It is to be noted that one pint of blood was administered to Mrs. Anderson after the baby was born. This fact is certified in a letter from Mr. Eugene Landy, plaintiff's counsel, on file with the *Notre Dame Lawyer*. For a detailed discussion of *Raleigh Fitkin*, see 40 *NOTRE DAME LAWYER* 126 (1964).

311 239 F. Supp. 752 (D. Conn.), *appeal dismissed*, No. 30014, 2d Cir., Oct. 5, 1965, *cert. denied*, 382 U.S. 1010 (1966).

312 239 F. Supp. at 754. The opinion does not indicate the extent to which the *Georgetown* rationale has been adopted.

313 *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914); Ford, *supra* note 299, at 215-16; 34 *GEO. WASH. L. REV.* 159, 165-66 (1965). See generally How, *supra* note 301, at 413-18.

314 *In re Brooks' Estate*, 32 Ill.2d 361, 205 N.E.2d 435 (1965).

315 205 N.E.2d at 440.

316 *Id.* at 442. One author has suggested that *Brooks* is "constitutionally correct." 64 *MICH. L. REV.* 554 (1966). Another has stated: "If the mother of several children is to be saved, then so must the childless individual." Comment, *Unauthorized Rendition of Lifesaving Medical Treatment*, *supra* note 299, at 872. It is questionable whether the "clear and present danger" test should be the guiding principle in these freedom of religion cases. Compare 44 *TEXAS L. REV.* 190, 191-93 (1965) with *Milhollin*, *supra* note 299, at 206.

of the orders which had been levied in the conservatorship proceedings below to effect the transfusion.³¹⁷

The opinions in *Georgetown*, *Anderson* and *George* clearly indicate that the criteria set forth in these "radical departures from established doctrine"³¹⁸ do not afford sufficient objectivity to define their limits as precedent. The present state of the law suggests that the Jehovah's Witness who wishes to enter a hospital or submit to medical care is met with a serious dilemma. If he fears that his religious objections to the transfusion of blood will not be respected by the hospital and the courts, it would seem that his only alternative, other than violating his conscience, would be to refrain from voluntarily admitting himself to a hospital.³¹⁹

It is submitted that the decisions upholding a right in the state to compel blood transfusions, notwithstanding the sincere religious objections of the patient, are inconsistent with the spirit of "accommodation" which has pervaded the thinking of the Supreme Court in recent years.³²⁰ To require an individual to submit to treatment which he considers a grave violation of his moral duties is authority which the state should be most reluctant to assume, absent a clearly compelled countervailing state interest.³²¹ The ultimate issue requiring resolution is:

[W]hether one man, or even a group of men acting through a court, are capable of deciding for another whether it is better to die at once and possibly go to heaven or to live a few additional years in what for the latter is surely moral oblivion. To answer this in the affirmative is to say for certain mortal life is such that an individual cannot through moral conscience rise above it.³²²

3. Religious Peculiarities — *Miscellany*

a. *Peyote-Worshippers, Sabbatarians, and Black Muslims.*

The delicate process of balancing the state's interest in the health, safety and welfare of the populace and the rights of individuals to practice their religion freely was apparent in two recent California decisions concerned with the practice of peyote worship.³²³ Neither of these cases involved federal or state

317 34 GEO. WASH. L. REV. 159, 166 (1965); 40 NOTRE DAME LAWYER 126, 129 (1964).

318 40 NOTRE DAME LAWYER 126, 130 (1964). The casenote discusses *Georgetown* and *Anderson*. It appears reasonable to classify *George* in the same category.

319 Jehovah's Witnesses do not reject surgery and other conventional medical treatment. Their objections are limited to the use of blood. Hence, their beliefs are radically different from groups commonly known as "faith healers" who reject all medical assistance. How, *supra* note 301, at 367.

320 See, e.g., *United States v. Seeger*, 380 U.S. 163 (1965); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943) stating:

We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

321 See, *Millhollin*, *supra* note 299, at 211-14.

322 *Id.* at 214.

323 *People v. Woody*, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); *In re Grady*, 394 P.2d 728, 39 Cal. Rptr. 912 (1964). Peyote is an intoxicating ingredient derived from a small, spine-

interference with Indian tribal regulations; hence, they are not analytically comparable to *Native American Church of North America v. Navajo Tribal Council*³²⁴ or *Oliver v. Udall*.³²⁵

In *People v. Woody*,³²⁶ the Supreme Court of California reversed defendants' convictions of illegal possession of peyote and held that the statute proscribing the use of peyote could not be constitutionally applied to its use by an Indian tribe as a sacramental symbol.³²⁷ The defendants, a group of Navajos who belonged to the Native American Church of California, had been apprehended while performing a religious ceremony. The court found that the statutory prohibition of peyote would result in virtually a total frustration of the defendants' religion. "To forbid the use of peyote is to remove the theological heart of Peyotism."³²⁸ It is submitted that the court, in applying the balancing test of *Sherbert v. Verner*,³²⁹ correctly decided in favor of accommodation.

On the basis of *Woody*, the court granted a writ of habeas corpus to the defendants in *In re Grady*³³⁰ who were convicted of unlawful possession of peyote. The cause was remanded, however, on the ground that it was not clear whether defendants were, in good faith, using peyote in the practice of religion.³³¹

In situations involving different facts, limitations on asserted religious freedom were upheld in *Andrews v. O'Grady*³³² and *Mohammad v. Sommers*³³³ for the reason that the action taken by the municipality or instrumentality thereof, in each instance, was necessary to implement a legitimate state interest. In *Andrews*, the petitioner, a Seventh Day Adventist, sought an order directing the chairman of the Transit Authority of New York City to reinstate his employment, alleging that his dismissal for refusing work assignments on his Sabbath violated his constitutional rights to the free exercise of religion and the equal protection of the law. The court sustained the validity of the seniority rules with which he had refused to comply, stating: "These time-honored rules are . . . most essential to the efficient and safe operation of the City transportation

less cactus, found in the Rio Grande Valley of Texas and Northern Mexico, which plays a central role in the ceremonies of many Indian tribes. The use of peyote produces hallucinatory effects in differing degrees depending upon the user. *People v. Woody*, *supra* at 816-17.

324 272 F.2d 131 (10th Cir. 1959). See 1960-62 *Church-State Survey*, *supra* note 1, at 649, 715. It has been suggested that the decision in *Native American Church* posed a paradox "where American citizens were not merely deprived of constitutional rights, but were held not to have any such rights." Note, *The Constitutional Rights of The American Tribal Indian*, 51 VA. L. REV. 121, 137 (1965).

325 306 F.2d 819 (D.C. Cir. 1962).

326 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

327 "We have concluded that since defendants used the peyote in a bona fide pursuit of a religious faith, and since the practice does not frustrate a compelling interest of the state, the application of the statute improperly defeated the immunity of the First Amendment" 394 P.2d at 815.

328 *Id.* at 818. "Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost." *Id.* at 817.

329 374 U.S. 398 (1963). See generally 1963-64 *Church-State Survey*, *supra* note, 1, at 479-81.

330 394 P.2d 728, 39 Cal. Rptr. 912 (1964).

331 "As we said in *Woody*, 'the trier of fact need inquire only into the question of whether the defendants' belief in Peyotism is honest and in good faith . . . or whether he seeks to wear the mantle of religious immunity merely as a cloak for illegal activities.'" 394 P.2d at 729.

332 44 Misc. 2d 28, 252 N.Y.S.2d 814 (Sup. Ct. 1964).

333 238 F. Supp. 806 (E.D. Mich. 1964).

system."³³⁴ Conceding that the rules necessitated the petitioner to choose between adherence to his faith and continued employment as a surface line operator, the opinion concluded that the choice imposed upon him did not result in a denial of free exercise. It is submitted that the lack of reasonable alternatives in *Andrews* justifies a conclusion different from that in *Sherbert*.

Mohammad v. Sommers, an action for damages brought by the leader of the Black Muslim movement, presents a rather clear case of one seeking "to wear the mantle of religious immunity merely as a cloak."³³⁵ Petitioner unsuccessfully argued that police officers' refusal to disarm when present at a meeting of "The Nation of Islam," whose tenets forbid holding meetings where weapons are present, constituted grounds for relief. That public policy necessitates police protection at gatherings which had, in the past, resulted in disorder and breaches of the peace hardly seems questionable.³³⁶

b. *The Amish School Controversy.*

The right of the state to enact legislation providing for compulsory school attendance and prescribing minimum standards of education has long been recognized.³³⁷ Although there have been numerous occasions where these laws have been assailed on the grounds that they were violative of religious freedom,³³⁸ it has been concluded "that religion is seldom any defense to a failure to comply with the education laws."³³⁹

Members of the Amish religion have often been involved in litigation questioning the validity of education laws. At present, a controversy between Amish farmers and local school authorities in Iowa is now in its fourth year. The dispute, which has been the subject of widespread publicity,³⁴⁰ arose as a result of the refusal of Amish parents to remove their children from non-accredited private schools and send them to public schools. Religious opposition has stemmed from the "worldliness" of urban schools and state-certified instructors.

Both the Governor and the Attorney General of Iowa have sympathized with the plight of this minority sect, the latter stating that school authorities were making "a very serious mistake in trying to force the Amish children into public schools, which the Amish people consider worldly."³⁴¹ It is submitted that whatever "danger" to society could possibly result from allowing the Amish to preserve their way of life is minimal in comparison with the resulting setback to cultural pluralism if public school attendance is compelled.

B. *Test Oaths — Torcaso Revisited*

The pervasiveness of the Supreme Court's decision in *Torcaso v. Watkins*³⁴²

334 252 N.Y.S.2d at 819.

335 *People v. Woody*, 394 P.2d 813, 821, 40 Cal. Rptr. 69 (1964).

336 *Cf. City of Cincinnati v. Epley*, 116 Ohio App. 245, 185 N.E.2d 483 (1962).

337 ANTIEAU, CARROLL & BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* 60-61 (1965).

338 See PFEFFER, *CHURCH, STATE AND FREEDOM* 594-97 (1953); 1960-62 *Church-State Survey*, *supra* note 1, at 711-12.

339 ANTIEAU, CARROLL & BURKE, *op. cit. supra* note 337, at 62.

340 *E.g.*, N.Y. Times, Nov. 23, 1965, p. 41, col. 2; *id.*, Nov. 28, 1965, p. 1, col. 7; *id.*, Dec. 1, 1965, p. 30, col. 4; *id.*, Dec. 18, 1965, p. 24, col. 5; *id.*, Dec. 21, 1965, p. 30, col. 4.

341 *Id.*, Nov. 23, 1965, p. 41, col. 2.

342 367 U.S. 488 (1961).

has recently manifested itself in what Maryland Attorney General, Thomas B. Finan, has called "the gravest crisis in the administration of criminal law in my experience."³⁴³ That Justice Black's "free wheeling definition"³⁴⁴ of religion, accompanied by the interpretation given to the religious protection embodied in the first amendment, would have widespread ramifications was recognized soon after *Torcaso* was reported.³⁴⁵

Torcaso held that Article 37 of the Maryland Declaration of Rights,³⁴⁶ which requires a candidate for public office to declare his belief in the existence of God, unconstitutionally abridged the freedom of religion of one who was denied his commission to the office of notary public because of his refusal to so declare. In language approximating that which appeared in *Everson v. Board of Educ.*,³⁴⁷ the Court stated that neither the state nor the federal government can "constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."³⁴⁸ The fact that Roy Torcaso, an avowed atheist, was afforded constitutional protection signified that thenceforth non-believers were within the ambit of the first amendment.³⁴⁹

The *Torcaso* rationale was the basis of the decision of the Maryland Court of Appeals in *Schowgurow v. State*³⁵⁰ which precipitated the "crisis" that "brought to a halt every current criminal case in the entire state."³⁵¹ The court reversed the first degree murder conviction of a Buddhist on the grounds that the method of selecting the grand jury which indicated him and the petit jury which convicted him was unconstitutional. Article 36 of the Maryland Declaration of Rights reads in part:

[N]or shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; *provided, he believes in the existence of God*, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come.³⁵² [Emphasis added.]

The appellant, noting a footnote to the *Torcaso* opinion,³⁵³ argued that the

343 Time, December 10, 1965, p. 67; U.S. News & World Report, October 25, 1965, p. 6.

344 Saladin, *Relative Ranking of the Preferred Freedoms: Religion and Speech*, in 1964 RELIGION AND THE PUBLIC ORDER 163.

345 See Pfeffer, *Some Current Issues in Church and State*, 13 W. RES. L. REV. 9 (1961); 1960-62 *Church-State Survey*, *supra* note 1, at 704-08.

346 "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution."

Md. CONST. art. 37.

347 330 U.S. 1 (1947).

348 367 U.S. at 495.

349 See Pfeffer, *op. cit. supra* note 345, at 30-33; Note, 1962 DUKE L.J. 272.

350 240 Md. 121, 213 A.2d 475 (1965).

351 Time, *supra* note 342.

352 MD. CONST. art. 36.

353 213 A.2d at 478 n.1. The *Torcaso* footnote states: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." 367 U.S. at 495 n.11.

provision deprived him of due process and equal protection of the laws since it is well established that the Buddhist religion does not teach a belief in God or a Supreme Being.³⁵⁴ The court, after taking judicial notice of the widespread exclusion of jurors who did not state a belief in God, held that *Torcaso* compelled the invalidation of the "existence of God" provision of Article 36.³⁵⁵ Defendant's position was analogized to that of a defendant who is tried by a jury from which members of his race have been systematically excluded. The court stated: "The class excluded by our Constitution is not limited to Buddhists. It includes not only the various religious groups set forth in *Torcaso*, . . . whose members do not believe in God, but also all atheists and agnostics."³⁵⁶ Since the system of jury selection was discriminatory on its face, the defendant was not required to show prejudice. "[I]t is the danger of abuse resulting from the method of selection which renders it unconstitutional."³⁵⁷

Several recent decisions of the Court of Appeals of Maryland have delimited the *Schowgurow* holding. In *State v. Madison*,³⁵⁸ a member of the Apostolic faith who believed in the existence of a Supreme Being moved to dismiss an indictment returned against him. The state contended that the defendant had no standing to question the validity of the grand jury which indicted him, since he was not a member of the class prejudiced by the unconstitutionality of Article 36. The court, dismissing the indictment, held: "Where, as here the unconstitutional discrimination is an integral part of the governing law,"³⁵⁹ defendant's right to object required no more than a showing that he was indicted by the invalid grand jury. It is submitted that the extension of *Schowgurow* to a defendant who admittedly believes in the existence of God, though technically consistent with the "unconstitutional on its face" line of reasoning, is not compelled by the *Torcaso* rationale.

Excepting those convictions which had not become final prior to the decision, *Schowgurow* held that the "proper administration of justice" required that the holding only be prospectively applied.³⁶⁰ The non-retroactivity of *Schowgurow* was upheld by the Court of Appeals in *Husk v. Warden*,³⁶¹ *Maryland Penitentiary* and *Hamm v. Warden, Maryland Penitentiary*.³⁶² In both cases, post-conviction relief was denied to petitioners whose convictions had become final prior to the rendition of the *Schowgurow* decision. However, in *Hays v. State*,³⁶³ the court enabled defendants to benefit from *Schowgurow*, permitting them to challenge their pre-*Schowgurow* indictment and conviction

354 213 A.2d at 478; Brief for Appellant, pp. 4-8.

355 "If, as was held by the Supreme Court in *Torcaso*, a notary public cannot constitutionally be required to demonstrate his belief in God as a condition to taking office, it follows inevitably that the requirement is invalid as to grand and petit jurors, whose responsibilities to the public and to the persons with whom they deal are far greater."

Id. at 479.

356 *Id.* at 481.

357 *Id.* at 482.

358 240 Md. 265, 213 A.2d 880 (1965).

359 213 A.2d at 882.

360 213 A.2d at 482.

361 240 Md. 353, 214 A.2d 139 (1965).

362 240 Md. 725, 214 A.2d 141 (1965).

363 240 Md. 482, 214 A.2d 573 (1965).

via timely appeals. In *Smith v. State*,³⁶⁴ the conviction of the defendant, who contended that all indictments returned by unconstitutionally selected grand juries were null and void, was affirmed. The court responded: "There is nothing in our decisions in *Schowgurow* and *Madison*, nor in their legal effect, upon which to predicate so catastrophic a conclusion."³⁶⁵ In a recent federal habeas corpus proceeding, the Maryland prisoner sought to attack the constitutionality of the holding that *Schowgurow* would not be applied retroactively.³⁶⁶ The district court, citing the recent Supreme Court decision in *Linkletter v. Walker*,³⁶⁷ held that the principles enunciated in *Schowgurow* and *Madison* with respect to retroactivity were not violative of the fourteenth amendment or any other constitutional provision.³⁶⁸

Schowgurow places in doubt the validity of nonjury trials before judges who are required to declare a belief in God upon assuming office.³⁶⁹ Similarly, the constitutionality of that provision of Article 36 which requires *witnesses* to express a belief in God is also subject to serious question.³⁷⁰ One author, though aware that such a result is unlikely, has contended that *Torcaso* requires the amendment of all statutes prescribing oaths which contain the phrase "so help me God."³⁷¹ Recently, a California Superior Court judge ordered this phrase stricken from all oaths administered in his courtroom.³⁷² It is clear, then, that the boundaries of the potential implications of *Torcaso* and *Schowgurow* have yet to be determined.

C. Conscientious Objection

Considerable attention has been focused on the conscientious objector provision of the Universal Military Training & Service Act³⁷³ in the two-year period under study. To be sure, the record levels of peacetime draft calls and the serious misgivings of many citizens with respect to the war in Vietnam have heightened this interest. Concomitantly, the decision of the Supreme Court in *United States v. Seeger*³⁷⁴ has occasioned widespread commentary.³⁷⁵

364 240 Md. 464, 214 A.2d 563 (1965).

365 214 A.2d at 565.

366 *Smith v. Brough*, 248 F. Supp. 435 (D. Md. 1965).

367 381 U.S. 618 (1965).

368 248 F. Supp. at 449.

369 *Time*, *supra* note 342.

370 12 CATHOLIC LAW, 74, 77 (1966).

371 PFEFFER, *supra* note 345, at 33. (Mr. Pfeffer was counsel for the appellant in *Torcaso v. Watkins*).

372 South Bend Tribune, December 12, 1965, p. 1, col. 4.

373 62 Stat. 612-13 (1948), as amended, 50 U.S.C. APP. § 456(j) (1958): "Nothing contained in this title

... shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. . . ." [Emphasis added.]

374 380 U.S. 163 (1965). See Annot., 13 L. Ed. 2d 733.

375 See, e.g., Clancy & Weiss, *The Conscientious Objector Exemption: Problems In Conceptual Clarity and Constitutional Considerations*, 17 MAINE L. REV. 143 (1965); Tietz, *Deity Belief: Necessity for Draft Status*, 38 So. CAL. L. REV. 529 (1965); Note, *The Conscientious Objector Exemption: Still Unsettled*, 33 GEO. WASH. L. REV. 1108 (1965); 34 FORDHAM L. REV. 129 (1965); 18 VAND. L. REV. 1564 (1965); For newspaper coverage of Seeger's beliefs, see N.Y. Times, Jan. 21, 1964, p. 1, col. 7, p. 26, cols. 1-4; *id.*, May 5, 1964, p. 26, cols. 3-7.

Congressional solicitude for those who conscientiously object to the bearing of arms can be traced back to the Civil War.³⁷⁶ Though the standards qualifying one for an exemption have varied considerably, statutory recognition of the scruples of the conscientious objector has consistently accompanied draft enactments since then.³⁷⁷

The ultimate question in conscientious objector cases is the sincerity of the claimant's beliefs.³⁷⁸ The exemption from military service has been traditionally considered a matter of legislative grace,³⁷⁹ and the burden of establishing a right thereto is upon the selective service registrant.³⁸⁰ The need for equitable and efficient administration of classification procedures prompted Congress to delegate a wide range of discretion to the Selective Service System.³⁸¹ Judicial review of Appeal Board decisions has been extremely limited. One court has referred to the scope of review in cases of this type as "the narrowest known to the law."³⁸² Absent a denial of procedural fairness, a decision of the Appeal Board will be reversed "only if there is no basis in fact for the classification which it gave the registrant."³⁸³

For the most part, the adjudication of conscientious objectors' claims has involved the procedural aspects of classification.³⁸⁴ Several recently reported cases typify the procedural problems with which the courts have been concerned. In *United States v. Biesiada*,³⁸⁵ the district court refused to review the 1-A classification of a registrant who had been indicted for refusing to submit to induction. Despite having alleged his conscientious objection, the defendant had "failed to avail himself of the administrative remedies open to him to obtain review of this classification."³⁸⁶ Similarly, in *Woo v. United States*,³⁸⁷ defendant was denied judicial review where he had failed to request a personal appearance or to comply with the other administrative remedies afforded registrants.³⁸⁸ "To hold otherwise would create a shambles of this area of selective service classification."³⁸⁹ Likewise, in *United States v. Taylor*,³⁹⁰ defendant was denied

376 For a discussion of the history of conscientious objector provisions, see Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252, 256-63 (1963); Donnici, *Governmental Encouragement of Religious Ideology: A Study of the Current Conscientious Objector Exemption From Military Service*, 13 J. PUB. L. 16, 25-38 (1964); Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409, 412-29; Comment, *Constitutionality of Requiring Belief In Supreme Being for Draft Exemption as Conscientious Objector*, 64 COLUM. L. REV. 938, 941-44 (1964). U.S. News & World Report, Nov. 15 1965, p. 12 answers many of the questions frequently posed concerning conscientious objector classification.

377 *Ibid.*

378 See *United States v. Corliss*, 280 F.2d 808 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960); *Bouziden v. United States*, 251 F.2d 728 (10th Cir.), *cert. denied*, 356 U.S. 927, *rehearing denied*, 356 U.S. 964 (1958).

379 *Fleming v. United States*, 344 F.2d 912, 915 (10th Cir. 1965); *Keefer v. United States*, 313 F.2d 773, 776 (9th Cir. 1963).

380 *Fleming v. United States*, *supra* note 379, at 915.

381 See *Estep v. United States*, 327 U.S. 114, 122-23 (1946).

382 *Blalock v. United States*, 247 F.2d 615, 619 (4th Cir. 1957).

383 *Estep v. United States*, 327 U.S. 114, 122-23 (1946).

384 Donnici, *supra* note 376, at 28.

385 247 F. Supp. 599 (S.D.N.Y. 1965).

386 *Id.* at 602.

387 350 F.2d 992 (9th Cir. 1965).

388 See 32 C.F.R. §§ 1624, 1625, 1626 and 1627.

389 350 F.2d at 995.

390 351 F.2d 228 (6th Cir. 1965).

the right to claim conscientious objector status *after* he had received notice of induction.

The exemption granted to conscientious objectors who, "by reason of religious training and belief . . . in a relation to a Supreme Being," are opposed to participation in war is embodied in Section 456(j) of the Universal Military Training & Service Act of 1948.³⁹¹ Until the Supreme Court's recent interpretation of the "relation to a Supreme Being" requirement, serious doubts as to the constitutionality of this statutory language had existed.³⁹² One author, referring to this section as "the most flagrant of current governmental preferences of religious, vis-à-vis secular, ideology,"³⁹³ concluded that the statutory scheme effected an unconstitutional establishment of religion.³⁹⁴

The Supreme Court's decision to grant *certiorari* in *Seeger* was predicated upon the conflicting opinions of the Second and Ninth Circuits as to the constitutionality of the congressional classification limiting military exemptions to those who expressed a belief in a Supreme Being.³⁹⁵ The Second Circuit, in *United States v. Seeger*,³⁹⁶ held: "a requirement of belief in a Supreme Being, no matter how broadly defined, cannot embrace all those faiths which can validly claim to be called 'religious.'"³⁹⁷ Similarly, in *United States v. Jakobson*,³⁹⁸ Judge Friendly avoided the constitutional issue by interpreting "religion" "as broadly as the words permit,"³⁹⁹ thereby classifying defendant's "total affirmation of the basic blessedness of the fact of being"⁴⁰⁰ within the statutory exemption. The Ninth Circuit, however, in *Peter v. United States*,⁴⁰¹ adopted the rationale of one of its earlier opinions⁴⁰² that "no matter how pure and admirable his standard may be . . . [it] cannot be said to be religion in the sense of that term as it is used in the statute."⁴⁰³ Hence, the stage was set for the Supreme Court's resolution of the issue; *Seeger*, *Jakobson* and *Peter* were consolidated for oral argument.⁴⁰⁴

391 Universal Military Training & Service Act § 6(j), 62 Stat. 612-13 (1948), as amended, 50 U.S.C. APP. § 456 (j) (1958). See text quoted *supra* note 373.

392 See Donnici, *supra* note 376, at 32-38.

393 *Id.* at 44.

394 *Ibid.*

395 Compare Donnici, *supra* note 376 with Conklin, *supra* note 376. •

396 326 F.2d 846 (2d Cir. 1964), *aff'd*, 380 U.S. 163 (1965).

397 326 F.2d at 852.

398 325 F.2d 409 (2d Cir. 1963), *aff'd*, 380 U.S. 163 (1965).

399 325 F.2d at 415.

400 *Id.* at 413.

401 324 F.2d 173 (9th Cir. 1963), *rev'd* 380 U.S. 163 (1965).

402 *Berman v. United States*, 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946).

403 156 F.2d at 380.

404 *Seeger*

declared that he was conscientiously opposed to participation in war in any form by reason of his "religious" belief; that he preferred to leave the question as to his belief in a Supreme Being open, "rather than answer 'yes' or 'no'"; that his "skepticism or disbelief in the existence of God" did "not necessarily mean lack of faith in anything whatsoever"; that his was a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."

380 U.S. at 166.

Jakobson believed

in a "Supreme Being" who was the "Creator of Man" in the sense of being "ultimately responsible for the existence of" man and who was "the Supreme Reality" of which "the existence of man is the result." . . . He had concluded that man must be "partly spiritual" and, therefore, "partly akin to the Supreme Reality"; and that his "most

Mr. Justice Clark, whose opinion in *Seeger* reads "like a short course in theology,"⁴⁰⁵ did not interpret the exemption clause in the same manner as the Second Circuit had. Instead, he was able to avoid the necessity of holding the statute unconstitutional by interpreting congressional intent in referring to "Supreme Being" rather than "God" as a deliberate attempt to expand the scope of the exemption beyond that which would normally accompany the appellation "God."

This vast panoply of beliefs [the numerous denominations which have opposed war] reveals the magnitude of the problem which faced the Congress when it set about providing an exemption from armed service. It also emphasizes the care that Congress realized was necessary in the fashioning of an exemption which would be in keeping with its long-established policy of not picking and choosing among religious beliefs.⁴⁰⁶

An appreciation of *Seeger's* contribution to the "new dynamism"⁴⁰⁷ of free exercise can best be illustrated by quoting the Court's holding:

We have concluded that Congress, in using the expression "Supreme Being" rather than the designation "God," was merely clarifying the meaning of religious belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not.⁴⁰⁸

Albeit the product of a somewhat strained definition of the term "Supreme Being," Mr. Justice Clark's opinion paves the way for administrative and judicial recognition of the "broad spectrum of religious beliefs among us" and "the diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated."⁴⁰⁹

It is to be noted that the Court painstakingly avoided addressing itself to the effect of *Seeger* on the status of atheists who demonstrate a sincere revulsion

important religious law" was that "no man ought ever to wilfully sacrifice another man's life as a means to any other end"

380 U.S. at 167-68.

Peter appended a statement that

he felt it a violation of his moral code to take human life and that he considered this belief superior to his obligation to the state. As to whether his conviction was religious, he quoted with approval Reverend John Haynes Holmes' definition of religion as "the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands . . . [it] is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best."

380 U.S. at 169.

405 N.Y. Times, Mar. 9, 1965, p. 1, col. 7.

406 380 U.S. at 175.

407 1963-64 *Church-State Survey*, *supra* note 1, at 483.

408 380 U.S. at 165-66.

409 N.Y. Times, Mar. 10, 1965, p. 15, col. 1.

for war.⁴¹⁰ In so doing, it is submitted, the Court has inexpediently postponed the inevitable task of reconciling Section 456(j) with *Torcaso v. Watkins*.⁴¹¹ The sophistries which the Court might employ to exclude sincere atheists from the statutory exemption, while at the same time upholding the establishment rationale of *Torcaso*, are somewhat inconceivable.⁴¹² It is submitted that *Seeger* effects a mere semantic distinction between objection which is "religiously" inspired and that which is "philosophically," "sociologically," or "morally" motivated, absent the registrant's blatant admission that his opposition to military service is not "religious." In those instances where the claimant is foolhardy enough to insist upon his "non-religious" motivation, it would seem that *Torcaso* will protect him from the invidious discrimination resulting from such an establishment. Thus, it is submitted that the *Seeger* test is neither as "objective" nor as "simple" as the Court indicates.⁴¹³

The difficulties besetting courts as a result of *Seeger* were illustrated in two recent post-*Seeger* decisions. In *Fleming v. United States*,⁴¹⁴ the Tenth Circuit reversed the conviction of one whose conscientious objection appeared to be sociologically or philosophically inspired. The defendant was able to present some evidence of a religious background which enabled the court to hold that the hearing examiner's denial of the military exemption had no basis in fact. It appears that the court interpreted *Seeger* as requiring the exemption whenever there is some evidence of religion in the files of the registrant. It is submitted that this approach tends to emasculate the role of administrative fact-finders in this area.

The extent to which courts, under the guise of *Seeger*, are willing to disregard the recommendations of the administrative branch was rather clearly indicated by *United States v. Stolberg*.⁴¹⁵ Although the defendant had returned the conscientious objector form as not applicable to him, the Chief of the Conscientious Objector Section of the Department of Justice had recommended that defendant's claim not be sustained, and the court found it "difficult to state just what Stolberg's religious beliefs were,"⁴¹⁶ the decision stated that *Seeger* "forced [the court] to conclude that Stolberg's beliefs qualified him for the classification of conscientious objector."⁴¹⁷

Classification problems similar to those concerning conscientious objection have arisen as a result of the provision exempting ministers from military service.⁴¹⁸ The ministerial exemption has also involved the courts in the perplexing task of defining statutory scope. The major difficulty has stemmed from the attempt to ascertain which individuals qualify as ministers. Since the

410 "We also pause to take note of what is not involved in this litigation. No party claims to be an atheist or attacks the statute on this ground. The question is not, therefore, one between theistic and atheistic beliefs. We do not deal with or intimate any decision on that situation in these cases."

380 U.S. at 173-74.

411 367 U.S. 488 (1961).

412 See notes 342-49 and accompanying text *supra*.

413 380 U.S. at 184.

414 344 F.2d 912 (10th Cir. 1965).

415 346 F.2d 363 (7th Cir. 1965).

416 *Id.* at 364.

417 *Id.* at 365.

418 62 Stat. 611 (1948), 50 U.S.C. App. § 456(g) (1958).

exemption has been granted sparingly, it has not been afforded to all members of those sects who "by reason of their membership . . . each is a minister."⁴¹⁹ Typically, Jehovah's Witnesses, who claim that every member of the sect is a minister of religion, have been involved in litigation in this area.

In *Fitts v. United States*,⁴²⁰ a Jehovah's Witness who was denied a ministerial exemption was convicted of failing to report for civilian work assigned to him as a conscientious objector. The defendant had admitted that he was primarily engaged in farming and that his ministerial work totalled forty-eight hours a month. The Fifth Circuit referred to three basic considerations which have guided the courts when reviewing the status of Jehovah's Witnesses:

First, the registrant must have the ministry as a vocation rather than as an avocation. . . . Second, religious affairs must occupy a substantial part of the registrant's time and they must be carried on with regularity. . . . Finally, and most important, in order to obtain an exemption a registrant must stand in the relation of a minister to a congregation or in an equivalent relation as a recognized leader of a group of lesser members of his faith. One of the basic purposes of the exemption is to guard against a flock being left without its shepherd.⁴²¹

In similar circumstances, the Seventh Circuit in *United States v. Norris*⁴²² upheld the Appeal Board's denial of the exemption to the defendant who had not sustained the burden of showing that "this work was his vocation and not his avocation."⁴²³

In contrast, *United States v. Hestad*⁴²⁴ held it an abuse of discretion for the local board to refuse to reopen the classification of a registrant who offered evidence that he was spending more than 200 hours per month in his religious work. The court found that the board's decision to ignore this uncontroverted evidence constituted a violation of due process. In another recent case, the defendant whose claim to the ministerial exemption had been denied was acquitted of violating the draft law on the grounds that he had been denied his right to an Appeal Board review of his classification.⁴²⁵

Despite the rather frequent litigation in this area, the decisions have yet to consider the impact of *Torcaso* on the ministerial exemption. It is submitted that a broad reading of *Torcaso* casts considerable doubt on the constitutionality of this provision of the Act.⁴²⁶

D. Prisoners' Freedom to Practice Religion

The attempts to balance the exigencies of prison discipline and the constitutional protections afforded those who are lawfully incarcerated have pre-

⁴¹⁹ *Dickinson v. United States*, 346 U.S. 389,394 (1953).

⁴²⁰ 334 F.2d 416 (5th Cir. 1964).

⁴²¹ *Id.* at 421.

⁴²² 341 F.2d 527 (7th Cir. 1965). *Accord*, *United States v. Stidham*, 248 F.Supp. 822 (W.D. Mo. 1965).

⁴²³ 341 F.2d at 530.

⁴²⁴ 248 F.Supp. 650 (W.D. Wis. 1965).

⁴²⁵ *United States v. Olkowski*, 248 F.Supp. 660 (W.D. Wis. 1965).

⁴²⁶ Compare *Donnici*, *supra* note 376, with 1963-64 *Church-State Survey*, *supra* note 1, at 484.

sented "a fascinating arena for the refinement of our conceptions of religious liberty versus society's interest."⁴²⁷ Given the very real need to maintain prison discipline, which necessitates the imposition of practical limitations on the constitutional rights of inmates, a theoretical discussion of religious freedom in this context would be sheer folly. For the delicate balancing process to lean in the direction of protecting free exercise, the societal interest in maintaining order at penal institutions must be clearly overshadowed. The categorization of prison administration as an "executive function"⁴²⁸ has prompted courts to be extremely reluctant to interfere with the enforcement of prison rules, regulations and discipline.⁴²⁹ Absent a rather clear indication of arbitrary and capricious conduct amounting to an abuse of discretion on the part of prison administrators, the judicial branch has yielded to the administrative.⁴³⁰

As in previous years, a majority of the cases arising in this area have involved claims of religious persecution by inmates adhering to the beliefs of the Black Muslim sect.⁴³¹ To a large extent, many of the difficulties have resulted from the strikingly unconventional tenets of "The Nation of Islam"⁴³² and the refusal of many prison administrators to view the Muslim movement as anything more than a sham.⁴³³ Suffice it to say that the broad definition of religion in *United States v. Seeger*⁴³⁴ appears to have settled the question of whether the Muslim sect is to be considered "religious."

The recent decisions rather clearly indicate that in the future, a suppression of Black Muslim activities within the prison "subociety"⁴³⁵ will require prison administrators to justify their actions with something more than peremptoriness. In *Sostre v. McGinnis*,⁴³⁶ several Black Muslim inmates of a "maximum security prison"⁴³⁷ in New York brought an action to compel prison authorities to recognize their rights to worship collectively, to obtain religious literature, and to confer and correspond with ministers of their sect. The Second Circuit accepted the district court's finding that the Muslims constitute a "religion." At the same time, the court recognized that the peculiar doctrines of plaintiffs' religion could quite understandably require more serious restrictions upon their religious activities. Concluding that plaintiffs' demands be honored "insofar as possible within the limits of prison discipline,"⁴³⁸ the court ordered the dis-

427 Frankino, *The Manacles and the Messenger: A Short Study in Religious Freedom in the Prison Community*, 14 CATHOLIC U.L. REV. 30, 31 (1965).

428 *Id.* at 37.

429 See *Sostre v. McGinnis*, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964).

430 See, e.g., *State v. Cabbage*, 210 A.2d 555, 564 (Del. Super. Ct. 1965).

431 See generally LINCOLN, *THE BLACK MUSLIMS IN AMERICA* (1961); Brown, *Black Muslims and the Police*, 56 J. CRIM. L., C. & P.S. 119 (1965); Comment, *Black Muslims in Prison: Of Muslim Rites and Constitutional Rights*, 62 COLUM. L. REV. 1488 (1962).

432 "Although the Black Muslims call their Movement a religion, religious values are of secondary importance. They are not part of the Movement's basic appeal except to the extent that they foster and strengthen the sense of group solidarity." LINCOLN, *op. cit. supra* note 431, at 27 "The core of this dogma, then, is hatred of the white man and the supremacy of the Black Man." Frankino, *supra* note 427, at 34.

433 See, e.g., *Bryant v. Wilkins*, 45 Misc. 2d 923, 258 N.Y.S.2d 455 (Sup. Ct. 1965).

434 380 U.S. 163 (1965). See text accompanying notes 391-413, *supra*.

435 Comment, *Black Muslims in Prison: Of Muslim Rites and Constitutional Rights*, *supra* note 431.

436 334 F.2d 906, (2d Cir.), *cert. denied*, 379 U.S. 892 (1964).

437 *Id.* at 908.

438 *Id.* at 912.

strict court to retain jurisdiction pending the implementation of this decision by the state courts.⁴³⁹ In *Bryant v. Wilkins*,⁴⁴⁰ the Commissioner of Correction's refusal to recognize the Muslim sect as a religion was held to constitute a denial of free exercise and equal protection violative of the Supreme Court's decision in *Seeger*. The court, holding that the commissioner's refusal exceeded the scope of his legislative authority, stated:

[I]f the exercise of any particular religion, as opposed to the actions of individual members of a sect, is shown by convincing evidence to pose a clear and present danger to proper discipline and management of the prison, then those exercises and practices may be prohibited . . . so long as the danger, in fact, exists.⁴⁴¹

Analogously, *State v. Cabbage*⁴⁴² held an allegation of "potential danger"⁴⁴³ insufficient to justify the imposition of restrictions on the petitioner's right to practice religion and to wear religious insignia. Furthermore, the free exercise of religion was held to encompass "the right to select the clergy and to determine their essential qualifications."⁴⁴⁴ *Banks v. Havener*⁴⁴⁵ was another significant case arising as a result of alleged religious oppression in the penal institutions maintained by the District of Columbia.⁴⁴⁶ The court held that neither the antipathy of other inmates resulting from Muslim adherence to a doctrine of black supremacy nor the speculation that future riots would be instigated by Muslims satisfied the prison officials' burden of proving a clear and present danger.⁴⁴⁷ One author has suggested that the clear and present danger test constitutes "the best standard for testing the limitations which can be placed on religious practices in prisons."⁴⁴⁸

Two recent decisions have upheld prison authorities' denials of Black Muslim requests. In *Cooke v. Tramburg*,⁴⁴⁹ Muslim inmates were denied the right to worship collectively and be preached to by ministers of their own choosing. The New Jersey Supreme Court, noting the "sensitive and explosive"⁴⁵⁰ nature of prison society, upheld the reasonableness of the denial on the grounds that previous experiences and occurrences involving Black Muslim

439 The state courts had ordered the Commissioner of Correction of the State of New York to promulgate administrative rules and regulations implementing N.Y. CORRECTION LAW § 610 which provides:

All persons who may have been or may hereafter be committed to or taken charge of by any of the institutions mentioned in this section, are hereby declared to be and entitled to the free exercise and enjoyment of religious profession and worship, without discrimination or preference

Cf., *Casey v. Fay*, 22 App. Div. 2d 941, 256 N.Y.S.2d 97 (1964); *Blazic v. Fay*, 21 App. Div. 2d 817, 251 N.Y.S.2d 494 (1964).

440 45 Misc. 2d 923, 258 N.Y.S.2d 455 (Sup. Ct. 1965).

441 258 N.Y.S.2d at 463.

442 210 A.2d 555 (Del. Super. Ct. 1965).

443 *Id.* at 568.

444 *Ibid.*

445 234 F. Supp. 27 (E.D. Va. 1964).

446 See, *Childs v. Pegelow*, 321 F.2d 487 (4th Cir. 1963); *Sewell v. Pegelow*, 291 F.2d 196 (4th Cir. 1961); *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962).

447 234 F. Supp. at 30.

448 Frankino, *supra* note 427, at 58.

449 43 N.J. 514, 205 A.2d 889 (1964). *Accord*, *Jones v. Willingham*, 248 F.Supp. 791 (D. Kan. 1965).

450 205 A.2d at 894.

inmates were sufficient to negate the contention of arbitrary or capricious conduct. Although the objective evidence submitted by the prison authorities militated against a finding that their fears were merely speculative, it remains questionable whether granting plaintiff's demands would have resulted in the clear and present danger deemed necessary to justify interference with the "preferred"⁴⁵¹ right to freedom of religion. The justification for denying petitioner's claims was considerably less dubious in *Coleman v. United States*,⁴⁵² where the district court upheld a prison regulation restricting the inmates' right to confer with Muslim ministers to designated times and places.

In *Cleggett v. Pate*,⁴⁵³ a case not involving a member of the Black Muslims, a plaintiff confined to a maximum security unit claimed that the warden's refusal to allow him the opportunity to participate in corporate worship infringed upon his constitutional right to exercise his religious beliefs. The court analogized the situation to *McBride v. McCorkle*,⁴⁵⁴ where a Roman Catholic assigned to solitary confinement was not permitted to attend Mass on Sundays or other holy days on the grounds that "the interest of an orderly society that required his imprisonment insists only that he be privileged to worship God to the extent that his conduct in prison permits."⁴⁵⁵ Similarly, the court in *Cleggett* suggested that granting such permission to a prisoner confined to a segregation unit "might endanger the remainder of the prison population."⁴⁵⁶

It is submitted that recent decisions in this area evidence an increasing tendency on the part of the judiciary to require considerably more than mere administrative distaste or convenience to justify an interference with or suppression of the religious practices of prisoners. Clearly, however, where the practice of any religion is likely to be inimical to the prison welfare, regulations should be upheld. That the spirit of accommodation has been extended to the prison population is indeed a tribute to the "new dynamism"⁴⁵⁷ of free exercise.

E. Sunday Closing Laws

Statutes compelling the observance of Sunday as a uniform day of rest have been a focal point of widespread disagreement for several decades. The religious character of Sunday closing laws enacted prior to the turn of this century is an accepted fact.⁴⁵⁸ For the most part, however, the rationale underlying the enactment of comparatively recent Sunday legislation has been articulated in terms of the state's interest in providing for the health and welfare of the populace. As early as 1904, a noted legal scholar recognized the secular undercurrents of Sunday legislation and stated:

It is well established that the character of Sunday legislation is secular and not religious, and under the principle of separation of church and state it

451 See e.g., *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

452 234 F. Supp. 408 (E.D. Va. 1964).

453 229 F. Supp. 818 (N.D. Ill. 1964).

454 44 N.J. Super. 468, 130 A.2d 881 (Super. Ct. 1957).

455 130 A.2d at 887.

456 229 F. Supp. at 821.

457 1963-64 *Church-State Survey*, *supra* note 1, at 483.

458 ANTIEAU, CARROLL & BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* 73 (1965).

could not be otherwise. The enforced abstention from work has been held to be justified by the experience that periods of rest from ordinary pursuits are requisite to the moral and physical well-being of the people. . . . [T]he legislation regarding it . . . may then be looked upon as a measure for the protection of the good order and comfort of the community established and recognised by common custom and convention.⁴⁵⁹

Objections to the constitutionality of specific Sunday legislation have been upheld in several instances. Not infrequently, statutes have been invalidated because of vagueness, unreasonable and arbitrary classification, or discriminatory application and enforcement. It is apparent that these objections to Sunday laws are, at most, tangential to church-state interrelationships. However, a sense of perspective necessitates a discussion of the latest decisions involving non-religious attacks on Sunday laws.

The classification scheme embodied in a recently enacted Sunday closing statute was declared unconstitutional in *Skag-Way Dep't Stores, Inc. v. City of Grand Island*.⁴⁶⁰ Similarly, a North Carolina statute proscribing the sale of merchandise on Sundays, which exempted forty-eight counties from its operation, was held in violation of a state constitutional provision prohibiting local laws.⁴⁶¹ Divergent opinions were rendered by the highest courts of Maine and Nebraska with respect to the constitutionality of exempting small retailers from the ambit of Sunday prohibition. In response to questions propounded by the state legislature, the Supreme Judicial Court of Maine held it reasonable to exempt small stores from the scope of the statute because their transaction of business would not interfere with the atmosphere of rest and leisure sought to be attained.⁴⁶² Antithetically, the Supreme Court of Nebraska invalidated a statute exempting retailers employing not more than two employees on the grounds that it denied the plaintiff equal protection and due process. The court was "unable to perceive how it can possibly be promotive of the health and welfare of the people . . . to prohibit the operation of retail outlets having more than two employees . . . while permitting those with two employees to operate"⁴⁶³ A concurring opinion, which indicated serious doubts as to the propriety of Sunday legislation, stated:

We are now in a position where we must face the facts that now exist in our more complex social and economic society. The real purpose of Sunday closing laws is not to protect religious worship, or to provide a uniform day of rest, or to provide family unity. Its real purpose is to enlist the power of the state to protect narrow commercial interests, influenced by the fierce competition between the discount store and the downtown merchants.⁴⁶⁴

459 FREUND, *THE POLICE POWER* § 185, at 169 (1904). For an interesting comparison of the underlying rationale of Sunday laws in the United States and Canada see Barron, *Sunday in North America*, 79 HARV. L. REV. 42 (1965).

460 176 Neb. 169, 125 N.W.2d 529 (1964). The ordinance, which proscribed some retail and wholesale activities but permitted many others to sell the same commodities, was declared arbitrary and discriminatory.

461 *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965).

462 *Opinion of the Justices*, 159 Me. 410, 191 A.2d 637 (1963).

463 *Terry Carpenter, Inc. v. Wood*, 177 Neb. 515, 129 N.W.2d 475, 481 (1964).

464 129 N.W.2d at 483. See ANTIEAU, CARROLL & BURKE, *op. cit. supra* note 458, at 75;

When Sunday laws are assailed as unconstitutionally vague, the attack is often directed at the broad language that typically appears in exculpatory clauses.⁴⁶⁵ A recent New York decision,⁴⁶⁶ in which the court broadly construed the words "conducts trade," exemplified the problems of interpretation in this area. In other recent cases, statutes prohibiting the sale of "building supply materials,"⁴⁶⁷ "wearing apparel,"⁴⁶⁸ and "housewares,"⁴⁶⁹ without further definition, were upheld over allegations of vagueness.

The Supreme Court, in 1961, addressed itself to the constitutionality of Sunday closing laws.⁴⁷⁰ These decisions, covering 222 pages in the official report, marked the earliest adjudication by the Court of the first amendment objections to Sunday laws.⁴⁷¹ Statutes of Maryland, Pennsylvania, and Massachusetts were deemed consistent with the establishment clause and the free exercise protection afforded by the Constitution. The "rejuvenation given the Sunday statutes"⁴⁷² by Mr. Chief Justice Warren, speaking for the Court, has withstood widespread criticism.⁴⁷³

The decision in *McGowan v. Maryland*⁴⁷⁴ did not preclude the possibility of a given state statute constituting an establishment:

We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.⁴⁷⁵

In light of the pronouncement above, the constitutionality of statutes not purporting to be secular in purpose and effect must be seriously questioned. Although "the better view would appear to be that the Sunday Blue Laws do not respect an establishment of religion,"⁴⁷⁶ a decision such as *Smith v. State*⁴⁷⁷ presents serious obstacles to a reconciliation with *McGowan*. In *Smith*, judicial acts performed on Sunday were vitiated on the grounds that they conflicted with

Comment, 43 N.C.L. REV. 123 (1964). For a rather graphic example of economic interests motivating the proponents of Sabbath Laws, see *People v. Paine Drug Co.*, 39 Misc. 2d 824, 241 N.Y.S.2d 946 (Monroe County Ct. 1963), *rev'd*, 22 App. Div. 2d 156, 254 N.Y.S.2d 492 (1964), *aff'd*, 16 N.Y.2d 503, 208 N.E.2d 176, 260 N.Y.S.2d 444, *cert. denied*, 382 U.S. 838 (1965). In *Paine* a small group of merchants initiated criminal proceedings for the sole purpose of preventing competition. See also N.Y. Times, May 23, 1963, p. 59, col. 1.

465 See, e.g., *Arlan's Dep't Store v. Commonwealth*, 369 S.W.2d 9 (Ky. 1963), *appeal dismissed*, 376 U.S. 186 (1964). Compare *State v. Katz Drug Co.*, 352 S.W.2d 678 (Mo. 1961), *with State v. Hill*, 189 Kan. 403, 369 P.2d 365 (1962).

466 *People v. Schwebel*, 44 Misc. 2d 1035, 255 N.Y.S.2d 760 (Sup. Ct. 1965).

467 *State v. Deutch*, 245 La. 819, 161 So. 2d 730 (1964).

468 *State v. Wiener*, 245 La. 889, 161 So. 2d 755 (1964).

469 *State v. McQueen*, 378 S.W.2d 449 (Mo. 1964).

470 *Gallagher v. Crown Kosher Market*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961). For a detailed discussion of these cases, see 1960-62 *Church-State Survey*, *supra* note 1, at 680-86; Comment, 30 TENN. L. REV. 249 (1963).

471 50 GEO. L.J. 161, 162-63 (1961); 50 ILL. B.J. 792 (1962).

472 8 N.Y.L.F. 403, 409 (1962).

473 See, e.g., Mann and Garfinkel, *The Sunday Closing Laws Decisions—A Critique*, 37 NOTRE DAME LAWYER 323 (1962); 35 CONN. B.J. 523 (1961); 50 GEO. L.J. 161 (1961).

474 366 U.S. 420 (1961).

475 *Id.* at 453.

476 35 CONN. B.J. 523, 528 (1961).

477 385 S.W.2d 748 (Tenn. 1965).

a state statute recognizing "the sanctity of the Lord's Day."⁴⁷⁸ The Tennessee court declared: "In fact, the Sunday laws of our State tend to strengthen the policy of sanctity of the Sabbath, as espoused by the common law, and prevent the exercise of any unnecessary secular labor on the Sabbath."⁴⁷⁹ The more typical approach⁴⁸⁰ to such legislation was reflected in *State v. Rogers*,⁴⁸¹ where the secular rather than the religious rationale was propounded. Recognizing the legislature's emphasis on secular considerations, the court held that the Sunday legislation regulating work and sales, despite the presence of "religiously associated language," bore no relationship to the concept of establishment.⁴⁸²

Many states, recognizing the religious genesis of their Sunday closing laws, have afforded exemptions to those whose religious scruples require them to observe a day other than Sunday as their Sabbath.⁴⁸³ The constitutionality of the Sunday statutes of Pennsylvania and Massachusetts, which did not provide for the exemption of Sabbatarians,⁴⁸⁴ was upheld in *Braunfeld v. Brown*⁴⁸⁵ and *Gallagher v. Crown Kosher Super Market*.⁴⁸⁶ The Supreme Court, conceding that the effect of not providing an exemption was "to make the practice of . . . religious beliefs more expensive,"⁴⁸⁷ sustained the validity of the Sunday legislation "despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."⁴⁸⁸ In a separate opinion, Mr. Justice Frankfurter noted that none of the decisions concerning the effect of Sunday closing laws on Sabbatarians concluded that the free exercise of religion had been infringed.⁴⁸⁹ The dissents of Justices Brennan, Douglas and Stewart recognized the majority's utter lack of sensitivity to the plight of minority sects; the state's interest in a uniform day of rest can hardly justify requiring an individual to choose between his religious beliefs and impending economic disaster. Criticism of the Court's holding in *Braunfeld* and *Gallagher* has been widespread and vociferous.⁴⁹⁰

Questions concerning the constitutionality of Sabbatarian exemptions have been very much alive in the two-year period since the last Survey. In *State v. Gates*,⁴⁹¹ a statute providing an exemption for those faiths observing Saturday as the Sabbath, but not extending to Friday Sabbatarians, was declared constitutional. The petitioners, members of the Druse and Moslem faiths, assailed the West Virginia statute on numerous grounds. The court, quoting *Braunfeld* extensively, held that the exemption restricted to Saturday worshippers constituted neither an establishment of religion nor a denial of free exercise. It is

478 *Id.* at 750.

479 *Ibid.*

480 ANTIEAU, CARROLL & BURKE, *op. cit. supra* note 458, at 77.

481 105 N.H. 366, 200 A.2d 740 (1964).

482 200 A.2d at 743.

483 8 N.Y.L.F. 403 (1962).

484 "Sabbatarians," for purposes of this discussion, includes all those persons who observe a day other than Sunday as their Sabbath.

485 366 U.S. 599 (1961).

486 366 U.S. 617 (1961).

487 *Braunfeld v. Brown*, 366 U.S. at 605.

488 *Id.* at 607.

489 *McGowan v. Maryland*, 366 U.S. 420, 522 (1961).

490 See authorities cited note 473 *supra*.

491 141 S.E.2d 369 (W. Va. 1965).

submitted that this decision effects a rather hollow application of *Braunfeld* in the sense that the court failed to perceive the very basic distinction between *Gates* and *Braunfeld*. It is one thing to say that a Sabbatarian exemption is not constitutionally compelled. It is quite another to declare that the legislature may grant immunity to one religious group and withhold it from others. To effect this distinction is to run afoul of the broad definition of establishment propounded by the Court in *Torcaso v. Watkins*⁴⁹² and succeeding decisions.⁴⁹³

In *State v. Solomon*,⁴⁹⁴ an Orthodox Jew who did not open his general merchandise store on Saturdays was convicted of operating his business in violation of the South Carolina Sunday closing law. The defendant's argument paralleled that which was put forward in *Braunfeld* and *Gallagher*, i.e., the statute violated the establishment and free exercise clauses since it placed an undue economic burden on the exercise of his religious beliefs.⁴⁹⁵ The court sustained the enactment under the police power of the state, utilizing the conventional rhetoric: "[The statute] serves a strong state interest in providing one uniform day of rest for its citizens"⁴⁹⁶ Defendant's contention that *Sherbert v. Verner*⁴⁹⁷ required a different conclusion was negated by the court's adoption of the Supreme Court's rationale in distinguishing *Sherbert* from *Braunfeld*.⁴⁹⁸ It is submitted that the Supreme Court, in dismissing the defendant's appeal in *Solomon*,⁴⁹⁹ bypassed a fateful opportunity to efface the "unfortunate teaching of *Braunfeld*."⁵⁰⁰

The harshness of the Court's Sabbatarian doctrine was graphically depicted in *People v. Finkelstein*⁵⁰¹ in which a "scrupulously religious"⁵⁰² Orthodox Jewish storekeeper was convicted of violating New York's Sunday law.⁵⁰³ A majority of New York City's Criminal Court, after finding as a fact "that this defendant cannot survive economically without conducting business on Saturday after sundown and Sunday,"⁵⁰⁴ declared themselves "powerless to question"⁵⁰⁵ the constitutionality of the Sunday closing statute. A penetratingly exhaustive dissent by Judge Shalleck,⁵⁰⁶ the sentiments of which were subscribed to by the ma-

492 367 U.S. 488 (1961).

493 E.g., *United States v. Seeger*, 380 U.S. 163 (1965). See Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Note, *The Constitutionality of Sabbatarian Exemptions*, 43 B.U.L. REV. 386 (1963).

494 141 S.E.2d 818, *appeal dismissed*, 382 U.S. 204 (1965).

495 141 S.E.2d at 827.

496 *Id.* at 828.

497 374 U.S. 398 (1963). In *Sherbert*, the Supreme Court declared that a South Carolina unemployment compensation statute, which denied appellant relief because of her religiously inspired refusal to work on Saturdays, infringed upon appellant's freedom of religion.

498 To reconcile *Sherbert* and *Braunfeld* the majority held that the state interest in the former case was less compelling than in the latter. Also, the alternatives available in *Sherbert* were not found to be available in *Braunfeld*.

499 382 U.S. 204 (1965).

500 1963-64 *Church-State Survey*, *supra* note 1, at 480.

501 38 Misc. 2d 791, 239 N.Y.S.2d 835 (N.Y.C. Crim. Ct.), *aff'd*, 41 Misc. 2d 35, 244 N.Y.S.2d 727 (Sup. Ct. 1963), *aff'd*, 14 N.Y.2d 608, 198 N.E.2d 265, 248 N.Y.S.2d 889, *cert. denied*, 377 U.S. 1006 (1964) (Douglas, J., dissenting).

502 239 N.Y.S.2d at 835.

503 N.Y. PENAL LAW § 2147.

504 239 N.Y.S.2d at 836.

505 *Ibid.*

506 *Id.* at 838.

jority,⁵⁰⁷ urged that precedent established in the Sunday closing cases did not conclusively require the defendant's conviction. The dissent contended that the free exercise clause of the first amendment requires an exemption when a Sunday statute imposes a choice of either violating religious scruples or going into bankruptcy and on relief. Judge Shalleck stated:

The claim of the defendant raises an interesting and fundamental question involving the dignity of man. If the alternative to a religious man—not necessarily of Christian faith—wanting to believe in and to practice, his religion (as here, without hinderance [sic] or interference to others practicing theirs or enjoying the leisurely comforts of a Sunday) is the total loss of his business enterprise and the receiving of public relief for himself and his family, then it well becomes a Court to hesitate and ponder whether it would force each alternative upon him. For our country has grown civilly strong on the foundation of the dignity of each one of its inhabitants; and it has become economically great on the right of each man to make his own destiny by his own hands and not to suffer the prideless ignominy of avoidably living off the public's bounty.⁵⁰⁸

It is deemed unfortunate that the Supreme Court did not choose this opportunity to "graciously accept an invitation to reexamine"⁵⁰⁹ its decisions in the Sunday closing cases.⁵¹⁰

Some state legislatures, however, have responded to the increasing pressures to obviate the burdens placed upon Sabbatarians. A state statute authorized the City of New York to enact legislation that would exempt Sabbatarians who operated small stores.⁵¹¹ The Mayor of New York City, after signing the bill, stated: "This is the end of a long road of effort . . . to work out a law that takes cognizance of the religious sensibilities of all"⁵¹² Massachusetts has also responded to the plight of Sabbatarians by enacting an "effective exemption."⁵¹³

The decisions rendered in the two-year period under study have certainly not dampened the prospect that Sunday laws are likely to remain in force for some time to come.⁵¹⁴ Nonetheless, Sunday laws have been assailed on many grounds. It has been argued that "Sunday legislation is contrary not only to the principles of American law but to the principles and precepts of Christianity itself."⁵¹⁵ Solutions to the dilemmas occasioned by Sunday laws have ranged from

507 *Id.* at 837.

508 *Id.* at 842.

509 *Id.* at 840.

510 The Court elected to deny defendant's petition for certiorari. 377 U.S. 1006 (1964).

511 This Sabbatarian exemption has since been extended to the entire state. N.Y. Penal Law § 2154 (McKinney Supp. 1965).

512 N.Y. Times, Oct. 1, 1963, p. 1, col. 1. For additional newspaper coverage of the New York Sunday laws, see N.Y. Times, April 5, 1963, p. 1, col. 5; *id.*, April 8, 1963, p. 1, col. 2; *id.*, April 26, 1963, p. 20, col. 2; *id.*, June 19, 1963, p. 74, col. 7; *id.*, June 27, 1963, p. 27, col. 4; *id.*, Sept. 13, 1963, p. 30, col. 2; *id.*, Sept. 18, 1963, p. 1, col. 6; *id.*, Oct. 7, 1963, p. 25, col. 1; *id.*, Oct. 7, 1963, p. 1, col. 3; *id.*, Oct. 15, 1963, p. 38, col. 5.

513 1964 RELIGION AND THE PUBLIC ORDER 270.

514 ANTIEAU, CARROLL & BURKE, RELIGION UNDER THE STATE CONSTITUTIONS 78-79 (1965); 8 N.Y.L.F. 403, 409 (1962).

515 JOHNSON & YOST, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES 255 (1948).

outright abolition to the adoption of "one-in-seven laws" as a means of effecting the compelling state interest to provide a day of rest.⁵¹⁶

The recent legislative responses to hardships imposed upon Sabbatarians have resulted in a victory for cultural pluralism. Yet, the Supreme Court has not seen fit to reevaluate the Sunday closing cases decided in 1961. It is submitted that *Braunfeld* and *Gallagher* are contrary to the spirit of accommodation which has pervaded several of the Court's recent pronouncements.⁵¹⁷ Supreme Court review of the Sabbatarian exemption is also deemed necessary to reconcile the existence of these exemptions with the broad view of the establishment clause. The constitutional objection of a non-Sabbatarian in a jurisdiction where an exemption has been granted appears to be analogous to the issue underlying the unanswered question in *Seeger*.⁵¹⁸ Both the atheist seeking an exemption under the Universal Military Training & Service Act and the non-Sabbatarian desiring to transact business on Sunday would appear to be justified in relying on the language of *Torcaso* which prohibits the state from enacting legislation which aids religion, *i.e.*, extending benefits to those professing religious beliefs but not to non-believers.⁵¹⁹

IV. RELIGIOUS VALUES

This section will focus on the basic Church-State tension by exploring two aspects of the burden-benefit question: the extent to which "religion" is employed as a determinant legal fact; and the extent to which the rule of law reflects the thrust of "religious values." The categories drawn in this survey are purposeful primarily as methodological tools with which to approach the whole area. Although the aspects considered all adhere in one social phenomenon, they are separable and not separate. Religion, then, will simultaneously be institution, right and value, for the attempt is to achieve as comprehensive a survey as possible by taking different perspectives of the core object: the inter-play of church and state.

A. *Religion as Value: Determinant of Decisions*

1. "Religion"

As something more abstract than institution, "religion" is seldom made a conscious part of the materials of decision, nor is it usually acknowledged as having intruded into the legal process. In the normal course of events, the law does not turn to a man's religious activities as easily as to the whole gamut of his other actions to decide guilt or innocence, liability or immunity. It is suggested that this is the result of something more than a finding that religion is factually irrelevant; it marks a studied judicial reluctance to admit religion to the status of legal relevancy, an inhibition traceable to an acute deference for the sensitivities

516 ANTIEAU, CARROLL & BURKE, *op. cit. supra* note 514, at 76-77.

517 *United States v. Seeger*, 380 U.S. 163 (1965); *In re Jenison*, 375 U.S. 14 (1963); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

518 See text accompanying note 410 *supra*.

519 See text accompanying note 348 *supra*.

of the first amendment. However, there are occasions when the law does notice religion and makes it a part of the decisional fabric.

2. Religion and Family Law

As indicated in past Surveys,⁵²⁰ the area of domestic relations is one in which religion has been made a part of the legal picture and has been the object of efforts to make it a decisive factor.

a. Divorce

Divorce looms large in American society, with approximately 400,000 couples severing their marital bonds each year.⁵²¹ In the past, divorce laws have met with opposition from various church groups; yet there appears to be a greater willingness on the part of churchmen to live with less restrictive divorce laws. Illustrative is the relaxing of Catholic opposition to reform of the presently stringent New York law.⁵²²

Conjunctively, if the churches are now much less concerned with molding the law to help reinforce the values they hold dear, the law in turn no longer makes religion an integral consideration in the granting of a divorce decree. There has been no legal activity in the past two years that would indicate the courts have been inclined to change their settled position — namely, that religious differences standing alone are not a sufficient basis for the granting of a divorce or separation. Religion only enters into such a proceeding incidentally.⁵²³

b. Ante-Nuptial Agreements Regarding Religious Training

While scholars continue to debate the issue,⁵²⁴ the general rule remains unchanged: The courts will not enforce agreements to raise children in a given religion.⁵²⁵ The question is not simply one of contract law; insofar as enforcement is in aid of a given religion's membership, it raises serious problems as to the extent of the first amendment's prohibition against the establishment of religion by the state. If the rationale of *Shelley v. Kraemer*⁵²⁶ is applied here, the courts may have no choice but to abstain from enforcement.⁵²⁷

The shape of the present law is manifested in *O'Neill v. O'Neill*.⁵²⁸ The parents had signed the standard form provided by the New York Catholic Archdiocese, agreeing to raise the children of the union in the Roman Catholic religion. A child was born and baptized in the Catholic faith, but from the time of her parents' separation until the present action, she was brought up by her mother in the Jewish religion. The court curtly put aside any reliance on

520 *Church-State Surveys* cited note 1 *supra*.

521 *Time*, Feb. 11, 1966, p. 26.

522 *Id.* at 27.

523 1963-64 *Church-State Survey*, *supra* note 1, at 461.

524 Compare Gans, *Enforceability of Antenuptial Agreements Providing for the Religious Education of Children*, 1 J. FAMILY L. 227 (1961) with Rakes, *Equity and the Antenuptial Agreement to Raise Children in a Particular Religion*, 4 J. FAMILY L. 53 (1964).

525 1963-64 *Church-State Survey*, *supra* note 1, at 463.

526 334 U.S. 1 (1948). The proposition is that judicial enforcement of a contract entered into by private parties constitutes state action.

527 Gans, *supra* note 524.

528 45 Misc.2d 1, 255 N.Y.S.2d 776 (Sup. Ct. 1965).

contractual considerations and instead concerned itself with the welfare of the child. This it found to be best served by leaving the choice of religious training to the discretion of the custodial parent—here the mother.

Although the general pattern of refusing to enforce ante-nuptial agreements seems set despite occasional questioning of its legality, these agreements may still have some tangential impact on judicial decision. Occasionally, their terms have been incorporated into divorce decrees;⁵²⁹ one court has suggested that this type of contract would permit the religious factor to determine custody.⁵³⁰

c. *Child-Custody*

While the enforcement of an ante-nuptial agreement relating to religious training could conceivably dominate the granting of custody, the general rule is that custody will determine religion. Religion is at most one of a myriad of factors that will be regarded in making the initial award of custody.

Adoption proceedings have been a major source of judicial inquiry into religion. Here, there would seem to be a rather widespread public policy behind matching the religion of the child with that of the adoptive parents. Apart from the activities of child welfare agencies, which guide their placements by religious considerations, this policy has found expression in many state statutes.⁵³¹

However, the roots of the public policy—at least in some states—run back to the private right of the natural parents to determine the religion of their children. Thus, where the adoption is by consent, such private consent will be sufficient sanction to encompass a change in religion.⁵³² This consent can even eliminate the proposed change as a bar to the adoption, though the adoption may be prohibited for other reasons.⁵³³

The greatest judicial activity centers around a custody determination subsequent to a divorce or separation terminating a mixed marriage. This is not to say that religion is given more weight here than in an adoption proceeding, but only that the question arises more frequently, as the case law indicates. While, as noted above, pre-nuptial agreements have had some influence here, the rule once more is that religious considerations will not be the sole basis for the decision.⁵³⁴ If there is any bias in the law, it is in favor of awarding custody to the mother; but again it devolves into an inquiry into the child's "best interests."⁵³⁵

529 1963-64 *Church-State Survey*, *supra* note 1, at 463.

530 *Commonwealth v. Ackerman*, 204 Pa. Super. 403, 205 A.2d 49, 51 (1964) (dictum).

531 Katz, *Community Decision-Makers and the Promotion of Values in the Adoption of Children*, 4 J. FAMILY L. 7 (1964).

532 The practice in New York, contrary to Massachusetts, is that if a natural mother wants her child to be adopted by a parent of another faith and the court is convinced, first, that the mother knows what she is doing, that she is not acting in haste but is fully aware of the consequences of her action, and, secondly, if, as in all other cases, the adoption is required by the best interests of the child, then the New York courts almost uniformly will allow the adoption notwithstanding the difference in religion.

THE INSTITUTE OF CHURCH AND STATE, 1 CONFERENCE PROCEEDINGS: THE JURIDICAL STATUS OF CHURCHES; RELIGION IN ADOPTION AND CUSTODY CASES 78 (1957).

533 *In re Adoption of Anonymous*, 46 Misc.2d 928, 261 N.Y.S.2d 439 (Fam. Ct. 1965).

534 1963-64 *Church-State Survey*, *supra* note 1, at 461.

535 For a general discussion of factors and theories underlying custody determinations, see

Having decided that religion alone will not be the courts' sole guide, the more meaningful question is the extent to which the religious factor will be examined. Quite obviously, the courts will wish to avoid any comparison of the merits of different faiths.⁵³⁶ Yet, the inadequacy of clear parental mandates and the lack of overriding concerns as to the child's best interests⁵³⁷ may force the courts into coming perilously close to just that.

The matter is complicated since the courts must listen not only to the contentions of the parties, but also to the admonitions of the first amendment. Thus, in *Welker v. Welker*,⁵³⁸ the Wisconsin Supreme Court reversed a lower court decision that had based a custody award in part on the belief that a religious home was to be preferred to an irreligious one. The higher court said: "When custody of a child is in issue, this court has a narrow scope of inquiry regarding the religious concepts of the parents: Does the prospective custodian hold views which might reasonably be considered dangerous to the child's health or morals?"⁵³⁹ Relying on the statement of *Engel v. Vitale*,⁵⁴⁰ the court not only refrained from evaluating religions but also from preferring religion in general to non-religion. It read *Engel* as permitting an inquiry into religious beliefs only when their exercise endangered the rights of others.⁵⁴¹ Should the *Engel* rationale of "conscious" neutrality be further extended — as it was in *Welker* — it is conceivable that religious considerations will disappear altogether from family law.

3. Religion and the FCC:

If the predictions of pundits are reliable, the future may see litigation over the constitutionality of FCC requirements requesting information regarding the types and frequency of religious programming proposed by prospective radio and television broadcasters. One commentator has suggested that such procedures may be unconstitutional,⁵⁴² basing his argument on an application of the *Schempp*⁵⁴³ interpretation of the first amendment, which requires the Government to maintain a posture of "strict neutrality" towards religion. These comments have sparked journalistic rebuttals⁵⁴⁴ but as yet no cases.

B. *Religious Values: Law as Moral Implemen*

The distinction between the Church-State conflicts of the preceding section and those developed here is more one of the level on which the basic problem is approached than of substance. Here the battle is usually not consciously argued as one involving religion — at least not in the courtroom. The friction evidencing the underlying conflict is more obvious in political attempts to inter-

Note, *Religion in Custody Proceedings*, 38 N.D.L. REV. 87 (1962); Comment, *Child Custody: Considerations in Granting the Award Between Adversely Claiming Parents*, 36 So. CAL. L. REV. 255 (1963).

536 *Commonwealth v. Ackerman*, 204 Pa. Super. 403, 205 A.2d 49, 51 (1964).

537 *Daubert v. Daubert*, 239 Md. 303, 211 A.2d 323 (1965).

538 24 Wisc.2d 570, 129 N.W.2d 134 (1964).

539 129 N.W.2d at 138.

540 370 U.S. 421 (1962).

541 See generally text accompanying note 163 *supra*.

542 Cohn, *Religion and the FCC*, The Reporter, Jan. 14, 1965, p. 32.

543 *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

544 E.g., Fitzgerald, *Religious TV and the Constitution*, U.S. Catholic, Oct. 1965, p. 51.

ject religious values into legal determinations. If the legal battle in these areas is more clandestine, the tension is probably more acute. There is more discretion left to the courts with less "legal" censure, except where the guarantees of free speech are concerned. The interaction not being clearly delineated in terms of the basic tension, the balance can more freely swing against religious values. The issue, then, is the degree to which the direction of the law has been in accord with religious precepts.

1. Birth Control

Birth control has been an obvious source of strife in the political sphere; its working-out in the legal is now considered.

a. Artificial Insemination

Speculation as to the problems artificial insemination poses for the law has been rife; but there have been far too few cases upon which to project the development of the law. The practice, when it entails the sperm of a third-party donor, raises knotty moral questions; its reception by various religious groups has been varied, ranging from "outright condemnation, to an unexpressed sanction."⁵⁴⁵ Legally, there have been no cases foreclosing any of the vexatious questions⁵⁴⁶ posed by the technique. In the only case to deal with the subject in the last two years, the husband's duty to pay alimony sufficient to cover the support of two daughters conceived by the process with his consent was at issue.⁵⁴⁷ The husband defended on the ground that the children were illegitimate, the sperm having been supplied by a stranger. Relying on an earlier New York case, *Gursky v. Gursky*,⁵⁴⁸ the court sidestepped the legitimacy question and found that the specific consent of the husband constituted an implied contract to support the children.

While the insubstantial number of decisions in this area serve only to tantalize the legal appetite at present, there are indications that many potential cases are now in the process of gestation. Some 150,000 Americans are purported to have been conceived by artificial insemination;⁵⁴⁹ 250 more a year are said to come into the world by this method in Los Angeles alone.⁵⁵⁰ Increasing utilization of this process should inevitably have an impact on the law.

b. Contraception

The controversy between Church and State centering on the promotion of contraception hardly needs documentation. The Catholic Church in particular has been noted for its opposition to birth-control programs, whether privately or publicly sponsored. Due to their opposition, Catholics have been credited

⁵⁴⁵ Note, *Artificial Insemination*, 30 BROOKLYN L. REV. 302, 311 n.28 (1964).

⁵⁴⁶ Does it constitute adultery? Are the children legitimate? For a general discussion of the specific problems raised, see Biskind, *Legitimacy of Children Born by Artificial Insemination*, 5 J. FAMILY L. 39 (1965); Note, *Artificial Insemination*, 30 BROOKLYN L. REV. 302 (1964).

⁵⁴⁷ Anonymous v. Anonymous, 41 Misc.2d 886, 246 N.Y.S.2d 835 (Sup. Ct. 1964).

⁵⁴⁸ 39 Misc.2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963). See generally 1963-64 *Church-State Survey*, *supra* note 1, at 464.

⁵⁴⁹ Time, Feb. 25, 1966, p. 48.

⁵⁵⁰ Newsweek, Nov. 15, 1965, p. 81.

in the past with the destruction of a government-inaugurated program in Puerto Rico⁵⁵¹ and with sparking the "cautious approach" adopted by the Office of Economic Opportunity (OEO) towards birth-control.⁵⁵² Thus, the pace of proposed governmental expansion in this area⁵⁵³ may hinge on the attitudes and tolerances of the Catholic Church.⁵⁵⁴

The development of the Catholic position is an old and convoluted one, culminating in adamant rigidity,⁵⁵⁵ but there are indications that the stand may be eased somewhat. The reaction of the Catholic laity to government birth-control projects no longer seems to differ significantly from the rest of the American population;⁵⁵⁶ there have even been predictions that a possible change in the official policy of the Church may be forthcoming.⁵⁵⁷ The speculation is strengthened by one of the *schematas* adopted at the last session of the Vatican Council. The document supplies the basis for an inference that the matter may be treated as a disciplinary rule which the Church could relax rather than as an immutable dictate of the natural law.⁵⁵⁸

But, however sensitive the political realities, the law has not waited for the Church. In *Griswold v. Connecticut*,⁵⁵⁹ the Supreme Court declared unconstitutional a Connecticut law prohibiting, *inter alia*, the use of contraceptive devices.⁵⁶⁰ The Court was some time in reaching this issue, rejecting an attempt to have the statute invalidated as late as 1961.⁵⁶¹ When it finally did face the question, it did so notably.

The case confronting the Court involved an affirmation of the conviction of the Director of the Planned Parenthood League and a clinical physician as accessories to a violation of the prohibitory statute.⁵⁶² Permitting the appellants to assert the rights of the married couples they had counseled, the Court struck down the statute. Justice Douglas, writing for the Court, found a "right to

551 Time, Feb. 25, 1966, p. 27.

552 Evans-Novak, *Birth-Control Shackles on Poverty War*, Chicago Sun-Times, Dec. 16, 1965, p. 108, col. 4. But see The National Catholic Reporter, Nov. 10, 1965, p. 3, col. 6 (reporting the first OEO birth-control information program outside urban areas).

553 James, *Birth-Control Push*, The Wall Street Journal, Feb. 3, 1965, p. 1, col. 6.

554 A great deal turns on Pope Paul's commission on the birth control issue. There have been reports, including the Pope's interpolation in his UN speech, of a more conservative attitude based on past church teachings. But the position of the church, which sanctions only the rhythm method of birth control, is unchanged. And if the forthcoming report stands on past teachings the likelihood of any action by Congress will be, to say the least, remote.

Childs, *Birth Control Issue Ahead for Congress*, Chicago Sun-Times, Dec. 4, 1965, p. 22, col. 2.

555 See generally NOONAN, *CONTRACEPTION* (1965), undeniably the most comprehensive treatment of the Church's position.

556 Time, Feb. 25, 1966, p. 25.

557 Chicago Sun-Times, Dec. 4, 1965, p. 40, col. 1.

558 SCHEMA CONSTITUTIONIBUS PASTORALIS: DE ECCLESIA IN MUNDO HUIUS TEMPORIS (1965). At one passage, the term, "sons of the Church" (*Filii Ecclesiae*), is used to indicate those bound by the precepts of the Church on this point. As this would suggest that non-Catholics are not bound, it would seem the Church has moved from considering the prohibition as one of the natural law. "*Filii Ecclesiae, huius principii innixi, in procreatione regulanda, vias inire non licet, quae a Magisterio, in lege divina explicanda, improbantur.*" SCHEMA, *supra* at 47.

559 381 U. S. 479 (1965).

560 CONN. GEN. STAT. REV. § 53-32 (1958).

561 *Poe v. Ullman*, 367 U.S. 497 (1961). For a general discussion of the previous attempts, see Smith, *The History and Future of the Legal Battle over Birth Control*, 49 CORNELL L.Q. 275 (1964).

562 *State v. Griswold*, 151 Conn. 544, 200 A.2d 479 (1964).

privacy" lurking in the "penumbras" of the Bill of Rights. This right would be violated by permitting enforcement of the statute: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"⁵⁶³

While Justice Douglas wove together the first, third, fourth, fifth and ninth amendments to establish this "right to marital privacy," the Chief Justice and Justices Brennan and Goldberg preferred to ground it in the ninth amendment, finding it a right not to be disparaged although unenumerated.⁵⁶⁴ Justice Harlan concurred in a separate opinion in which he predicated the right on "due process" and "ordered liberty,"⁵⁶⁵ as did Mr. Justice White in his opinion.⁵⁶⁶ Only Justices Stewart and Black dissented — not because they agreed with the policy of the law⁵⁶⁷ — but because they did not find such a right in the body of the Bill of Rights to be transmuted by the fourteenth amendment from a restriction on the federal government to one binding the states.

The decision is nothing less than novel. Admirably, perhaps, the Court confined itself to the narrowest grounds possible and did not go so far as to hold that all state regulation of contraceptives was violative of constitutional guarantees. Indeed, insofar as it was directed at a law forbidding the *use* of such devices, it has little direct impact. Only the Connecticut law, of all those adopted by the various states, had such a prohibition; most of the others are restricted to controlling the *sale* of contraceptives.⁵⁶⁸ It is hard to see how the rationale of this decision could be extended to cover this latter category of statutes.⁵⁶⁹

In one sense, then, the decision completely failed to achieve the full potential of the constitutional attack: appellants were unquestionably interested in eliminating all bars to their work. The ban on *use* was the least of these, as the years the statute was on the books did not disclose a single attempt to enforce this particular aspect of the provision.⁵⁷⁰ Yet this was no illusory victory. Appellants did succeed in invalidating this law; thus, the educative function of the opinion is not to be overlooked. Perhaps as a result of *Griswold*, both as argued and decided, 1965 has seen a movement by the states to modify or repeal their birth control laws.⁵⁷¹ Even more importantly, the case is significant for its employment of the ninth amendment as a decisional base — an apparent first in constitutional law — and may foreshadow future explication of further rights.⁵⁷²

563 *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

564 *Id.* at 486 (concurring opinion).

565 *Id.* at 499 (concurring opinion).

566 *Id.* at 502 (concurring opinion).

567 *Id.* at 527 (dissenting opinion) ("I think this is an uncommonly silly law").

568 *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 162 n.4 (1965).

569 One court refused to hold that *Griswold* applied to the New York law making it a misdemeanor to sell contraceptive devices. *People v. Baird*, 47 Misc.2d 478, 262 N.Y.S.2d 947 (Sup. Ct. 1965). The case came up after passage but before the effective date of the amendment noted note 571 *infra*.

570 *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (Opinion of Frankfurter, J.).

571 Pilpel, *A Right is Born*, Civil Liberties, Nov. 1965, p. 2, col. 1. *E.g.*, N.Y. PENAL LAW § 1142 (Supp. 1965).

572 *But see Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965) (rejecting a "right to privacy" in a public toilet); *Davis v. Gallingshouse*, 246 F. Supp. 208, 216 (E.D. La. 1965) (no right to have a sworn statement accepted at face value).

2. Anti-Miscegenation

Despite changes in the level of racial sophistication in this country, some states still maintain laws prohibiting a man and a woman of differing races from marrying or cohabiting. Although the ramifications of such laws are manifold, particularly the psychological if not the practical, they have been largely ignored by Civil Rights leaders.⁵⁷³ Attacks on these statutes have been sporadic, probably due to a scarcity of test cases. While they stand, however, they symbolize a state posture opposed to religious beliefs in the innate and inviolable dignity of all men. And to the extent that they prevent not only civil marriages within the state but also participation in attendant religious rights, they bespeak an unwarranted governmental interference with the free exercise of religion.⁵⁷⁴

The significance of these laws is not relegated solely to the symbolic; they lay hard upon the lives of those who would run counter to them, as demonstrated by the recent attempt of a Caucasian and a Malay to wed in Baltimore, which was thwarted by the Maryland statute.⁵⁷⁵ The couple had to leave the state to be married.⁵⁷⁶

As deplorable as such occurrences are, the legislation spawning them is still viable. Eradication of these acts has been slow. In 1962, there were twenty-four states with such statutes and/or constitutional provisions;⁵⁷⁷ in 1964, twenty;⁵⁷⁸ and, at the beginning of 1966, seventeen.⁵⁷⁹ Yet the trend is there, and the decision of the Supreme Court in *McLaughlin v. Florida*⁵⁸⁰ has placed these statutes under a cloud. *McLaughlin* called for a constitutional testing of the Florida statute prohibiting nocturnal occupancy of a room by a Negro and white of different sexes.⁵⁸¹ Mr. Justice White spoke for the Court and struck down the provision as a violation of the fourteenth amendment's "equal protection" clause. Going beyond the *Pace v. Alabama*⁵⁸² approach which limited judicial review to the question of equal applicability to the members of the class covered, the Court went on to ask whether there was a rational basis for the classification established by the statute. Finding no "overriding statutory purpose requiring the proscription of the specified conduct [only] when engaged in by a white person and a Negro,"⁵⁸³ the Court reversed.

The Court voted unanimously in *McLaughlin*. Although not touching upon anti-miscegenation statutes per se, this opinion points to the conclusion that this Court will not be partial to arguments that the fourteenth amendment

573 Zabel, *Interracial Marriage and the Law*, The Atlantic Monthly, Oct. 1965, p. 75, 79.

574 See 1960-62 *Church-State Survey*, *supra* note 1, at 697.

575 MD. ANN. CODE art. 27, § 398 (1957).

576 Time, Feb. 25, 1966, p. 25.

577 1960-62 *Church-State Survey*, *supra* note 1, at 697 n.396.

578 1963-64 *Church-State Survey*, *supra* note 1, at 464 n.298.

579 Indiana, Nebraska and Wyoming are the latest to have eliminated such provisions.

580 379 U.S. 184 (1964).

581 FLA. STAT. ANN. § 798.05 (1965).

582 106 U.S. 583 (1882).

583 *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). Justice Stewart, joined by Justice Douglas, concurred separately, rejecting the majority's suggestion that there could be any state purpose justifying the usage of skin coloring alone as the basis of categorization. *McLaughlin v. Florida*, *supra* at 198 (concurring opinion).

is any less applicable to such legislation.⁵⁸⁴ It appears inevitable that these provisions will not find constitutional approbation if and when they are tried.⁵⁸⁵

3. Obscenity

Obscenity regulation is one area where the tension between the legal process and religious values is most noticeable. Rarely in the Church-State field is there a nexus as fraught with conflict as is this, yet as little recognized as such. Acknowledgement of this fact has been limited almost exclusively to these biennial Surveys.⁵⁸⁶ While the interests of the churches in controlling obscenity have been manifest,⁵⁸⁷ they are not elsewhere grouped with the multiplicity of concerns covered in these Surveys. The standard treatise on Church-State relations will not discuss the problem of obscenity.⁵⁸⁸ Yet the involvement of the Christian Church in particular, either directly or as the inspiration of reformers, is an old one marked by early Fourth Century prohibitions against the possession or distribution of pagan works;⁵⁸⁹ the establishment of the Catholic Church's *Index Librorum Prohibitorum* in the Sixteenth Century;⁵⁹⁰ the antics of Anthony ("Morals, Not Art or Literature") Comstock in the Nineteenth;⁵⁹¹ and groups in the Twentieth such as "Operation Yorkville."⁵⁹² The extent of this involvement has been such as to prompt St. John-Stevas to remark: "The Christian Church has always paid books a high compliment by taking them seriously. Unfortunately this concern for literature has not always been regulated by counsels of prudence."⁵⁹³

An awareness of this religiously-based concern and of the present metamorphosis in the law dictates that any proper cognizance of the dynamics of Church-State include an acquaintance with the field of obscenity. The movement of the law in this area will reflect the extent to which legal machinery can be counted on to promote or retard the impact of religious values and the degree to which religion must rely on nonlegal modes of value reinforcement.⁵⁹⁴ If the response of the law to the obscene coincided with religious formulations,

584 E.g., Pittman, *The Fourteenth Amendment: Its Intended Effect on Anti-Miscegenation Laws*, 43 N.C.L. REV. 92 (1964).

585 This assumes, obviously, that no "overriding statutory purpose" can be shown to justify the classification.

586 E.g., 1963-64 *Church-State Survey*, *supra* note 1.

587 Representative statements of concern with the problem of obscenity by spokesmen of various religious bodies and affiliates may be found in *Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary*, 85th Cong., 2d Sess., ser. 10 (1958).

588 E.g., ANTIEAU, CARROLL & BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* (1965); BETH, *THE AMERICAN THEORY OF CHURCH AND STATE* (1958); FELLMAN, *RELIGION IN AMERICAN PUBLIC LAW* (1965); McGRATH, *CHURCH AND STATE IN AMERICAN LAW* (1962); ZOLLMANN, *AMERICAN CIVIL CHURCH LAW* (1917).

589 St. John-Stevas, *The Church and Censorship*, in *TO DEPRAVE AND CORRUPT* 89 (Chandos ed. 1962).

590 CRAIG, *SUPPRESSED BOOKS* 18 (1963).

591 This interesting crusader, whom St. John-Stevas termed a "Protestant zealot," St. John-Stevas, *supra* note 589, at 105, led a forty-year drive which resulted in, among other things, the federal anti-obscenity legislation that is now 18 U.S.C. § 1461 (1964) — the prototype "Comstock law."

592 Recently formed and supported by clergymen of the three major faiths, this group has attacked the Supreme Court for recent decisions which it feels reflect an undue libertinism towards obscenity. N.Y. Times, Sept. 1, 1964, p. 37, col. 8.

593 St. John-Stevas, *supra* note 589, at 91.

594 See 1963-64 *Church-State Survey*, *supra* note 1, at 466.

there would be no problem. That there is no such coincidence as a matter of fact has prompted religious institutions to seek nonlegal controls. Dean John Cornelius Hayes,⁵⁹⁵ a legal consultant to the National Office for Decent Literature (NODL) of the Catholic Bishops of the United States, has summed up the position of the morally motivated:

1) Obscene publications exert a substantial adverse effect on *public* morality and must, therefore, be controlled — either legally by the state, or extra-legally but not illegally by private agencies of society.

2) Legal control by the state is, and can reasonably be, only minimal.

3) For that very reason, extra-legal control by private agencies of society which are non-officiously concerned with the public welfare and which themselves act only within the law is necessary for the common good.⁵⁹⁶

The gap between Church and State is widened further by the freer association of sexual discussions with the category of the obscene in the moral order than in the legal. As Mr. Justice Brennan has noted:

Clearly enough, sex and obscenity are not [legally] synonymous. The portrayal of sex, for example, in art, literature, and scientific works is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Thus the moral judgments made by theologians of what constitutes obscenity, if embodied in laws, might well transgress constitutional limits. In other words, the social norm is not necessarily congruent with a religiously held sexual ethic.⁵⁹⁷

The vacillation of the law in bearing the burden of obscenity control will mark the increments by which the American Church will measure its need to seek other supports.

a. *The Present Law*

There is an old adage, "He who sups with the Devil needs a long spoon." If, as some moralists would have it, the obscene is the province of the Devil, to deal with it requires certain precautionary measures. The question is the adequacy of the law's utensils when entering this area.

So much has been written about obscenity within the last few years that it has begun to develop its own genre.⁵⁹⁸ But be that as it may, there is such a plethora of judicially unanswered questions that one author was prompted to say that "the criminal law of obscenity has become such a jungle of verbiage that no one could clearly set forth its rules of conduct."⁵⁹⁹ Whether recent developments warrant acceptance of such a pessimistic conclusion remains to be seen.

595 Dean of the Loyola University School of Law, Chicago, Illinois.

596 Hayes, *A Position on the Control of Obscenity*, 51 Ky. L.J. 641 (1963).

597 Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 6 (1965).

598 E.g., Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960). This is, if not the best, the most frequently cited article in the field.

599 Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834 (1964).

(i) The Standard — *Roth* Revisited

The rule in *Regina v. Hicklin*⁶⁰⁰ was long the most popular in American and English law. Said Lord Chief Justice Cockburn: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to *deprave and corrupt those whose minds are open to such immoral influences*, and into whose hands a publication of this sort may fall."⁶⁰¹ (Emphasis added.) The rule was first accepted into American federal jurisprudence in *United States v. Bennett*⁶⁰² and over the years gained weight if not admirers. While feeling obliged to employ the rule, Judge Learned Hand said in 1913:

While, therefore, the demurrer must be overruled, I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time . . . I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses.⁶⁰³

It was some twenty years later that there came a challenge to the supremacy of the *Hicklin* rule and a presentiment of future patterns. The historic case of *United States v. One Book Called "Ulysses"*⁶⁰⁴ saw Judge Woolsey leave behind the test of the most susceptible person to embrace the standard of the "person with average sex instincts."⁶⁰⁵ The test was still somewhat crude — "tending to stir the sex impulses or to lead to sexually impure and lustful thoughts"⁶⁰⁶ — but the threshold of reaction was raised to a higher level. In addition, conviction by bowdlerization was rejected for an approach that purported to take the material as a whole.⁶⁰⁷

While the *Hicklin* test is still a viable force in England,⁶⁰⁸ the present law

600 L.R. 3 Q.B. 360 (1868).

601 *Id.* at 371.

602 24 Fed. Cas. 1093 (No. 14,571) (S.D.N.Y. 1879).

603 *United States v. Kennerley*, 209 Fed. 119, 120-21 (S.D.N.Y. 1913). The judge went on to say:

If there be no abstract definition, such as I have suggested, should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence.

United States v. Kennerley, *supra* at 121.

604 5 F. Supp. 182 (S.D.N.Y. 1933).

605 *Id.* at 184.

606 *Ibid.*

607 Harrington, *The Evolution of Obscenity Control Statutes*, 3 WILLIAM & MARY L. REV. 302, 303 (1962).

608

The definition of obscenity set out in section 1 of the Obscene Publications Act, 1959, is substantially that adhered to at common law. An article is deemed to be obscene if, subject to certain safeguards, its tendency is to deprave and corrupt those who are likely to read, see or hear it.

Williams, *The Control of Obscenity—II*, 1965 CRIM. L. REV. (Eng.) 522, 528. The inclusion of the *Hicklin* test was quite studied and not without modification. See Select Committee on Obscene Publications, *Report* (1959). Significantly, the statute provides for a "defense of public good":

(1) A person shall not be convicted . . . if it is proved that publication of the

of obscenity in America, for the most part, begins and ends with *Roth v. United States*.⁶⁰⁹ Actually two cases heard and decided together,⁶¹⁰ this historic decision upheld the constitutionality of both a federal statute prohibiting the mailing of obscene publications⁶¹¹ and a California statute prohibiting the sale or advertising of such material.⁶¹² Employing what has been styled the "two-level free-speech theory,"⁶¹³ Mr. Justice Brennan, speaking for the Court, held that "obscenity is not within the area of constitutionally protected speech or press."⁶¹⁴ Justice Brennan rejected the *Hicklin* test outright and, relying heavily on history for his constitutional conclusion, stated what has come to be regarded as the constitutionally required test: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"⁶¹⁵ and is "utterly without redeeming social importance."⁶¹⁶

From 1957 to early 1966, the Court decided some seventeen cases dealing with the law of obscenity and censorship.⁶¹⁷ Since they were all decided either on procedural points,⁶¹⁸ by per curiam order,⁶¹⁹ or in a paroxysm of opinions in none of which a majority of the Court concurred,⁶²⁰ they let *Roth's* substantive statement stand in pristine purity. Inherent in the *Roth* definition, however, were ambiguities which plagued the courts. A major substantive problem was the question: "[A]ppeal to whose prurient interest? judged by whom? on what basis?"⁶²¹ This is a fair summation of the substantive problems left unsettled by the Court in those nine years.

One of the latest decisions by the Court in this area continued the lack of

article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.

(2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground.

Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 4.

609 354 U.S. 476 (1957).

610 The other case involved was *Alberts v. California*, 354 U.S. 476 (1957).

611 18 U.S.C. § 1461 (1964).

612 CAL. PENAL CODE § 311.

613 At one level there are communications which, even though odious to the majority opinion of the day, even though expressive of the thought we hate, are entitled to be measured against the clear-and-present-danger criterion. At another level are communications apparently so worthless as not to require any extensive judicial effort to determine whether they can be prohibited.

Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUPREME CT. REV. 1, 11.

614 *Roth v. United States*, 354 U.S. 476, 485 (1957).

615 *Id.* at 489.

616 *Id.* at 484. But see text accompanying note 701 *infra*.

617 Chronologically, *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Times Film Corp. v. City of Chicago*, 355 U.S. 35 (1957); *Mounce v. United States*, 355 U.S. 180 (1957); *One, Inc. v. Olesen*, 355 U.S. 371 (1958); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959); *Smith v. California*, 361 U.S. 147 (1959); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Tralins v. Gerstein*, 378 U.S. 576 (1964); *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (1964); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Trans-Lux Distrib. Corp. v. Board of Regents*, 380 U.S. 259 (1965).

618 *E.g.*, *Marcus v. Search Warrant*, *supra* note 617.

619 *E.g.*, *One, Inc. v. Olesen*, 355 U.S. 371 (1958).

620 *E.g.*, *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962).

621 *United States v. Klaw*, 350 F.2d 155, 165 (2d Cir. 1965).

consensus that too-often characterized its obscenity determinations. In *Jacobellis v. Ohio*,⁶²² the conviction of an Ohio theater owner was reversed amid a shower of opinions and a hail of verbiage. Six opinions were written, indicating the division of the Court.⁶²³ In none did a majority concur.

Justice Stewart concurred in a separate opinion in which he construed *Roth* as directing its force solely against "hard-core pornography." Admitting difficulty in defining that term, he said, "I know it when I see it, and the motion picture involved in this case is not that."⁶²⁴ This statement gave judicial support to Professors Lockhart and McClure's assertion that the concept of obscenity held by most members of the Court was that of "hard-core pornography."⁶²⁵

In addition to concurring in Mr. Justice Brennan's opinion, Justice Goldberg wrote an opinion of his own in which he emphasized that the "fleeting" nature of the most objectionable scene was such as to pass unnoticed were it not for the censor's concern.⁶²⁶ Justice Black concurred in a separate opinion, joined by Justice Douglas, on the basis of an absolutist approach to the first amendment which rejected both the *Roth* test and any attempt to regulate obscenity.⁶²⁷ Justice White simply concurred in the judgment and did not join any of the opinions of his Brothers.

The Chief Justice dissented, in an opinion joined by Justice Clark, not on the grounds that the film was obscene, but more in deference to a judicial restraint which would accord the findings of the lower courts more weight.⁶²⁸ Justice Harlan dissented with an eye toward giving the states greater freedom to suppress than the federal government, making his test for the states "one of rationality" encompassing the regulation of sex treated "in a fundamentally offensive manner."⁶²⁹

By far the most important of the opinions was that of Justice Brennan. In it, he emphasized that the *Roth* standard required an initial finding that the material at issue "goes substantially beyond the customary limits of candor in description or representation of such matters."⁶³⁰ This test was the second part

622 378 U.S. 184 (1964). The movie involved, *Les Amants*, "depicted the facial expressions of a woman during orgasm, induced, suggested off-screen, by cunnilingus." Note, *Obscenity Prosecution: Artistic Value and the Concept of Immunity*, 39 N.Y.U.L. REV. 1063, 1079 (1964).

623 Analysis of the opinions in *Jacobellis* has led to differing numerical judgments as to the separate stands taken by the Justices. Compare Murphy, *The Value of Pornography*, 10 WAYNE L. REV. 655, 679 (1964) (five) with Port, *Standards of Judging Obscenity—Who? What? Where?* 46 CHICAGO B. RECORD 405 (1965) (two).

624 *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion). Justice Stewart has subsequently attempted to delineate what he meant. See *Ginzburg v. United States*, 86 Sup. Ct. 942, 957, n.3 (1966) (dissenting opinion).

625 Lockhart & McClure, *supra* note 598, at 60. But this conclusion has been since called into question. Speaking for the Court later on, Justice Brennan said: "The New York courts have interpreted 'obscenity' in § 1141 to cover only so-called 'hard-core pornography.' . . . Since that definition of 'obscenity' is more stringent than the *Roth* definition, the judgment that the constitutional criteria are satisfied is implicit in the application of § 1141 below." *Mishkin v. New York*, 86 Sup. Ct. 958, 963 (1966).

626 *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion).

627 *Id.* at 196 (concurring opinion).

628 *Id.* at 199 (dissenting opinion).

629 *Id.* at 204 (dissenting opinion). This echoes his "patent offensiveness" test. See text accompanying note 649 *infra*.

630 *Id.* at 191 (Opinion of Brennan, J.).

of the American Law Institute's definition of obscenity⁶³¹ which Justice Brennan had utilized in a footnote in *Roth* to explain the term "prurient interest."⁶³² Perhaps his most crucial statements in *Jacobellis* were that "the constitutional status of an allegedly obscene work must be determined on the basis of a national standard,"⁶³³ and that the issue of obscenity "must ultimately be decided by this Court."⁶³⁴ Criticized though these remarks have been,⁶³⁵ the fact that they did not represent the reasoning of a majority of the Court has been often overlooked; they have been taken by courts⁶³⁶ and commentators⁶³⁷ alike as definitive pronouncements.

It is difficult to state categorically exactly what it is that *Jacobellis* does stand for. It is not even valid to say that the Court determined that the film was not legally obscene since, of the six Justices concurring in the judgment, two of them, Justices Douglas and Black, did not base their decision on an application of *Roth* but on their belief that the first amendment forbids any impingement whatever on speech.⁶³⁸

The confusion was heightened with the reversals in the *Tralins*⁶³⁹ and *Grove Press*⁶⁴⁰ cases. Both were per curiam decisions. In both, the majority was again fragmented, each Justice citing his stand in *Jacobellis*. In both, Mr. Justice White left the ranks of the *Jacobellis* majority and cast his vote with the minority who felt that certiorari should be denied.

The *Grove Press* decision was particularly unsatisfying. Involved was the enjoining of the sale and distribution of Henry Miller's *Tropic of Cancer* in the State of Florida. The District Court of Appeals of Florida had granted the requested injunction after a jury had found the book was obscene under the

631 MODEL PENAL CODE § 207.10(2), (Tent. Draft No. 6, 1957): "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." [Emphasis added.]

632 *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957).

633 *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) (Opinion of Brennan, J.). In this case, he very questionably reads Judge Hand in *Kennerley* to intend a national standard.

634 *Id.* at 188. For this point, he cites Justice Harlan's opinion in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488 (1962). The evolution of Justice Brennan's thought on this point is interesting. In his dissenting opinion in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 448 (1957), he said:

The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards.

Considering the local character of the jury, this would suggest he then had in mind something less than a national community.

635 *E.g.*, O'Meara & Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME LAWYER 1 (1964).

636 *E.g.*, *United States v. Luros*, 243 F. Supp. 160 (N.D. Iowa 1965); *City of Chicago v. Kimmel*, 31 Ill. 2d 202, 201 N.E.2d 386 (1964).

637 *E.g.*, Comment, *Obscenity: Roth Goes to the Movies*, 14 BUFFALO L. REV. 512 (1965).

638 *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964) (concurring opinion). The consistency of these Justices on this point can be seen by an examination of their positions in: *A Quantity of Books v. Kansas*, 378 U.S. 205, 213 (1964) (concurring opinion); *Smith v. California*, 361 U.S. 147, 155 & 167 (1959) (concurring opinions); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 690 & 697 (1959) (concurring opinions); *Roth v. United States*, 354 U.S. 476, 508 (1957) (dissenting opinion). Much of the confusion in this area is due to this stand. By refusing to apply the *Roth* test, they are actually taking a third position which obscures the meaning of a given decision.

639 *Tralins v. Gerstein*, 378 U.S. 576 (1964).

640 *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (1964).

Roth test.⁶⁴¹ Other jurisdictions that had considered the book had found it not obscene.⁶⁴² Thus, it was the national status of the book that was at issue. However, the summary reversal, solely by reference to *Jacobellis*, settled nothing as to the Court's view of the nature of the material.⁶⁴³ Indeed, with regard given to the afore-mentioned switching of sides by Justice White, it can be fairly said that three justices did not think the book obscene,⁶⁴⁴ four did not wish to review the conviction,⁶⁴⁵ and two believed the first amendment barred *any* obscenity conviction.⁶⁴⁶

The impact of *Jacobellis* upon the *Roth* standard has been similar to the impact of the earlier *Manual Enterprises* case.⁶⁴⁷ Like *Jacobellis*, *Manual Enterprises* had no opinion of the Court. Likewise, concurrence of the justices was on different grounds. Justice Brennan, for example, believed that the declaration being reviewed was an ultra vires act;⁶⁴⁸ Justice Harlan, on the other hand, read *Roth* as requiring proscribable material to have a certain "patent offensiveness"⁶⁴⁹ which was lacking in the magazines under consideration. Yet, lower courts were quick to seize upon the language of Justice Harlan's opinion as an addendum to the *Roth* test although it was his and not the Court's. Exemplative are the words of one court: "[M]aterial is proscribable 'obscenity,' or hard-core pornography, if it has the requisite prurient appeal, and if it so exceeds customary candor as to be patently offensive, *unless* it has *any* redeeming social importance." The last requirement is part of the broad protective mantle of the first amendment.⁶⁵⁰

It is the probabilistic import — the belief that this is an impliedly accurate or constitutionally safer guess as to the Court's real position — that gives *Jacobellis*, like *Manual Enterprises* and others,⁶⁵¹ its legal impetus. Thus, for example, the Supreme Court of Arizona concluded:

The word "obscene" began to take a fixed legal meaning with the interpretation given in *Roth* This was followed by *Manual Enterprises* . . . holding the publication of photographs of nude male figures designed to appeal to homosexuals not to be so obscene as to lose the protection of the First Amendment. Then, in *Grove Press* . . . the United States Supreme Court held *Tropic of Cancer* to be within the protection of the

641 *Grove Press, Inc. v. State*, 156 So.2d 537 (Fla. 1963).

642 *E.g.*, *Zeitlin v. Arnebergh*, 383 P.2d 152, 31 Cal. Rptr. 800 (1963). Arguably, this case may have applied a stricter test since the statute under which the action was brought was construed as encompassing only "hard-core pornography." But then it has been said that that is exactly what the Court had in mind when it wrote *Roth*. Lockhart & McClure, *supra* note 598, at 60. But see note 406 *supra*.

643 *Contra*, *State v. Martin*, 3 Conn. Cir. 309, 213 A.2d 459 (App. Div. 1965); *People v. Cohen*, 22 App. Div. 2d 932, 255 N.Y.S.2d 813 (Sup. Ct. 1964). Both of these cases applied *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958). The former came to its holding only after discussing the differing meanings that had been given by various courts to explain the reversal. *State v. Martin*, *supra*, 213 A.2d at 462.

644 Justices Brennan, Goldberg and Stewart.

645 Chief Justice Warren, Justices Clark, Harlan and White.

646 Justices Douglas and Black.

647 *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962).

648 *Id.* at 495 (concurring opinion). The case involved review of a Post Office Department ruling that the matter in question was nonmailable because obscene. Justice Brennan did not find there was legislative authority for such an order.

649 *Id.* at 486 (Opinion of Harlan, J.).

650 *United States v. Klaw*, 350 F.2d 155, 164 (2d Cir. 1965).

651 *E.g.*, *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964) (no opinion of the Court).

First Amendment, and, at the same time, in *Tralins* . . . held *Pleasure Was My Business* not to be obscene. Up to this time, there was some confusion as to whether the community standards were local or national. This was put at rest in *Jacobellis* . . . which held *The Lovers* . . . not to be obscene.⁶⁵²

Despite such statements, the signification of these post-*Roth* cases remains essentially connotative rather than denominative.

The most obvious result of these decisions was to leave the lower courts — both state and federal — in a state of confusion. Judge Moore has summed up the situation with his statement that “the judiciary in our tormented modern civilization are also lost in a wilderness.”⁶⁵³ From 1957 to 1966, the Supreme Court decided cases; it did little to facilitate perception of the rule of law. There was, in short, an abnegation by the Court of its instructional role.⁶⁵⁴ The sui generis nature of obscenity regulation did not make such an approach practical. Many courts appeared to have unarticulated doubts as to the constitutionality of obscenity control — an area characterized by a vagueness accepted out of history, a sanction arising more from fear of a “thing” than of a person. The result of this abdication has been the development of a “play it safe” attitude on the part of the lower courts. They were inclined to fill the interstices of the legal fabric with the above-noted “probabilistic import” rather than with the more traditional legal implements of analysis, analogy and reason.

Attributable to this reaction — and not to the holdings of the Supreme Court — were the following conclusions as to the substantive requirements for a declaration of obscenity: (1) the appeal must be to the prurient interest of the average man and not to such interest in a person of peculiar susceptibilities or to deviant attractions, such as brutality or sadism; (2) the matter in question must be patently offensive, surpassing customary limits of candor; (3) the material must be without any social importance whatever; (4) national community standards are to be employed; (5) final determination is subject to de novo judicial review. This, then, was the safest route. However, the extent to which these principles have been accepted and the questions which are still unforeclosed are yet to be considered.

(a) *Prurient Appeal — What and Whose?*

When Justice Brennan articulated the *Roth* test, he explained the meaning of “appeal to prurient interest” by referring, in a footnote of his opinion, to the American Law Institute’s definition of prurient interest as “a shameful or morbid interest in nudity, sex or excretion.”⁶⁵⁵ A vexing question is the extent to which this definition can be expanded to include appeals to other aberrational

652 *State v. Locks*, 97 Ariz. 148, 397 P.2d 949, 951 (1964). The court held the state obscenity statute unconstitutional on the grounds that the examined decisional law indicated that the term “obscene” was unconstitutionally vague. 397 P.2d at 952.

653 *United States v. Klaw*, 350 F.2d 155, 168 (2d Cir. 1965).

654 This Court hears cases such as the instant one not merely to rule upon the alleged obscenity of a specific film or book but to establish principles for the guidance of lower courts and legislatures. Yet most of our decisions since *Roth* have been given without opinion and have thus failed to furnish such guidance.

Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting).

655 Authority cited note 631 *supra*.

interests, such as brutality or sadism. A recent case, *United States v. One Carton Positive Motion Picture Film*,⁶⁵⁶ expressly rejected such inclusion when passing on the allegedly obscene nature of an impounded foreign film. Certainly, there is a strong analogy between these appeals; but as this decision indicates, present sensitivities to the need for as much specificity as possible remain strong, and expansion of the category of the obscene is not easily tolerated.

Related to the question of the nature of the interest to which an appeal is being made is the question of the legitimacy of regulating appeals to the prurient interest of other than the "average man."⁶⁵⁷ Is an appeal to the prurient interest of a homosexual forbidden? The Court in *Manual Enterprises* never reached this question, though the magazines involved were considered to be so directed.⁶⁵⁸

The question was still open when the court in *United States v. Klaw*⁶⁵⁹ reviewed a conviction under 18 U.S.C. § 1461, which prohibited the mailing of obscene matter. The exhibits were described by the Court of Appeals as "sado-masochistic." Apparently accepting—at least for the sake of argument—the possibility that appeal to the prurient interest of a deviate might be the basis for a finding of obscenity, the court reversed the conviction for lack of evidence showing appeal to the prurient interest of *anyone*.⁶⁶⁰

When a New Jersey court confronted the problem, a conviction under an obscenity ordinance was reversed although photographs on which the conviction was based were regarded as appealing to homosexual prurient interests.⁶⁶¹ Constrained by a previous holding of the state's supreme court,⁶⁶² which had "approved the frame of reference of the 'average member of society' rather than the 'weakest,' and of 'society at large' rather than 'some local geographical area,'" the intermediate court expressly rejected the "effect solely upon homosexuals in applying the 'prurient appeal' aspect of the obscenity test."⁶⁶³ That this type of result may have been more due to the inadvertence of the court and an eagerness to disapprove of *Hicklin*, rather than due to an analysis of *Roth*, has been suggested by Lockhart and McClure.⁶⁶⁴ Certainly it was not clearly compelled by the *Roth* test, which could be construed to mean that the "average man" was to determine if there was a prurient appeal to the audience to which the material was directed.⁶⁶⁵

This was the situation when the Supreme Court addressed itself to the question in *Mishkin v. New York*.⁶⁶⁶ Appellant had been sentenced to three years in prison for, *inter alia*, publishing obscene books in violation of a New

656 247 F. Supp. 450 (S.D.N.Y. 1965).

657 See generally Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 70 (1960); Wilson, *California's New Obscenity Statute: The Meaning of "Obscene" and the Problem of Scierter*, 36 So. CAL. L. REV. 513, 523 (1963).

658 1963-64 Church-State Survey, *supra* note 1, at 468.

659 350 F.2d 155 (2d Cir. 1965).

660 *Id.* at 168.

661 *Newark v. Licht*, 83 N.J. Super. 499, 200 A.2d 508 (Super. Ct. 1964).

662 *State v. Hudson County News Co.*, 41 N.J. 247, 196 A.2d 225 (1963).

663 *Newark v. Licht*, 83 N.J. Super. 499, 200 A.2d 508, 510 (Super. Ct. 1964).

664 Lockhart & McClure, *supra* note 657, at 73.

665 See Wilson, *supra* note 657.

666 86 Sup. Ct. 958 (1966).

York statute.⁶⁶⁷ The books were concededly "sado-masochistic." The main argument before the Court was that the definitional limits of obscenity — as spelled out by the Court — did not encompass material that was "merely sadistic or masochistic." By a vote of six to three, the Court affirmed the convictions. Justice Brennan, writing the first "opinion of the Court" since *Roth* to deal with a substantive obscenity question,⁶⁶⁸ answered quite succinctly:

We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement.

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the "average" or "normal" person in *Roth* . . . does not foreclose this holding. . . . We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test.⁶⁶⁹

Justice Harlan concurred separately on the basis of his views in his dissent in the *Fanny Hill* case, discussed below, which would permit the states to employ "reasonable" tests for dealing with obscenity.⁶⁷⁰ Justices Black, Douglas and Stewart dissented in separate opinions. Justice Black maintained his stance of total opposition to any restraint on speech,⁶⁷¹ as did Justice Douglas in an opinion written to express his dissension in both this case and another decided the same day.⁶⁷² Justice Stewart dissented in the belief that the material was not "hard-core" pornography, the test he has favored for some years now.⁶⁷³

Despite such differing views, the mustering of a clear — though minimal — majority behind an opinion meeting the question head-on should serve to end the debate here. The Court has stepped in to moderate what was fast becoming an extreme reaction to the equally extreme *Hicklin* rule.

(b) *Patent Offensiveness — Customary Limits of Candor*

As *Mishkin* would suggest, a possible resolution of many problems in this area would entail a shift in emphasis to an examination of the intent of the creator or disseminator. To a great degree, however, the courts are primarily

⁶⁶⁷ N.Y. PENAL LAWS § 1141.

⁶⁶⁸ Only five justices joined in the opinion of the Court. Justice Harlan concurred separately. See note 670 *infra*.

⁶⁶⁹ *Mishkin v. New York*, 86 Sup. Ct. 958, 963-64 (1966).

⁶⁷⁰ *Id.* at 968 (concurring opinion).

⁶⁷¹ *Id.* at 968 (dissenting opinion). Justice Black noted that he had not read any of the material in question.

⁶⁷² *Id.* at 969 (dissenting opinion).

⁶⁷³ *Id.* at 969 (dissenting opinion). Interestingly enough, the New York Court of Appeals had applied a "hard-core" pornography test of its own to a different consequence. Of this Justice Stewart said: "This case makes abundantly clear that the phrase has by no means been limited in New York to the clearly identifiable and distinct class of material I have described . . ." *Mishkin v. New York*, *supra*, at 969, footnote (dissenting opinion).

concerned⁶⁷⁴ with the effect of the material in the light of community mores; for it would be anomalous to outlaw that which is tolerated by society in general. This is why Justice Brennan felt compelled to emphasize that obscenity exceeds "customary limits of candor,"⁶⁷⁵ and why Justice Harlan interjected the term "patent offensiveness."⁶⁷⁶ Yet, while sensing the rationale of this aspect of the test, the lower courts have been somewhat muddled in their approach to it. In the last two years, at least one court has ignored "patent offensiveness";⁶⁷⁷ at least one other has used the term in lieu of "customary limits of candor";⁶⁷⁸ and a third has used both terms, recognizing the intended equation between them.⁶⁷⁹ Oddly enough, however, other lower courts have accepted "patent offensiveness" and "exceeding customary limits of candor" as part of the definition of obscenity, but as *separate* tests in name if not in application.⁶⁸⁰ The sum of this activity evidences what may be a totally unprecedented judicial regard for a footnote. The Supreme Court has not yet spoken to this question.

(c) *Social Importance*

In *Roth*, the Court noted that:

All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. *But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.*⁶⁸¹ (Emphasis added.)

Roth has thus been considered to have established a treble standard: appeal to prurient interest; exceeding customary limits of candor so as to be patently offensive; lack of redeeming social importance. This last aspect has developed its own unique brand of confusion; namely, did the Court intend to permit a balancing of social importance against prurient appeal and patent offensiveness.⁶⁸²

In *Jacobellis*, Justice Brennan stated:

It follows that material dealing with sex in a manner that advocates ideas, *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection.

674 1963-64 *Church-State Survey*, *supra* note 1, at 470.

675 *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (Opinion of Brennan, J.).

676 *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 486 (1962) (Opinion of Harlan, J.). Compare MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957), cited by Justice Brennan, with MODEL PENAL CODE § 251.4(1) (Proposed Official Draft 1962), cited by Justice Harlan and which gives greater emphasis to the dual nature of the proposed test.

677 *City of Chicago v. Kimmel*, 31 Ill. 2d 202, 201 N.E.2d 386 (1964).

678 *People v. Kaplan*, 44 Misc. 2d 110, 252 N.Y.S.2d 927 (Crim. Ct. 1964).

679 *United States v. Klaw*, 350 F.2d 155 (2d Cir. 1965).

680 *E.g., United States v. One Carton Positive Film*, 247 F. Supp. 450 (S.D.N.Y. 1965); *Dale Book Co. v. Leary*, 233 F. Supp. 754 (E. D. Pa. 1964).

681 *Roth v. United States*, 354 U.S. 476, 484 (1957).

682 See generally Note, *Obscenity Prosecution: Artistic Value and the Concept of Immunity*, 39 N.Y.U.L. Rev. 1063 (1964).

Nor may the constitutional status of the material be made to turn on a "weighing of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance."⁶⁸³

Application of this principle was made by the Tenth Circuit in *Haldeman v. United States*.⁶⁸⁴ The defendant had mailed booklets which were found on trial to be obscene. Purportedly written by a doctor, they followed a question-and-answer format by which information and details regarding sexual experiences and practices, primarily abnormal, were related. Relying on the above statement of Justice Brennan and on *Kingsley Int'l Pictures Corp. v. Regents*,⁶⁸⁵ the appellate court reversed on a finding of social importance.

In *People v. Bruce*,⁶⁸⁶ the Supreme Court of Illinois overturned a decision which had found night-club entertainer Lenny Bruce guilty of an obscene performance. The court had originally affirmed the conviction on the basis of a "balancing test" which found the offensive nature of the act was such as to outweigh its value as social commentary. This judgment and opinion were vacated and the case was re-argued in the light of *Jacobellis*. The court then concluded that since some of the performance had social importance as satire, the whole was immunized.⁶⁸⁷ Justice Schaefer, in a separate opinion, concurred in the result, but disagreed with the notion that a modicum of social importance would protect the totality.⁶⁸⁸

Justice Schaefer's comment highlights the problem on this point and focuses on the balancing question. He is not alone in his approach. In *G. P. Putnam's Sons v. Calissi*,⁶⁸⁹ a New Jersey court was called upon to review a decision finding the book *Fanny Hill* to be obscene. The court rejected the notion that social value to a certain select group of experts would fulfill the demands of the test. It found that if there was no "social, literary or historical" value to the average man, the material would be "utterly without redeeming social import." It would appear that this was at heart a balancing test. Significantly, the court noted that: "A book may be well-written but still obscene."⁶⁹⁰

The *Fanny Hill* book has had a long history in American courts and has been accorded rather disparate treatment. In one of the first obscenity cases in this country, the Commonwealth of Massachusetts had held against it.⁶⁹¹ Shortly before the above New Jersey decision, it had nonetheless been cleared by the New York Court of Appeals.⁶⁹² In the most recent Massachusetts case dealing with *Fanny Hill*, a decree declaring it to be obscene was affirmed by the state's highest court.⁶⁹³ In its opinion, the Supreme Judicial Court said:

683 *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (Opinion of Brennan, J.).

684 340 F.2d 59 (10th Cir. 1965).

685 360 U.S. 684 (1959). See generally text accompanying note 772 *infra*.

686 31 Ill.2d 459, 202 N.E.2d 497 (1964).

687 202 N.E.2d at 498.

688 202 N.E.2d at 498 (concurring opinion).

689 86 N.J. Super. 82, 205 A.2d 913 (Super. Ct. Ch. 1964).

690 205 A.2d at 922.

691 *Commonwealth v. Holmes*, 17 Mass. 335 (1821).

692 *Larkin v. G. P. Putnam's Sons*, 14 N.Y.2d 399, 200 N.E.2d 760, 252 N.Y.S.2d 71 (1964).

693 *Attorney General v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure,"* 206 N.E.2d 403 (Mass. 1965).

But the fact that the testimony may indicate this book has some minimal literary value does not mean it is of any social importance. We do not interpret the "social importance" test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene.⁶⁹⁴

Quite obviously, the court had accepted the concept of a balancing test as constitutionally permissible in this area.

An appeal was taken to the United States Supreme Court which reversed in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General* (hereinafter *Fanny Hill*).⁶⁹⁵ The Court divided six to three and once again failed to produce a majority opinion. Justice Brennan announced the judgment of the Court and wrote the initial opinion which was joined by the Chief Justice and Justice Fortas. Citing the above passage from the lower court's opinion, he said:

[R]eversal is required because the court misinterpreted the social value criterion. . . . A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. *Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness.*⁶⁹⁶ (Latter emphasis added.)

Justice Douglas concurred in a separate opinion in which he persisted in his contention that "the First Amendment does not permit the censorship of expression not brigaded with illegal action."⁶⁹⁷ He also agreed with Justice Brennan that *Fanny Hill* was not obscene under the *Roth* standard, as the record disclosed that the prosecution failed to prove lack of "social importance." This appears to be the first time he has chosen to make *any* application of *Roth*,⁶⁹⁸ but his opinion focused primarily on the integrity of the first amendment. He made the striking suggestion that the adjudication of first amendment cases by a majority vote of the justices constituted the type of majority domination against which the Bill of Rights was designed to protect: "To outlaw the book on such a voting record would be to let majorities rule where minorities were thought to be supreme."⁶⁹⁹

The other justices who voted for reversal, Black and Stewart, did so for the reasons given in their respective dissenting opinions in the *Ginzburg* and *Mishkin* cases.⁷⁰⁰ The three justices in the minority each wrote a dissenting opinion which went off on different grounds. Justice Clark first attacked the statement that the *Roth* test envisioned a finding of lack of social importance. Raising the issue for the first time, he felt that the three justices who had joined

694 *Id.* at 406.

695 86 Sup. Ct. 975 (1966).

696 *Id.* at 977-78 (Opinion of Brennan, J.).

697 *Id.* at 981 (concurring opinion).

698 See cases cited note 638 *supra*.

699 *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 86 Sup. Ct. 975, 982 (1966) (concurring opinion).

700 *Id.* at 979 (concurring opinion).

in the initial opinion had interjected "a new test into that laid down in *Roth*."⁷⁰¹ Turning from that issue, he went on to criticize the application of the "social importance" test by his Brothers. He pointed out that the statement of the Supreme Judicial Court was "casual" insofar as the trial court had specifically found the book to be without any value.

Justice Harlan abstained from commenting on the necessity of requiring evidence of lack of social importance.⁷⁰² Alluding to the diversity of approaches taken by the other justices, he dissented on the basis of his frequently stated contention that the constitutional limits on state regulation of obscenity were not as stringent as those on federal regulation: "[T]he Fourteenth Amendment requires of a State only that it apply criteria *rationaly related* to the accepted notion of obscenity and that it reach results not wholly out of step with current American standards."⁷⁰³ (Emphasis added.)

Mr. Justice White was the third dissenter. Like Justice Clark, he took issue with the employment of the "social importance" test in Justice Brennan's opinion. He recognized the usage of the terminology in *Roth*, but construed it as being "not an independent test of obscenity but . . . relevant only to determining the predominant prurient interest of the material, a determination which the court or the jury will make based on the material itself and all the evidence in the case, expert or otherwise."⁷⁰⁴

What does this decision portend? If deference is paid to the "no-majority-opinion" principle, the spate of opinions is merely "sound and fury, signifying nothing." The judgment of the Supreme Judicial Court of Massachusetts was reversed, and that was all. On the other hand, should "probabilistic import" come into play here—as it did with the *Jacobellis* and *Manual Enterprises* cases⁷⁰⁵—the lower courts can be expected to seize upon Justice Brennan's opinion as the word of the Court and use it to reject any "balancing" in this area, although such a result would be due to less than a careful reading of the decision. The opinion will almost certainly be used to buttress the application of "social importance" as a separate and necessary test for obscenity. If recent history is any teacher, the fact that this reading of *Roth* was strongly objected to by two justices and assented to by only three will probably be overlooked by the lower courts as they turn to this decision.

The division of the Justices over this point marks the fullest discussion yet given to "social importance" by the Court. The *Roth* explication had included the acceptance of "social importance" as a constituent test without any clear analysis of it. Now, however, members of the Court have themselves called its significance into question. At essence, the controversy centers around the "independence" of the test. Is lack of social importance a conclusion flowing from a finding of obscenity, or is it itself a premise essential to such a finding? Framed another way, does *Roth* permit a "balancing" test?

The *Roth* majority opinion does not clearly answer the question. Its criti-

701 *Id.* at 989 (dissenting opinion).

702 *Id.* at 996 n.1 (dissenting opinion).

703 *Id.* at 997. See text accompanying note 629 *supra*.

704 *Id.* at 999 (dissenting opinion).

705 See text accompanying note 651 *supra*.

cal statement that obscenity was rejected as being "utterly without redeeming social importance" can be read fairly either way. However, the remark was immediately followed by a quotation from *Chaplinsky v. New Hampshire*⁷⁰⁶ which denoted obscene utterances as being of "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."⁷⁰⁷ Reliance on this statement would tend to substantiate the position that *Roth* treated lack of "social importance" as a concomitant of obscenity and not as a necessary factor in its determination. This was the basis for the dissents of Justices Clark and White.

Justice Brennan's approach may be more palatable, as it prevents a holding that matter which has even the slightest social worth may be nonetheless outlawed. At the same time, the Brennan approach — if accepted by the judiciary — might lead to a total emasculation of *Roth* in situations where (1) the material is not clearly "hard-core" pornography, or (2) where there is no evidence of any "pandering."⁷⁰⁸ Justice White noted the potential reach of this position:

To say that material within the *Roth* definition of obscenity is nevertheless not obscene if it has some redeeming social value is to reject one of the basic propositions of the *Roth* case—that such material is not protected *because* it is inherently and utterly without social value.

If "social importance" is to be used as the prevailing opinion uses it today, obscene material, however far beyond customary limits of candor, is immune if it has any literary style, if it contains any historical references or language characteristic of a bygone day, or even if it is printed or bound in an interesting way. Well written, especially effective obscenity is protected; the poorly written is vulnerable. And why shouldn't the fact that some people buy and read such material prove its "social value"?⁷⁰⁹

It may be that the impact of Justice Brennan's opinion will not be great. Lower courts may well reject it as not being the law of the land or, while purporting to accept it, they may in fact covertly employ Justice White's methodology in the guise of Justice Brennan's terminology. Should, however, the Brennan approach gain full acceptance—either in future decisions of the Court or by virtue of its "probabilistic import" in the instant case—the character of obscenity regulation will assuredly be affected. Carried to its extreme, it would go far to eliminate cases in which the prosecution places major reliance on the character of the material alone. Some sort of case could probably be made out in favor of the "social importance" of nearly all objectionable material.

Furthermore, adoption of the Brennan approach would require delineation of "social value." But what is "social importance"? What constitutes "literary" or "artistic" value? This conundrum would have provided ample sport for a medieval debate. Given an aesthetics concerned with form, that which would be "artistic" would be that which is done well. Prescinding from content as

706 315 U.S. 568 (1942).

707 *Id.* at 572.

708 See text accompanying note 731 *infra*.

709 A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 86 Sup. Ct. 975, 999 (1966) (dissenting opinion).

such a theory does, well-wrought pornography or obscenity — that which would best appeal to prurient interest — could be considered “artistic.”

Such a conclusion is not a merely theoretical *reductio ad absurdum*. The description of an unidentified Cook County, Illinois, obscenity prosecution included the following: “Prosecutor Joseph R. Gill said, ‘I asked Prof. Cosbey [of the American Literature Department of Roosevelt University, testifying for the defense] his definition of literary merit. He said a book has to have a plot, a beginning, and an end, and continuity.’”⁷¹⁰ This is probably as minimal a definition of “literary merit” as can be conceived. If “literary merit” such as this would substantiate a finding of non-obscenity, there would be almost total emasculation of any meaningful legal control. If this is an example of what the courts will be confronted with by way of “literary merit,” and if a balancing test be denied them, they may have to utilize other devices, such as “pandering”;⁷¹¹ for, despite Justice Brennan’s statement to the contrary,⁷¹² he would seem in fact to limit *Roth* to “hard-core” pornography.

A concomitant problem is whether or not to evolve different tests for different media. This has already been done in the procedural area as will be seen below.⁷¹³ But what of a film vis-à-vis a book? Should it have the same standard applied to it? Must a film which is innocuous but for a brief segment be taken as a whole? What if that segment were to be a depiction of an act of sexual intercourse? The film, *Les Amants*, which was the subject of *Jacobellis*, was apparently close to that, but the question was not reached.⁷¹⁴

Such an issue may prove difficult to handle insofar as it would entail a modification of the “taken as a whole” aspect of *Roth*.⁷¹⁵ Possibly, entirely different grounds for the decision might be allowed: finding that the portrayal is close enough to actual conduct as to be regulated in the same way that the state could regulate such an act in the street.⁷¹⁶ In any event, the answer must once again wait upon the courts.

(d) *The Relevant Community*

Of greatest acceptance has been the notion that obscenity control requires the application of national rather than local community standards. As stated by one court:

[T]he phrase “contemporary community standards” refers to the entire nation and not the geographic boundaries of any state or subdivision thereof. To limit “contemporary community standards” to the standards of an area less than the entire nation would conflict with the First Amendment. *Jacobellis v. Ohio*⁷¹⁷

710 Mabley, *Jury Vetoes Another Smut “Masterpiece,”* Chicago’s American, Dec. 20, 1965, p. 3, col. 1. The jury went on to convict.

711 See text accompanying note 731 *infra*.

712 See note 625 *supra*.

713 See text following note 769 *infra*.

714 Justice Goldberg came close to this problem when he noted the “fleeting” aspect of the passage, but the manner of his acknowledgment was by way of dismissal. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion).

715 See generally Comment, *Obscenity: Roth Goes to the Movies*, 14 BUFFALO L. REV. 512 (1965).

716 *Trans-Lux Distrib. Corp. v. Board of Regents*, 14 N.Y.2d 88, 198 N.E.2d 242, 245 (1964), *rev’d on other grounds*, 380 U.S. 259 (1965).

717 *State v. Locks*, 97 Ariz. 148, 397 P.2d 949, 951 (1964).

Courts taking this position in reliance on statements made in *Jacobellis* and/or *Manual Enterprises* are manifold.⁷¹⁸ Despite criticism of the wisdom of such a holding⁷¹⁹ and a questionable analytical basis for regarding this point as conclusively settled by the Supreme Court,⁷²⁰ this stands forth as the rule at the present time.

(e) *De Novo Review*

The treatment given by the courts to the question of the proper scope of review on appeal has been summed up in one opinion:

[W]e accept the now prevailing view that in obscenity cases the issue for determination is subject to constitutional limitations and the courts are faced with an obligation to make an independent determination of the constitutional issue which cannot be avoided by considering "obscenity" as a fact question only.⁷²¹

In case after case,⁷²² this pattern is firmed and established. With little discussion other than a reference to *Jacobellis*, the matter is being settled.⁷²³ Again, the value of *Jacobellis* as a precedent may be questioned, but for all practical purposes, the only point to be settled may be whether or not the trial judge himself is under an obligation to make an independent judgment as to the nature of the material.⁷²⁴

(ii) Blue Ball to Intercourse to Middlesex — The *Ginzburg* Gloss

During the course of the writing of this Survey, the United States Supreme Court decided three cases which lend a new dimension to the law of obscenity and which will set the pattern for some time to come. Two of the cases — *Mishkin* and *Fanny Hill* — have already been considered in relation to different aspects of the *Roth* standard. The third is set off here to emphasize its significance. Unlike the two other cases, it does not just clarify *Roth*: it amplifies it to proportions heretofore unrealized.

In 1963, Ralph Ginzburg set out to secure mailing privileges for three of his publications.⁷²⁵ His trek took him from the postoffices in Blue Ball and Intercourse, Pennsylvania, to that in Middlesex, New Jersey. It was there that he was permitted to mail his publications. Subsequently, he was, like Mr. Roth, indicted and tried for violating the federal obscenity statute.⁷²⁶ Upon trial, he and the three corporations he controlled were convicted upon 28 separate

718 *E.g.*, *United States v. One Carton Positive Motion Picture Film*, 247 F. Supp. 450 (S.D.N.Y. 1965).

719 *E.g.*, *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (dissenting opinion).

720 Text accompanying note 635 *supra*.

721 *State v. Vollmar*, 389 S.W.2d 20, 28 (Mo. 1965).

722 *E.g.*, *United States v. Luros*, 243 F. Supp. 160 (N.D. Iowa 1965); *City of Chicago v. Kimmel*, 31 Ill.2d 202, 201 N.E.2d 386 (1964).

723 *But see Trans-Lux Distrib. Corp. v. Maryland State Bd. of Censors*, 240 Md. 98, 213 A.2d 235 (1965) where the court recognized the division in *Jacobellis* but did not reach the question itself.

724 See *United States v. Luros*, 243 F. Supp. 160 (N.D. Iowa 1965).

725 *EROS*, a magazine; *Liaison*, a biweekly newsletter; and *The Housewife's Handbook on Selective Promiscuity*, a short book.

726 18 U.S.C. § 1461 (1964).

counts.⁷²⁷ When an appeal to the Third Circuit failed to result in a reversal,⁷²⁸ he took his case to the Supreme Court. By a vote of five to four, the Court affirmed his conviction in *Ginzburg v. United States*.⁷²⁹

Justice Brennan wrote for a majority consisting of the Chief Justice and Justices Clark, White and Fortas. Relying heavily on what he styled "a background of commercial exploitation of erotica solely for the sake of their prurient appeal,"⁷³⁰ he held that "in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test."⁷³¹ The Court did not pass on the status of the material apart from the context of Ginzburg's activities but coupled it with his conduct to condemn him:

[B]y animating sensual detail to give the publication a salacious cast, petitioners reinforced what is conceded by the Government to be an otherwise debatable conclusion. . . . [T]hey deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed. They proclaimed its obscenity; and we cannot conclude that the court below erred in taking their own evaluation at its face value and declaring the book as a whole obscene despite the other evidence.⁷³²

The decision precipitated four strong dissents by the minority, all along lines now long familiar. In two separate opinions, Justices Douglas and Black said that the first amendment called for an end to governmental censorship.⁷³³ Justice Stewart voted to reverse on the grounds that the material before the Court did not constitute "hard-core" pornography.⁷³⁴ Justice Harlan, who had been with the majority in *Mishkin*, here found that the books did not meet a "hard-core" pornography test and disagreed with the notion that a "pandering" test could be read into the federal statute.⁷³⁵

The *Ginzburg* codicil represents the realization of Chief Justice Warren's wish that the law of obscenity be changed so that "it is not the book that is on trial; it is a person."⁷³⁶ Embraced in the opinion of the Court is the "variable obscenity" concept, which is basically a relative standard taking into account such factors as intent, conduct and the primary audience.⁷³⁷ The opinion also included the "commercial exploitation" rationale exemplified by the ALI Model Penal Code.⁷³⁸

Justice Brennan insisted that he was merely explicating the *Roth* standard:

727 *United States v. Ginzburg*, 224 F. Supp. 129 (E.D. Penn. 1963).

728 *United States v. Ginzburg*, 338 F.2d 12 (3d Cir. 1964).

729 86 Sup. Ct. 942 (1966).

730 *Id.* at 945.

731 *Id.* at 949.

732 *Id.* at 948.

733 *Id.* at 969 and 950 respectively (dissenting opinions).

734 *Id.* at 956 (dissenting opinion).

735 *Id.* at 953 (dissenting opinion). In line with his distinction between the powers of the state and federal governments in this area, he employs the more stringent "hard-core" pornography test for evaluating the conduct of the federal government.

736 *Roth v. United States*, 354 U.S. 476, 495 (1957) (concurring opinion).

737 See generally Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 68 (1960); Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834, 847 (1964).

738 See MODEL PENAL CODE § 251.4 (Proposed Official Draft 1962).

All that will have been determined is that questionable publications are obscene in a context which brands them as obscene as that term is defined in *Roth* — a use inconsistent with any claim to the shelter of the First Amendment. . . . It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged.⁷³⁹

This will be true to the extent that the test of "pandering" is reserved for "close cases" and "questionable publications" — that is, to the degree that *Roth* must first be applied to establish "closeness" or "questionableness" before *Ginzburg* comes into play. While *Ginzburg* would primarily be an adjunct to *Roth*, it is likely that the tail will begin to wag the dog.

In the first place, as Justice Brennan himself noted, the Court had previously "regarded the materials as sufficient in themselves for the determination of the question."⁷⁴⁰ But now the "close case" can be swung by other considerations. In his opinion in *Fanny Hill*, Justice Brennan suggested that evidence of "pandering" could have brought about a different result in that case, specifically negating the finding of social value.⁷⁴¹ Yet, what is a "close case"? Is it one in which (adopting Justice Brennan's position) only two of the three *Roth* standards are met? Would meeting one of the standards produce a "close case"? Moreover, are the standards to have different weight in terms of "closeness"? Would a finding of appeal to prurient interest always be necessary before elements of "pandering" could come in? If the "close case" is liberally construed and evidence of "pandering" is freely admitted, it is conceivable that even a sale of the Bible could be proscribed.⁷⁴² Essentially, it would be a matter of convicting on the basis of a mere representation of obscenity.⁷⁴³

But irrespective of the attainment of such an interpretation, *Ginzburg* will certainly permit *Roth* to be applied with more certainty in formerly dubious situations. Far more importantly, *Ginzburg* — along with *Fanny Hill* and *Mishkin* — may signal the beginning of the end of obscenity regulation premised on the nature of the material alone. The overriding concern of the majority in *Ginzburg* was the conduct of the defendant. In *Mishkin*, it was pointed out that "appellant was not prosecuted for anything he said or believed, but for what he did, for his dominant role . . . in producing and selling allegedly obscene books."⁷⁴⁴ (Emphasis added.) And insofar as *Mishkin* adjusted *Roth* to consider the audience to which the material was directed, it moved to a consideration of the activity of the purveyor.

The tenor of the Court in these opinions is certainly much different from that

739 *Ginzburg v. United States*, 86 Sup. Ct. 942, 949-50 (1966).

740 *Id.* at 944.

741 A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 86 Sup. Ct. 975, 978 (1966) (Opinion of Brennan, J.). He indicated, however, that there would have to be a finding of prurient appeal and patent offensiveness.

742 Justice Douglas suggested this possibility:

A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it. I cannot imagine any promotional effort that would make chapters 7 and 8 of the Song of Solomon any the less or any more worthy of First Amendment protection than does its unostentatious inclusion in the average edition of the Bible.

Ginzburg v. United States, 86 Sup. Ct. 942, 969-70 (1966) (dissenting opinion).

743 Compare MODEL PENAL CODE § 251.4(2)(e) (Proposed Official Draft 1962).

744 *Mishkin v. New York*, 86 Sup. Ct. 958, 961 (1966).

in *Roth* where Chief Justice Warren's was a solitary voice. Should Justice Brennan's reading of *Roth* in *Fanny Hill* be accepted — a reading which could go far toward narrowing *Roth's* application⁷⁴⁵ — the concurrence of the two themes could pitch obscenity control, for all intent and purposes, completely on conduct.

The prospects for the future are multifarious. The *Ginzburg* decision should do much to resolve the "inherent residual vagueness of the *Roth* test."⁷⁴⁶ The balance it strikes between the conflicting policies of free speech and obscenity control should still many rumblings of both the censorious and the libertarian. And in reverting to an emphasis on conduct, it goes far toward bringing obscenity regulation into line with the traditional concerns of the criminal law. The judicial custom of focusing on activity is not one to be easily abandoned.

Concomitantly, the increased concentration on conduct that these decisions will surely bring may well presage the end of the controversy over the scope of the standards to be employed and the limits of judicial review. "Pandering" would appear to be a rather relative concept that would vary almost of necessity with the locale. "Commercial exploitation" in Oskaloosa, Iowa, might well differ from a like activity in New York, but such a variance could well be within constitutional tolerances. At the same time, it would be based on concrete facts that would be solidly within the province of the jury.

The decision will certainly create new questions to be answered. As was asked above, how "close" need a case be before the "pandering" test can be employed? How much reliance can be put on "pandering" alone; and more importantly, how necessary will evidence of "pandering" be to a conviction? These questions, however, should prove easier to answer. The whole character of obscenity regulation appears to be on the verge of a change that would release many tensions now underlying it. Should the *Ginzburg* rationale temper the debate over governmental intervention in this area, the substantive side of obscenity law should work itself out as well as the procedural has.

(iii) The Procedures — A Stirring of the Waters

The problems accompanying obscenity regulation are not relegated solely to the definitional order. To a great extent, the procedural discussion presupposes the substantive, but adds the additional nebulous problem of prior restraint. The procedures used must not impinge upon the right to freely disseminate non-regulable matter.⁷⁴⁷

The landmark case of *Near v. Minnesota*⁷⁴⁸ recognized freedom of the press as meaning "principally although not exclusively, immunity from previous restraints or censorship."⁷⁴⁹ The modern Court has built upon this foundation in the course of several decisions. In *Kingsley Books, Inc. v. Brown*,⁷⁵⁰ decided the same day as the *Roth* case, Justice Frankfurter, writing for the Court, upheld

⁷⁴⁵ See text accompanying note 708 *supra*.

⁷⁴⁶ *Ginzburg v. United States*, 86 Sup. Ct. 942, 950 n.19 (1966).

⁷⁴⁷ See generally CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941); CHENERY, *FREEDOM OF THE PRESS* (1955); THAYER, *LEGAL CONTROL OF THE PRESS* (1962).

⁷⁴⁸ 283 U.S. 697 (1931).

⁷⁴⁹ *Id.* at 716.

⁷⁵⁰ 354 U.S. 436 (1957).

a New York statute which provided for the issuance of an injunction pendente lite and restricted the distribution of allegedly obscene booklets prior to a full judicial hearing on the merits. The proceeding was a civil one, seeking both a final injunction against distribution and the destruction of the books already published. Justice Frankfurter distinguished *Near* on the grounds that the proceeding in question did not involve yet-to-be-published material, but rather came after publication. Significantly, he stated: "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test."⁷⁵¹

Four years later, Justice Brennan clarified the meaning of *Kingsley Books* in *Marcus v. Search Warrant*.⁷⁵² At issue was the constitutionality of a Missouri statute providing for the ex parte granting of a search warrant which empowered a city police officer to seize all "obscene" materials preliminary to a court adjudication as to their nature. The procedure was struck down. *Kingsley Books* was distinguished since: (1) the proceeding in the New York case was initiated against a named publication, a copy of which was annexed to the complaint; (2) the restraints there were not "catch-alls"; and (3) the distributor there could still disseminate the books in the face of the injunction and could raise the issue of non-obscenity by way of defense.⁷⁵³

If *Marcus* represented something of a withdrawal from the position in *Kingsley Books* and a strengthening of the mandate against prior restraints, *Bantam Books, Inc. v. Sullivan*⁷⁵⁴ furthered the trend. In something of a variant approach, the Rhode Island legislature purported to create a "Commission to Encourage Morality in Youth" which, among other things, circulated lists of "objectionable" material. Justice Brennan, once more speaking for the Court, found this method of informal censorship to be a manner of state regulation which, "obviating the need to employ criminal sanctions . . . at the same time eliminated the safeguards of the criminal process" and was, therefore, procedurally defective.⁷⁵⁵

It was against this background that the Court undertook the task of demonstrating that Delphic obfuscation based on its tripartition would not be denied its treatment of the procedural.⁷⁵⁶ The Attorney General of Kansas, acting under a statute providing a procedure similar to that involved in *Marcus*, filed an information as the first step in a proceeding to have certain books declared obscene and destroyed. Apparently aware of the ramifications of *Marcus*, he went further than demanded by the statute by identifying the material he was after by title and by submitting copies of certain of the titles to the judge for his perusal. Upon the basis of this ex parte inquiry, the judge issued a warrant authorizing the seizure of the titles named in the information. All copies of the books found were seized. Over the objection of the distributor that the procedure was defective, a final hearing was held; the books were

751 *Id.* at 441.

752 367 U.S. 717 (1961).

753 *Id.* at 735-36.

754 372 U.S. 58 (1963).

755 *Id.* at 69.

756 See text accompanying note 638 *supra*. Unlike too many of the substantive cases, *Near*, *Kingsley Books*, *Marcus* and *Bantam Books* each had what has become a rarity in this area, a majority opinion.

found obscene and ordered to be burned. The decision was upheld on appeal.

On the same day that the Court handed down its decision in *Jacobellis*, it reversed the judgment of the Kansas Supreme Court in *A Quantity of Books v. Kansas*.⁷⁵⁷ Perhaps as a spill-over from the *Jacobellis* decision, there was once more no opinion of the Court. Decision was had amidst a welter of views. Mr. Justice Brennan announced the judgment of the Court and wrote the initial opinion concurred in by the Chief Justice, Justice White and Justice Goldberg. His opinion distinguished *Kingsley* and objected to the Kansas procedure on two grounds: that all the books were seized and that there was no adversary proceeding on the question of obscenity prior to the issuance of the warrant.⁷⁵⁸

Justice Black concurred in a separate opinion, joined by Justice Douglas, which reiterated his conviction that any regulation of the press was in violation of the dictates of the first amendment.⁷⁵⁹ Justice Stewart concurred separately and made an interesting distinction based on a "hard-core pornography" classification. If the initial scrutiny of the judge led him to believe that the material was "hard-core," the Justice would uphold the procedures as to the material inspected. He voted to reverse in this case since he found that the books did not fall into this category.⁷⁶⁰ This attitude would seem to be similar to the "contraband" argument—that obscenity is not entitled to procedural safeguards relating to searches and seizures since it is outside the law—expressly rejected by Justice Brennan in his opinion.⁷⁶¹

The decision concluded with a dissenting opinion by Justice Harlan, joined by Justice Clark. Referring to his views in *Jacobellis* regarding the constitutional acceptability of "rational" state procedures,⁷⁶² he took issue with the conclusion that the Kansas procedure was unconstitutional. He particularly directed his attention to Justice Brennan's two objections. Taking what he believed to be the four points used by Justice Brennan in *Marcus* to distinguish *Kingsley*, he considered them one by one and found them to be satisfied. The thrust of his argument was directed against the question of the imposition of extensive restraints prior to an adversary proceeding and the expeditious initiation of such proceeding. Prescinding from factual distinctions in the procedures, he emphasized that the practical effects would be no worse than *Kingsley*: (1) the *Kingsley* procedure did not really allow adequate time to make a meaningful defense prior to the hearing on the temporary injunction; (2) the "chilling effect" of such an order would be substantially the same as the procedure here; and (3) there was in fact no unreasonable delay in bringing the final hearing. In summation, he attacked what he considered a possibly "unarticulated premise" of the majority—that the procedure was struck down per se as a prior restraint—by referring back to a consideration of the policies prohibiting such a restraint. Such policies he found satisfied.⁷⁶³

Fortunately, the strong tradition of judicial unanimity when dealing with

757 378 U.S. 205 (1964).

758 *Id.* at 210 (Opinion of Brennan, J.).

759 *Id.* at 213 (concurring opinion).

760 *Id.* at 214 (concurring opinion).

761 *Id.* at 211 (Opinion of Brennan, J.).

762 *Jacobellis v. Ohio*, 378 U.S. 184, 203 (1964) (dissenting opinion).

763 *A Quantity of Books v. Kansas*, 378 U.S. 205, 215 (1964) (dissenting opinion).

procedural questions has not been severely impaired by the no-majority-opinion approach of *A Quantity of Books*. Lower courts approach such issues more confidently when raised, and settle them without stirring the deep dusts of judicial precedents. The impact of clarity may well explain the comparatively few cases that have arisen centering procedural questions. Given perceptible edges, enforcement officials are less apt to stray from the path of constitutionality.

Illustrative of the juridical facility in this area is the case of *Evergreen Review, Inc. v. Cahn*,⁷⁶⁴ decided two weeks prior to *A Quantity of Books*. Upon affidavit to a county judge, a search warrant was issued to seize purportedly pornographic materials. Two copies of the magazines were seized, brought to the judge, and read by him ex parte. This resulted in the authorization of an information against the printers and further warrants for their arrests. At the time of their arrests, some 21,000 copies of the magazine, the entire printing of the issue, were seized under the initial search warrant. Criminal actions based upon these transactions were pending when the defendants brought an action seeking a stay of the state proceeding and the return of the magazines. Finding the *Marcus* decision very much on point, the court granted the injunction on the basis of the mass seizure, the lack of an adversary proceeding, and the absence of judicial supervision.⁷⁶⁵

Two additional cases worth mentioning have risen subsequent to *A Quantity of Books*. In the first, *United States v. 18 Packages of Magazines*,⁷⁶⁶ the procedures provided by 19 U.S.C. § 1305 to prevent the importation of obscene or immoral articles were held unconstitutional, as they permitted seizure prior to any adversary determination.⁷⁶⁷ The district court relied on Justice Brennan's opinion in *A Quantity of Books* to settle the issue. Oddly enough, while recognizing the lack of a majority opinion, it still found Justice Brennan to be speaking for the Court; it also read Justice Black's opinion as demonstrating complete agreement with Justice Brennan's reasoning—a far from self-demonstrable proposition.

The other case referring to *A Quantity of Books* readily distinguished it since the seizure at issue was subsequent to a valid arrest.⁷⁶⁸ It is interesting, however, as another example of a lower court failing to recognize the no-majority-opinion principle in the course of its decision.⁷⁶⁹

A rather remarkable feature of the procedural side of obscenity law is the recognition that has been accorded motion pictures by applying slightly different rules to them. Here, the Court has distinguished between media in a way unknown to its substantive activity. The Court has maintained a rather low level of tolerance with respect to prior restraints on books, magazines and other like material. Judicial indignation is not encountered quite as early by those wishing to impose such restraints on motion pictures. *Joseph Burstyn, Inc. v.*

764 230 F. Supp. 498 (E.D.N.Y. 1964).

765 *Id.* at 504.

766 238 F. Supp. 846 (N.D. Cal. 1964).

767 *But see, United States v. One Carton Positive Motion Picture Film*, 247 F. Supp. 450 (S.D.N.Y. 1965) (same procedures later held constitutional); text accompanying note 786 *infra*.

768 *State v. Vollmar*, 389 S.W.2d 20 (Mo. 1965).

769 *Id.* at 26.

*Wilson*⁷⁷⁰ quite unequivocally established that motion pictures were entitled to the same basic protections accorded other media, but indicated that they were not "necessarily subject to the precise rules governing any other particular method of expression."⁷⁷¹ The Court did not decide to proceed further, however, in its intimation that a constitutionally sound system for licensing movies could be evolved.

The next major case that caused the Court to consider the banning of a film was *Kingsley Pictures Corp. v. Regents*.⁷⁷² The film involved, *Lady Chatterly's Lover*, was concededly not obscene, but had been denied a license for advocacy of "sexual immorality." Rejecting the notion that a state could prohibit the presentation of an idea, the Court reversed without reaching the procedural question left unsettled in *Burstyn*.

The Court first touched upon this question in *Times Film Corp. v. City of Chicago*.⁷⁷³ By the vote of a single judge, the Court held that a Chicago ordinance requiring the licensing of films prior to exhibition was not void on its face. Justice Clark, speaking for the Court, refused to delve further into the constitutionality of the procedures used. The Chief Justice, who had dissented in *Kingsley Books* in the belief that to proceed against a "thing" and to ignore the "personal element" in the criminal law was an invalid prior restraint,⁷⁷⁴ again dissented. This time he based his protest on an abhorrence of licensing generally and, more specifically, on the lack of even the minimal safeguards of the *Kingsley Books* statute.⁷⁷⁵ Foreshadowing later occurrences, he noted that: "[I]n *Kingsley Books* . . . the Court turned a corner from the landmark opinion in *Near* and from one of the bases of the First Amendment. Today it falls into full retreat."⁷⁷⁶ Subsequent ascendancy of this view explains the retrenchment in *Marcus* and *Bantam Books*,⁷⁷⁷ and set the stage for the Court's latest pronouncement respecting movie licensing.

A Baltimore theater owner decided to test the constitutionality of Maryland's motion picture censorship law. He exhibited a concededly innocuous picture without first submitting it to the Maryland State Board of Censors. Convicted of violating the statute, he found no relief in the state courts and took an appeal to the United States Supreme Court. Speaking for the Court in *Freedman v. Maryland*.⁷⁷⁸ Justice Brennan struck down the Maryland statute as not providing adequate procedural safeguards. Although the Justice had been one of the dissenters in *Times Film*, which had involved similar procedures, his opinion did not overrule that decision. Rather, he reaffirmed *Times Film* by distinction, accepting it as simply stating that all such prior restraints are

770 343 U.S. 495 (1952).

771 *Id.* at 503. See generally 1955-57 *Church-State Survey* *supra* note 1, at 447.

772 360 U.S. 684 (1959).

773 365 U.S. 43 (1961).

774 *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957) (dissenting opinion). Justices Douglas, Black and Brennan also dissented.

775 *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 50 (1961) (dissenting opinion). Justices Douglas, Black and Brennan again sided with the Chief Justice, this time joining in his opinion.

776 *Id.* at 54 (dissenting opinion).

777 Text accompanying notes 752-54 *supra*.

778 380 U.S. 51 (1965).

not per se unconstitutional. He went on to set out the tests that a permissible procedure would have to meet: (1) the burden of proving the film obscene must be on the censor; (2) the decision of the censor must be supported by a judicial determination in an adversary proceeding; (3) the procedure, from submission to judicial decision, must be as expeditious as possible.⁷⁷⁹

Whether or not *Times Film* meaningfully survives *Freedman* is open to debate. The Chicago ordinance probably would not meet the *Freedman* standards.⁷⁸⁰ To that extent, the *Times Film* dissenters have had their day, though not to the extent of barring all pre-exhibition licensing. The qualified character of the victory is evidenced by the fact that the more stringent Douglas and Black concurred separately in *Freedman*, again stating that no form of censorship is permissible.⁷⁸¹ This would seem to indicate that the Chief Justice and Justice Brennan have either modified their view somewhat or were never as quite as adamant as the *Times Film* dissents would seem to indicate. The former alternative is most likely the truer one with regard to the Chief Justice.

Two weeks later, this decision was utilized by the Court to reverse summarily a New York Court of Appeals case upholding a refusal to license a movie found by the Board of Regents of that state to be obscene.⁷⁸² Other actions were not long in coming. Not six weeks had passed from the date of decision before Maryland enacted a new licensing act.⁷⁸³ In quick succession, a case arose to challenge its validity. The Maryland Court of Appeals, in *Trans-Lux Distrib. Corp. v. Maryland State Bd. of Censors*,⁷⁸⁴ cited *Freedman* in approving the new procedures, although it reversed the lower court on a finding of non-obscenity.⁷⁸⁵

Freedman was also relied on in *United States v. One Carton Positive Motion Picture Films*⁷⁸⁶ to justify the procedures authorized under 19 U.S.C. § 1305 to accomplish forfeiture of an imported foreign film on the grounds of obscenity. Oddly enough, in *United States v. 18 Packages of Magazines*,⁷⁸⁷ the same procedures had been invalidated earlier as unconstitutional when applied to a shipment of magazines—the court relying on *A Quantity of Books*. The *One Carton* court noted the earlier decision but dismissed it as one having been rendered prior to the guidance of *Freedman*.⁷⁸⁸ This may be a sufficient explanation of the differing results, but perhaps they could be reconciled in terms of the

779 *Id.* at 58-59.

780 *Id.* at 61, footnote (concurring opinion).

781 *Id.* at 61 (concurring opinion).

782 *Trans-Lux Distrib. Corp. v. Board of Regents*, 380 U.S. 259 (1965), reversing 14 N.Y.2d 88, 198 N.E.2d 242, 248 N.Y.S.2d 857 (1964). The Court did, therefore, reach the substantive questions raised by the case. See text accompanying note 716 *supra*.

783 Md. Acts 1965, ch. 598.

784 240 Md. 98, 213 A.2d 235 (1965).

785 Both this case and *Trans-Lux Distrib. Corp. v. Board of Regents*, 380 U.S. 259 (1965), reversing 14 N.Y.2d 88, 198 N.E.2d 242, 248 N.Y.S.2d 857 (1964) involved the same film, *A Stranger Knocks*. The opinions of the Maryland and of the New York Courts of Appeals are worthy of comparison. They represent an intriguing study in the art of marshalling descriptive facts in such a way as to force the reader to agree with the writer's conclusion. At the same time, they bring the substantive questions into full focus and demonstrate the insoluble differences in opinion that are bound to arise.

786 247 F. Supp. 450 (S.D.N.Y. 1965).

787 238 F. Supp. 846 (N.D. Cal. 1964).

788 *United States v. One Carton Positive Motion Picture Film*, 247 F. Supp. 450, 462 (S.D.N.Y. 1965).

different procedures evolving for the different media. If so, they represent the most extreme divergence as yet displayed in this regard.

Such curiosities aside, the *Freedman* decision has given lower courts a relatively easy means with which to determine the constitutionality of pre-exhibition restraints.⁷⁸⁹ Prescinding from a discussion of the wisdom of tolerating any or all such procedures, the procedural experience indicates that clarity on the part of the Court breeds facility if not felicity.

(iv) Proof Thereof

Evidentiary decisions bespeak still further the breadth of the task remaining to be finished by the Court.

(a) *Scienter*

Although "intent" has not been of great consequence in the field of obscenity until recently,⁷⁹⁰ a quantum of knowledge has been of some moment. In *Smith v. California*,⁷⁹¹ the Court indicated that proof of the disseminator's knowledge of the contents of the material in question was necessary for an obscenity conviction. At issue was a Los Angeles city ordinance making it a criminal offense to possess an obscene book in a bookstore. The ordinance — either on its face or by construction — did not require any *mens rea*, but rather imposed a strict liability. Evidencing a concern for the deleterious effect such an ordinance would have on the dissemination of non-obscene literature, insofar as the bookseller would feel constrained to limit his inventory solely to books he had inspected, the Court ruled the ordinance unconstitutional in an opinion of Justice Brennan.⁷⁹² The Court refrained from determining the nature of the necessary knowledge, noting only that "eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents."⁷⁹³ Justice Frankfurter suggested that this lack of specificity arose out of a "regard for the State's interest" in regulating obscenity,⁷⁹⁴ which had been recognized in *Roth*.

Such absence of a standard has not been without analytical difficulty, particularly in determining whether a defendant need only be aware of a book's content or whether he must come to the judgment that it is obscene.⁷⁹⁵ A sampling of the decisions of the last two years, however, would tend to show that the courts have not been particularly troubled by the matter of *scienter*, intimating that their experience with *scienter* elsewhere stands them in good

789 See, e.g., *Embassy Pictures Corp. v. Hudson*, 242 F. Supp. 975 (W.D. Tenn. 1965), where the court was able to determine with ease the unconstitutionality of a Memphis ordinance requiring pre-exhibition licensing.

790 1963-64 *Church-State Survey* *supra* note 1, at 470.

791 361 U.S. 147 (1959).

792 *Id.* at 153. This concern that the public interest in having access to the non-obscene be unimpaired has become the touchstone in dealing with prior restraints. See, e.g., *A Quantity of Books v. Kansas*, 378 U.S. 205, 213 (1964) (Opinion of Brennan, J.); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); *Marcus v. Search Warrant*, 367 U.S. 717, 730 (1961).

793 *Smith v. California*, 361 U.S. 147, 154 (1959).

794 *Id.* at 164 (concurring opinion).

795 See, e.g., Wilson, *California's New Obscenity Statute: The Meaning of "Obscene" and the Problem of Scienter*, 36 So. CAL. L. REV. 513, 539-43 (1963).

stead here. Thus, the vending of books with lurid covers and titles,⁷⁹⁶ the preparing of descriptive advertisements,⁷⁹⁷ and the publishing of allegedly obscene books⁷⁹⁸ have served as a basis for a finding of scienter short of actual proof that the defendants had read the material.

An interesting variation was seen in *Kirby v. Municipal Court*,⁷⁹⁹ wherein a writ of prohibition against certain further criminal proceedings was denied. The petitioner had sought the writ on the grounds that the statute under which he had been convicted was unconstitutional. The statute made it a misdemeanor to advertise material represented by the advertiser as obscene.⁸⁰⁰ When petitioner raised the issue of scienter under *Smith*, the court found he was estopped from denying either that he actually knew the contents of what he advertised or that the material was in fact as he had represented it. In this instance, the purveyor's purported intent, rather than knowledge, weighed against him.

This approach was later approximated by the Court in the *Ginzburg* case,⁸⁰¹ even though *Ginzburg*, *Mishkin* and *Fanny Hill* did not speak to scienter. In *Fanny Hill*, the question was not discussed; in *Ginzburg*, it had been stipulated prior to trial.⁸⁰² There was some discussion of scienter in *Mishkin*, but it consisted solely of the Court's approving the New York requirement that a defendant be aware of the "character" of the material—apparently meaning that he have a knowledge of the contents of the material.⁸⁰³ Unfortunately, the Court refrained from indicating if any less knowledge would suffice.

This continued reluctance to define the limits of scienter may be due to the nature of the decisions themselves. Should they develop an expectedly greater concern with conduct and intent, questions as to the nature of the scienter may become academic. The debate will probably shift to the question of what evidentiary factors will establish "pandering." It will be less the knowledge of the material than the thought behind the act that will be crucial.

Peripherally to the above considerations, the Supreme Court of Arizona reiterated its position that a scienter requirement was implicit in its state obscenity statute,⁸⁰⁴ while the Supreme Court of Tennessee curtly refused to make such a finding with respect to its state statute.⁸⁰⁵ The Tennessee decision may be said to be exceptional since it runs counter to the general trend to "discover" such a requirement;⁸⁰⁶ certainly the court did not manifest the characteristically juristic penchant of responding to "implications."

796 *State v. Onorato*, 2 Conn. Cir. 428, 199 A.2d 715 (1963); *State v. Jungclaus*, 176 Neb. 641, 126 N.W.2d 858 (1964).

797 *People v. Sikora*, 32 Ill.2d 260, 204 N.E.2d 768 (1965).

798 *People v. Aday*, 226 Cal. App. 2d 520, 38 Cal. Rptr. 199 (Dist. Ct. App. 1964), *cert. denied*, 379 U.S. 931 (1965).

799 46 Cal. Rptr. 844 (Dist. Ct. App. 1965).

800 CAL. PENAL CODE § 311.5: "Every person who writes or creates advertising or solicits anyone to publish such advertising or otherwise promote the sale or distribution of matter represented or held out by him to be obscene, is guilty of a misdemeanor."

801 See text accompanying note 732 *supra*.

802 *Ginzburg v. United States*, 86 Sup. Ct. 942, 946 n.8 (1966).

803 *Mishkin v. New York*, 86 Sup. Ct. 958, 964 & n.9 (1966).

804 *State v. Locks*, 97 Ariz. 148, 397 P.2d 949 (1964). Ironically, however, the court, after a review of the case law on the terms "obscene" and "indecent," found that their employment made the statute unconstitutionally vague. 397 P.2d at 952.

805 *Ellenburg v. State*, 384 S.W.2d 29 (Tenn. 1964).

806 *Id.* at 33 (dissenting opinion).

(b) *Expert Testimony*

Outside the substantive area, there is no greater locus of confusion in obscenity law than the position of the expert. The role of the expert here is one that underscores the effect of poor direction on the part of the Supreme Court, as it has not as yet made any definitive statement as to the expert's status. What utterances have been made have been confined to concurring and dissenting opinions, and have dealt solely with the need for expert testimony on contemporary community standards. Justice Brennan has at one point stated that the jury has a "special aptitude" for determining questions of obscenity.⁸⁰⁷ This might indicate that he would not require expert testimony on the issue of contemporary community standards; yet, such a conclusion might be rash in the light of his opinion in *Jacobellis*.⁸⁰⁸

Justices Harlan and Frankfurter have also spoken on the place of the expert in determining these standards: the former being ambivalent, leaving the requirement of such testimony to the discretion of the states;⁸⁰⁹ the latter apparently raising the admission of expert testimony to the level of a constitutional mandate.⁸¹⁰ Justice Frankfurter would not, however, make such testimony conclusive as to the ultimate question.⁸¹¹

Confronted with the silence of the Court, other benches have done the best they can, but the decisions constitute something more akin to tin than "boiler-plate."⁸¹² Judicial confusion in developing substantive formulae has carried over quite naturally to these evidentiary questions since it is over testimony as to the elements of the standard that the controversy rages. The three most discussed matters for expert testimony have been "prurient appeal," "contemporary community standards," and "literary merit or social importance."

With respect to expert testimony as to "prurient appeal," two courts have required it,⁸¹³ two have permitted it,⁸¹⁴ and two have expressly denied it.⁸¹⁵ Similar division is recorded relating to attestation as to "contemporary community standards," with at least three courts allowing it,⁸¹⁶ one court excluding

807 *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 448 (1957) (dissenting opinion).

808 *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Opinion of Brennan, J.) ('calling for a national standard and de novo review'). See text accompanying note 824 *infra*.

809 *Smith v. California*, 361 U.S. 147, 172 (1959) (dissenting and concurring opinions).

810 *Id.* at 164 (concurring opinion).

811 *Id.* at 165 (concurring opinion).

812 For a general discussion of the problems in this area, see Note, *The Use of Expert Testimony in Obscenity Litigation*, 1965 WIS. L. REV. 113.

813 *United States v. Klaw*, 350 F.2d 155 (2d Cir. 1965); *United States v. One Carton Positive Motion Picture Film*, 247 F. Supp. 450 (S.D.N.Y. 1965). In the former case, the material involved was described as "sado-masochistic" and alleged to appeal to deviant prurient interest. As the reviewing court found that the jury was not able to properly determine such appeal, the case was reversed for lack of evidence on this point. The *One Carton* court referred to *Klaw* although the material it had before it appeared to appeal to the prurient interest of the average man.

814 *Trans-Lux Distrib. Corp. v. Maryland State Bd. of Censors*, 240 Md. 98, 213 A.2d 235 (1965); *State v. Jungclaus*, 176 Neb. 641, 126 N.W.2d 858 (1964).

815 *United States v. West Coast News Co.*, 228 F. Supp. 171 (W.D. Mich. 1964); *G. P. Putnam's Sons v. Calissi*, 86 N.J. Super. 82, 205 A.2d 913 (Ch. 1964).

816 *Trans-Lux Distrib. Corp. v. Maryland State Bd. of Censors*, 240 Md. 98, 213 A.2d 235 (1965); *G. P. Putnam's Sons v. Calissi*, *supra* note 815; *People v. Aday*, 38 Cal. Rptr. 199 (Dist. Ct. App. 1964).

it,⁸¹⁷ and two not finding it necessary.⁸¹⁸ A consensus has been reached only on the introduction of testimony as to "literary merit or social importance," with most, if not all, of the courts permitting it.⁸¹⁹ But even here, there has been no definitive statement as to the weight to be given such testimony or its relevancy in meeting the burden of proof. Some courts have held testimony showing literary merit to be nonconclusive;⁸²⁰ others have allowed the mere autoptical evidence of the allegedly obscene material to sustain the burden without requiring any other evidence as to the lack of "social importance."⁸²¹

For the most part, the opinions have not dealt extensively with the questions raised by expert testimony. One that did, *United States v. West Coast News Co.*,⁸²² stands out conspicuously and is certainly worth reading for its exhaustive commentary. Most fascinating is the unique viewpoint the report affords: the final opinion of the court is preceded at appropriate junctures by the original trial opinion. This provides an enlightening comparison between the feeling of the court when it made its orders and its comments on them after the events of the trial. Of singular interest are the misgivings the court had, after having admitted expert testimony on the issue of community standards at the request of the defendants, upon finding that the experts turned out to be "ardent advocates for their chosen causes" and did not reflect true community standards.⁸²³

Resolution of the role of the expert will have to await, in part, greater analysis and settlement of substantive questions. The scope of the relevant community, for example, may markedly affect the need for expert testimony as to the standards currently prevailing therein. A local jury might plausibly be found inadequate to determine the breadth of national standards if such are held to be constitutionally required.⁸²⁴

(c) *Comparative Evidence*

In attempting to demonstrate "contemporary community standards" and "customary limits of candor," efforts have been made to introduce into evidence other works—either accepted or rejected ones—to indicate community levels of tolerance. The difficulties inherent in such a procedure are almost self-evident. May the court forbear admission until it has first determined that the material is not obscene per se? What will constitute a proper foundation establishing similarity between the materials? Will judicial decisions as to the obscene or non-obscene nature of questionable material have a bearing on other decisions?

817 *State v. Vollmar*, 389 S.W.2d 20 (Mo. 1965).

818 *City of Chicago v. Kimmel*, 31 Ill.2d 202, 201 N.E.2d 386 (1964); *City of Chicago v. Doe*, 471 Ill. App. 2d 134, 197 N.E.2d 711 (1964).

819 *E.g.*, *United States v. One Carton Positive Motion Picture Film*, 247 F. Supp. 450 (S.D.N.Y. 1965); *United States v. West Coast News Co.*, 228 F. Supp. 171 (W.D. Mich. 1964); *State v. Vollmar*, 389 S.W.2d 20 (Mo. 1965); *G. P. Putnam's Sons v. Calissi*, 86 N.J. Super. 82, 205 A.2d 913 (Super. Ct. Ch. 1964).

820 *E.g.*, *G. P. Putnam's v. Calissi*, *supra* note 819.

821 *E.g.*, cases cited note 818 *supra*.

822 228 F. Supp. 171 (W.D. Mich. 1964).

823 *Id.* at 190.

824 Note, *The Use of Expert Testimony in Obscenity Litigation*, *supra* note 812, at 120.

Some courts have rejected outright any proffered comparisons.⁸²⁵ Yet others have felt compelled to permit comparison to satisfy the demands of due process.⁸²⁶ Again, the limits of constitutional dictates are not delineated; again, questions of judicial expediency and practicality arise as the waters of decision run shallow.

(v) In the Alternative

Undoubtedly, one of the gravest concerns of the censorious is that salacious material may deprave youth. However, that which might have a harmful influence on youth will be generally conceded to encompass more than that which might have such effect on an adult. Consequently, as the limits of the obscene have shrunk, greater attention has been given to protecting the young by specific legislation. Drafting such legislation has led to its own brand of problems.

In *Butler v. Michigan*,⁸²⁷ the Supreme Court made it abundantly clear that any such attempt must not operate in such a way as to deny to the adult population material not otherwise regulable as to them. To do so would be "to burn the house to roast the pig" by limiting "the adult population . . . to reading only what is fit for children."⁸²⁸ The implication was that properly drafted statutes or ordinances proscribing the supplying of objectionable material would not run counter to first amendment guarantees even if not confined to the obscene.⁸²⁹

"How-to" is another matter. The *Bantam Books* case, considered above,⁸³⁰ exemplifies one attempt that ended in procedural invalidation. Two recent New York cases⁸³¹ bear on the substantive problem. Both cases dealt with a New York statute making it unlawful to knowingly sell to a minor: "any book . . . which exploits [or] is devoted to . . . descriptions of illicit sex or sexual immorality . . . [or any publication] which contains pictures of nude or partially de-nuded figures, posed or presented in a manner to provoke or arouse lust or passion . . . for commercial gain."⁸³² Both the descriptive and the pictorial sections were held to be unconstitutionally vague in their terminology, forcing the state legislature to pass a new act setting out in specific language exactly what was prohibited.⁸³³

Drafting problems have also thwarted attempts to amend the federal "Comstock" law⁸³⁴ to penalize the use of the mails to send offensive matter to minors. Numerous such attempts have made in recent years,⁸³⁵ none of which have

825 *E.g.*, *G. P. Putnam's Sons v. Calissi*, 86 N.J. Super. 82, 205 A.2d 913 (Super. Ct. Ch. 1964).

826 *E.g.*, *United States v. West Coast News Co.*, 228 F. Supp. 171 (W.D. Mich. 1964).

827 352 U.S. 380 (1957).

828 *Id.* at 383.

829 Note, "*For Adults Only*": *The Constitutionality of Governmental Film Censorship by Age Classification*, 69 YALE L.J. 141, 150-52 (1959). See *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) (Opinion of Brennan, J.).

830 Text accompanying note 754 *supra*.

831 *People v. Bookcase, Inc.*, 14 N.Y.2d 409, 201 N.E.2d 14, 252 N.Y.S.2d 433 (1964), and *People v. Kaplan*, 44 Misc. 2d 110, 252 N.Y.S.2d 927 (Crim. Ct. 1964).

832 N.Y. Laws 1955, ch. 836.

833 N.Y. PENAL LAW § 484-h (McKinney Supp. 1965).

834 18 U.S.C. § 1461 (1964).

835 *E.g.*, H.R. 319, 88th Cong., 1st Sess. (1963); H.R. 3033, 85th Cong., 1st Sess. (1957); H.R. 3498, 85th Cong., 1st Sess. (1957); H.R. 3663, 85th Cong., 1st Sess. (1957).

been successful. While other factors may well have entered into this lack of success,⁸³⁶ illustrative of the drafting problem is a bill introduced in the 89th Congress.⁸³⁷ The bill tries to provide a way by which a recipient of indecent mail can protect himself and his household. It would enable him to begin a process that could culminate in a court order forbidding any such future mailings. Although the problem of unsolicited obscene mailings appears to be substantial enough to warrant congressional attention,⁸³⁸ the bill will probably die if it remains in its present form. The basis of the objection centers around a construction of the bill that would seem to leave determination of the obscene nature of the mail to the subjective opinion of the recipient; both the Post Office Department and the Department of Justice have used this interpretation to raise doubts about the constitutionality of the bill.⁸³⁹

b. *Obscenity — A Prospect*

For all the difficulties engendered by obscenity regulation, for all the confusion, the law is amazingly viable. Functionally, the rules to be followed are clear enough to permit a surprisingly large number of convictions. In 1965 alone, complaints made to the Post Office Department resulted in 696 convictions.⁸⁴⁰ Moreover, it has not been necessary, in the years since *Roth*, to sustain every conviction before the Supreme Court. Since 1957, the Supreme Court has refused certiorari in at least twenty-three cases;⁸⁴¹ numerous other cases have never been appealed. The number of cases that have in fact reached the Court would appear to be a relatively small percentage of those which have arisen. They represent but the apex of the judicial pyramid.

It is also interesting that there are simply no decisions of the Court which would *clearly* indicate that the majority reversed on the grounds of non-obscenity under the *Roth* standard.⁸⁴² A modicum of sophistication in reading the deci-

836 Obscenity in and censorship of the mails is a subject which has begun to develop its own specialized literature treating in full the various censorship devices that have been used and the constitutional problems that have been engendered. The topic is too broad for inclusion here. For a general discussion, see PAUL & SCHWARTZ, *FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL* (1961); Sigler, *Freedom of the Mails: A Developing Right*, 54 *Geo. L.J.* 30 (1965).

837 H.R. 980, 89th Cong., 1st Sess. (1965).

838 In the 1957 fiscal year, the United States Post Office Department received some 40,000 complaints of violations of the obscenity statutes. For the same period in 1965, the number of such complaints rose to 128,140. Letter from H.B. Montague, Chief Inspector, Post Office Department, to Assistant Professor G. Robert Blakey, Notre Dame Law School, Dec. 20, 1965.

839 H.R. REP. NO. 219, 89th Cong., 1st Sess. 6-9 (1965).

840 Letter from H. B. Montague, *supra* note 838.

841 Chronologically, *Matthews v. Florida*, 356 U.S. 918 (1958); *Parr v. United States*, 358 U.S. 824 (1958); *Padell v. United States*, 359 U.S. 942 (1959); *Cain v. United States*, 362 U.S. 952 (1960); *Hochman v. United States*, 364 U.S. 837 (1960); *Collier v. United States*, 365 U.S. 833 (1961); *Womack v. United States*, 365 U.S. 859 (1961); *Astore v. United States*, 366 U.S. 925 (1961); *Chobot v. Wisconsin*, 368 U.S. 15 (1961); *Oakley v. United States*, 368 U.S. 888 (1961); *Monfred v. Maryland*, 368 U.S. 953 (1962); *Heinecke v. United States*, 368 U.S. 901 (1961); *Kahn v. United States*, 369 U.S. 859 (1962); *Finkelstein v. New York*, 371 U.S. 863 (1962); *Zucker v. New York*, 371 U.S. 863 (1962); *Goldstein v. Virginia*, 372 U.S. 910 (1963); *Mishkin v. United States*, 375 U.S. 827 (1963); *Darnell v. United States*, 375 U.S. 916 (1963); *Zuideveld v. United States*, 376 U.S. 916 (1964); *Fried v. New York*, 378 U.S. 578 (1964); *Williamson v. California*, 377 U.S. 994 (1964); *Wenzler v. California*, 377 U.S. 994 (1964); *Aday v. California*, 379 U.S. 931 (1964).

842 Three of the per curiam reversals, however, cited *Roth*: *Times Film Corp. v. City of Chicago*, 355 U.S. 35 (1957); *One, Inc., v. Olesen*, 355 U.S. 371 (1958); *Sunshine Book*

sions of the Court lends credence to the position that the Court has not been as "libertine" as certain groups would seem to believe.⁸⁴³ As Chief Justice Warren has pointed out:

[C]ourts are often presented with procedurally bad cases and, in dealing with them, appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared and were conducted with the appropriate concern for Constitutional safeguards, courts would not hesitate to enforce the laws against obscenity.⁸⁴⁴

But be that as it may, there is no denying that the many unanswered questions make obscenity regulation a somewhat unpredictable business. What exactly, then, is the central issue, if any, that permeates this area? Undeniably, it is a constitutional one; but that answers nothing by answering all. More specifically, much has been made of the problem of "vagueness." A great deal of criticism has been levied on the grounds that obscenity is impossible to define precisely, as it is a purely subjective concept. Consequently, it is said, workable rules are impossible to formulate, and regulatory attempts tend to have an over-breadth running against that which is not obscene.⁸⁴⁵

It is submitted, however, that workable rules are, to a great degree, attainable. Much of the basis for a finding of "unworkableness" is centered on a finding of inconsistent results.⁸⁴⁶ To a certain extent, such results can be explained by the ambiguities of the *Roth* standard but these could be resolved easily enough by the Court. Even so, there would probably remain a certain amount of imprecision. And even this degree of inexactitude would be objected to by some just as surely as others would feel that the law was too "soft" towards obscenity.

This suggests that the real problem is not the lack of workable rules or needed definitional refinement. A certain quantity of imprecision has always been tolerated by the law as long as the rule was set: "In other areas of the law, terms like 'negligence,' although in common use for centuries, have been difficult to define except in the most general manner. Yet the courts have been able to function in such areas with a reasonable degree of efficiency."⁸⁴⁷ Indeed, to demand the black-and-white is to ask that the law become no law, for law will inevitably run to grays. So the controversy lies deeper. The debate is not really over great and subtle distinctions; rather, it devolves into an all-or-nothing

Co. v. Summerfield, 355 U.S. 372 (1958). Arguably, the Court found the material was non-obscene rather than that the tests employed were unconstitutional. See *State v. Martin*, 3 Conn. Cir. 309, 213 A.2d 459, 462 (App. Div. 1965).

843 See N.Y. Times, Sept. 1, 1964, p. 37, col. 8 (reporting the attack of "Operation Yorkville" upon the Court).

844 *Jacobellis v. Ohio*, 378 U.S. 184, 202 (1964) (dissenting opinion). But cf. Justice Clark's statement:

While those in the majority like ancient Gaul are split into three parts, the ultimate holding of the Court today . . . requires the United States Post Office to be the world's largest disseminator of smut and Grand Informer of the names and places where obscene material may be obtained.

Manual Enterprises, Inc. v. Day, 370 U.S. 478, 519 (1962) (dissenting opinion).

845 See, e.g., ERNST & SCHWARTZ, CENSORSHIP: THE SEARCH FOR THE OBSCENE (1964).

846 E.g., *Fanny Hill* had been held obscene in Massachusetts, *Attorney General v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure,"* 206 N.E.2d 403 (Mass. 1965), *rev'd*, 86 Sup. Ct. 975 (1966), but not in New York, *Larkin v. G. P. Putnam's Sons*, 14 N.Y.2d 399, 200 N.E.2d 760, 252 N.Y.S.2d 71 (1964).

847 *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting).

choice. What is at issue is quite simply whether or not regulation in this area is to be accorded the same tolerance as is accorded the law in other fields.

It is to be emphasized that this is no easy choice. But sight of the central issue should not be obscured by the emotion that is almost certain to be generated, for the choice must be made in an unusually sensitive area—that of the first amendment: “The obscenity problem, however, is aggravated by the fact that it involves the area of public expression, an area in which a broad range of freedom is vital to our society and is constitutionally protected.”⁸⁴⁸ Discussions centered on “vagueness,” “effect,” and “clear and present danger” are somehow inappropriate. Such terms are not touchstones; they are conclusionary referents appropriately employed only when predicated upon a decision to the ultimate question suggested above. To employ such words is to presume an answer. To argue that obscenity should not be regulated unless it presents a “clear and present danger” is to assume a certain minimal tolerance. The assumption itself is based on a view of the role of the state in condemning immorality: “Concentration on whether obscenity may—or may not—incite to unlawful acts aims beside the mark. The question, rather, is whether the state may suppress expression it deems immoral”⁸⁴⁹

Certainly, the scope of the decision is not to be confined to matters of morality. Many other considerations weigh heavily here, notably a fear of undue intervention by the state into the realm of ideas, even though our history has not been one of suppression. Significantly, it took the Supreme Court nine years before it held any material to be obscene under the *Roth* standard. Balancing these various factors and considering the different risks, the Court has chosen to maintain the legitimacy of obscenity regulation, manifesting its decision in the form of a theory as to the meaning of the first amendment. Perhaps the Court has heeded the words of Justice Holmes: “Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done.”⁸⁵⁰ In any event, the choice has been made and renewed. The state will have a part to play in this area of morality for some time to come.

Frank P. Cihlar⁸⁵¹

Michael K. Cook⁸⁵²

Joseph P. Martori, Jr.⁸⁵³

Paul J. Meyer⁸⁵⁴

848 *Ibid.*

849 Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 392 (1963).

850 *Blinn v. Nelson*, 222 U.S. 1, 7 (1911).

851 Text accompanying notes 520-850 *supra*.

852 Text accompanying notes 11-138 *supra*.

853 Text accompanying notes 270-519 *supra*.

854 Text accompanying notes 139-269 *supra*.