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Church-State -- Religious Institutions and Values: A Legal Survey -- 1963-64

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NOTES

CHURCH-STATE—RELIGIOUS INSTITUTIONS AND VALUES: A LEGAL SURVEY—1963-64

CONTENTS

	Page
I. Introduction	427
II. Religious Institutions	429
A. Church Property	429
1. Basic Concepts	429
2. Zoning	435
3. Taxation	439
4. Tort Liability	444
B. Education	448
1. Religion in the Public Schools	449
2. Aid to Parochial Education	453
III. Religious Values	458
A. Sunday Closing Laws	458
B. Domestic Relations	461
1. Separation and Divorce Problems	461
2. Antimiscegenation	464
3. Birth Control	464
C. Obscenity	466
1. Introduction: Self-help Reconsidered	466
2. Refining the Definition	467
3. Policing the Definition	473
4. Interpreting the Definition	475
IV. Free Exercise	477
A. The Fundamental Conflict	477
B. Public Health and Welfare	479
1. Welfare Legislation	479
2. Public Health	481
C. Conscientious Objection	483
D. Prisoners' Freedom to Practice Religion	485
E. Summary	487

I. INTRODUCTION

This Survey Note, analyzing the problems which inhere in the church-state relation in contemporary America, marks the fourth such study in a series which began in 1958.¹ Others in the series were published in the May, 1960,² and August, 1962,³ issues of the *Notre Dame Lawyer*.

It is the purpose of these studies to report and to evaluate the relevant judicial decisions and legislative enactments which have occurred in the two-year period under study. The complexity of the subject matter precludes a "black letter" law approach. For that reason a sustained effort is made to report in depth significant trends against the backdrop of a central commitment to the efficacy of religious values in a viable legal system. However, the Survey Note is certainly not intended

¹ *Religious Institutions and Values: A Legal Survey* (1955-57), 33 NOTRE DAME LAW. 416 (1958).

² *Religious Institutions and Values: A Legal Survey* (1958-60), 35 NOTRE DAME LAW. 405 (1960); 35 NOTRE DAME LAW. 537 (1960).

³ *Religious Institutions and Values: A Legal Survey* (1960-62), 37 NOTRE DAME LAW. 649 (1962).

to be a definitive and exhaustive analysis of all the church-state problems in the United States.

To be sure, the broad areas of conflict have remained clearly identified since they were first set out in our 1958 Note. Previously noted trends often continue, e.g., the abrogation of the charitable immunity doctrine; however, it is equally clear that each two-year period seems to include problems deserving special examination. For example, the case of *Torcaso v. Watkins*⁴ presented the writers of the 1962 Survey with the problem of a religious test oath. In our present Survey we shall examine some of the ramifications of *Torcaso* in the area of the conscientious objector exemption to the Universal Military Training and Service Act.⁵

Sometimes a problem considered by an earlier Note remains static, such as the area of church gambling and zoning.⁶ At other times a problem like Sunday Closing Laws, discussed in the light of *Braunfeld v. Brown*⁷ in the 1962 Survey, will persist even after the Supreme Court speaks. In this issue we return to the Sabbatarian exception, urged unsuccessfully in *Braunfeld*, in order to consider afresh affirmative arguments recently advanced and to evaluate the impact of *Sherbert v. Verner*⁸ — a Supreme Court case strikingly sympathetic to religious values. *Sherbert* is significant in two other respects. First, it suggests interesting possibilities for the free exercise of religion vis-à-vis welfare legislation enacted for a concededly valid secular purpose. These possibilities, together with some tentative predictions about the path of the law, are discussed in this Note. Secondly, it illustrates the swiftly changing attitudes of the court when confronted with problems of religious accommodation. In this regard the court may be reacting in an understandable fashion to the virulent criticism with which they were confronted after *Engel v. Vitale*⁹ and *School District of Abington Township, Pa. v. Schempp*.¹⁰ The implications of the *School Prayer Cases*' constitutional proscription of religious exercises for public school children are dispassionately examined in this Survey. A similar attempt at dispassionate analysis is offered concerning the continuing challenge to religious values presented by obscenity. Since the last Survey, the Supreme Court has given us the first gloss upon *Roth v. United States*¹¹; and some attempt is made hereafter to place this latest pronouncement concerning obscenity in its proper legal and moral context. The persistent problem of aid to parochial education is re-examined in the light of the *School Prayer Cases*¹² and some suggestions for solving the present impasse are considered. While these problems largely bristle with church-state conflict, they also often occasion a discussion of the implications of ecumenicism. In this regard particular attention is paid hereafter to the possible effect of the ecumenical movement on church mergers and other sources of inter-church conflicts.

Realizing that there are inherent limitations in a Survey of this kind, we have restricted ourselves to reporting and evaluating the relevant judicial decisions and legislative enactments which have occurred in the two-year period under study. In order to assist the reader in gaining a broader understanding of these changes, we have further attempted to illustrate the trends present in the various areas of the church-state relationship.

4 367 U.S. 488 (1961).

5 62 Stat. 612 (1948), as amended, 50 U.S.C. App. § 456(j) (1958).

6 1958-59 *Church-State Survey*, *supra* note 2 at 424 for a discussion of the Church gambling situation. 1955-57 *Church-State Survey*, *supra* note 1 at 418-20; 1958-59 *Church-State Survey*, *supra* note 2 at 406-12; 1960-62 *Church-State Survey*, *supra* note 3 at 655-60 for a discussion on Church zoning.

7 366 U.S. 599 (1961).

8 374 U.S. 398 (1963).

9 370 U.S. 421 (1962).

10 374 U.S. 203 (1963).

11 354 U.S. 476 (1957).

12 *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

II. RELIGIOUS INSTITUTIONS

A. Church Property

1. Basic Concepts — *Clarification of the Problem*

"The policy of the state in matters of religious opinion is that of masterly inactivity, of hands off, of laissez faire, of fair play and no favors."¹³ This spirit of "laissez faire" is grounded upon the first amendment which establishes the freedom and independence of churches.¹⁴ In the area of intra-church affairs the courts are reluctant to intervene in disputes that involve purely ecclesiastical matters.¹⁵ The courts will, however, enter the arena of intra-church conflict when "property rights"¹⁶ are in question.¹⁷ From this intervention arises the problem as to what the courts mean by a property right in contradistinction to purely ecclesiastical matters over which they will not assume jurisdiction.

Where two factions of a congregation claim title to a given parcel of church property the jurisdiction of the court over the controversy is generally recognized.¹⁸ But there is an area wherein the distinction between purely ecclesiastical matters and property rights becomes difficult to ascertain. This elusive area is brought into focus by a recent Massachusetts case¹⁹ in which members of a synagogue brought suit against the synagogue and its officers to restrain them from introducing mixed seating within the synagogue in violation of Mosaic Law. The plaintiffs alleged that the introduction of mixed seating was a violation of their property rights on the theory that as adhering orthodox members of the congregation they had a property right in the synagogue as originally organized. The court dismissed the case saying that, "It is not the province of civil courts to enter the domain of religious denominations for the purpose of deciding controversies touching matters exclusively ecclesiastical."²⁰

It is submitted that in the elusive overlapping area between property rights and purely ecclesiastical matters the determinative question is whether the court envisages the case before it as one involving a temporal right that deserves judicial

¹³ ZOLLMANN, *AMERICAN CIVIL CHURCH LAW* 21 (1917).

¹⁴ See generally, PFEFFER, *CHURCH, STATE AND FREEDOM* Chapter 5 (1953).

¹⁵ In *Watson v. Jones*, 80 U.S. 679, 728-29, Justice Miller set forth the federal position as to interference in intrachurch disputes.

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the associations, and for the ecclesiastical government of all the individual members, congregations and officers within the general associations, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decisions 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.

¹⁶ See ZOLLMANN, *AMERICAN CHURCH LAW* 301-02 (1933). Some courts have expanded the term "property" by adding the word "civil."

¹⁷ For statements by various state supreme courts as to the criteria that they employ in determining jurisdiction in this area see, 3 STOKES, *CHURCH AND STATE IN THE UNITED STATES* 387-89 (1950).

¹⁸ *E.g.*, *First Independent Missionary Baptist Church of Chosen v. McMillan*, 153 So. 2d 337 (Fla. Dist. Ct. App. 1963), for a suit involving majority and minority groups within a church over their respective rights to real and personal property after the majority had voted to abandon the church due to a dispute over a mortgage.

¹⁹ 344 Mass. 755, 183 N.E.2d 492 (1962).

²⁰ *Id.* at 493.

protection in order to prevent injustice. In close cases the distinction between property rights and ecclesiastical matters is not really helpful as these terms become descriptive rather than determinative of the given result.²¹ What a given judge decides is a temporal right to be protected will in close cases be dictated by his individual sense of justice, which in part is formulated by his interpretation of the first amendment as to what is "judicial noninterference."

Once the court decides that an intra-church dispute is subject to judicial determination, the issue arises as to what criteria it should employ in rendering a decision. In the early English case of *Attorney General v. Pearson*,²² the foundation was laid for the adoption by the American courts of the implied trust doctrine.²³ Many early American cases accepted this theory.²⁴ In essence, the implied trust doctrine is that church property is impressed with a trust for the maintenance of the church's original ecclesiastical structure and religious beliefs. As a result of the necessity of determining what the "original" beliefs were, the court finds itself in the position of interpreting religious rules and doctrines. Inherent in the implied trust doctrine is a violation of the concept of majority rule in congregational polities. Under this doctrine a majority in a congregational polity might alter the beliefs or structure of the congregation and then lose the right to church property as against a faithful minority.²⁵

A distinctively American approach to decision-making in intra-church disputes was proclaimed in 1871 in *Watson v. Jones*.²⁶ This case proposes three divisions

21 See ZOLLMANN, AMERICAN CHURCH LAW 305 (1933).

22 3 Mer. 353, 36 Eng. Rep. 135 (Ch. 1817). *Id.* at 153-54. Lord Eldon said, [I]f any body of persons mean to create a trust of land, or money, in such a manner as to render the gift effectual, and to call upon this Court to administer it according to the intent of the foundation, whether that trust has religion for its object or not, it is incumbent on them, in the instrument by which they endeavor to create the trust, to let the Court know enough of the nature of the trust to execute it; and therefore, where a body of Protestant Dissenters have established a trust without any precise definition of the object or mode of worship, I know no means the Court has of ascertaining it, except by looking to what has passed, and thereby collecting what may, by fair inference be presumed to have been the intention of the founders.

23 For a list of early American decisions applying the implied trust doctrine, see 75 HARV. L. REV. 1151-54 (1962). These pages also contain an excellent historical analysis.

24 General Assembly of Free Church of Scotland v. Overtoun, [1904] A.C. 515 (Scot.). In this case the House of Lords awarded 800 churches £1,000,000 of invested funds and three universities to a small group of highland congregations having not more than thirty ministers who were faithful to the original beliefs. The decision could not be practically implemented, and Parliament reversed the court's decision by statute the following year by the Churches (Scotland) Act, 1905, 5 Edw. 7, c.12.

25 80 U.S. (13 Wall.) 679 (1871).

26 The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies, may, so far as we have been able to examine them, be profitably classified under three general heads, which of course do not include cases governed by considerations applicable to a church established and supported by law as the religion of the State. 1. The first of these is when the property which is the subject of controversy has been by 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 judicatory over the whole membership of that general organization. *Id.* at 722-23.

with a different rule of decision applicable to each division.²⁷ Our survey indicates that state courts have at least formally abandoned the implied trust doctrine.

In the hierarchical polity division, recent decisions reflect the *Watson* approach with its deference to the highest ecclesiastical authority.²⁸ When the central body asserts its right over a subordinate local authority in regard to property, the courts recognize the superior body's rights.²⁹ In one recent case³⁰ a newly appointed pastor sought to enjoin the deposed pastor from interfering with the former's pastoral work. The court looked to the last ruling of the church governing body to determine the validity of the new pastor's appointment. But in looking at the decisions of these hierarchical judicial bodies the courts do hold them to the code of procedure that is laid down for them by their church law and they will even look to tradition and custom to ascertain what this procedure is.³¹

Although the employment of the *Watson* approach in the hierarchical sphere seems in harmony with a judicial attitude of noninterference, in that the courts leave religious matters to central ecclesiastical authority, this approach is not without its inherent difficulties. The court must decide whether a given polity is hierarchical or congregational and it may be called upon to determine whether the hierarchy has the right to control where that right is challenged.³² There may be contests within the ecclesiastical decision-making body that make it difficult to ascertain the legitimate source of authority.³³

The most significant of these problems is determining whether a polity is congregational or hierarchical. In *Hayman v. St. Martin's Evangelical Lutheran Church*,³⁴ the court struggled with this difficulty in a suit for declaratory judgment by a minority faction of a church congregation split by schism to determine which group has the right to church property. To determine whether this was a hierarchical or congregational polity, the court looked to the bylaws of the synod with which the local congregation was affiliated and found that no approval of the synod was necessary for withdrawal. The court concluded that this evidenced the fact that the local body was a free and autonomous unit. The character of the congregation, therefore, for which the property is to be held in a "sacred trust," in accordance with the bylaws of the synod, is to be determined by the majority.³⁵

A recent North Carolina case³⁶ highlighted another difficulty in this area. The Edgemont Church was an allegedly independent and autonomous church voluntarily associated with the Western Conference and other similar church organizations. A factional dispute occurred within the Edgemont Church and the Western Conference contended that it had the right to decide which faction would prevail as to church property. The court left to a final hearing the question whether the Western Conference had jurisdiction over the local congregation; it made the observation, however, that a "congregation may be congregational in some respects

27 *Id.* at 722-23. As to the first category the donor's intent prevails, in the second majority rule governs, and in the third the determination of the supreme ecclesiastical judicatory is the rule of decision.

28 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871).

29 *Immanuel Evangelical Lutheran Church v. Fromm*, 367 Mich. 575, 116 N.W.2d 766 (1962).

30 *Jones v. Johnson*, 353 S.W.2d 82 (Tex. Civ. App. 1962).

31 See *Kupperman v. Congregation Nusach Sfar of the Bronx*, 240 N.Y.S.2d 315 (Sup. Ct. 1963).

32 *Rector, Church Wardens and Vestrymen of Church of Holy Trinity in City of Brooklyn v. Melish*, 195 Misc. 337, 91 N.Y.S.2d 717 (Sup. Ct. 1949). A recent law review article described the *Melish* decision in terms of administrative law principles, Pasztory, *The Melish Litigation: Application of Administrative Law Principles in Resolution of Church Disputes*, 17 BUS. LAW 997 (1962).

33 See 75 HARV. L. REV. 1142, 1158-67 (1962).

34 227 Md. 338, 176 A.2d 772 (1962).

35 *Id.* at 777.

36 *Western Conference of Original Freewill Baptists of North Carolina v. Creech*, 256 N.C. 128, 123 S.E.2d 619 (1962).

and connectional in others.³⁷ The decision formally adhered to the *Watson* case and that case was cited with approval, so that the quoted statement was not intended as a qualification of the *Watson* approach; however, it did acknowledge one of its problems, to wit, that the hierarchical-congregational dichotomy may be in many cases quite arbitrary.

The congregational polity as categorized by *Watson*³⁸ has as its criterion for determining congregational disputes the will of the majority.³⁹ The courts have attempted to protect majority rule in congregational polities by what may be termed the "properly called meeting" rule.⁴⁰ In *Padgett v. Verner*⁴¹ reference was made to the fact that for majority rule to have efficacy there must be sufficient notice given to all members of a meeting at which a vote is taken. This case involved an attempt by a minority to discontinue services and thus to permit property to revert to the heirs of the grantor. The court held that such an action at a routine business meeting was not binding on the majority of members despite the fact that a majority of the members present at the meeting had voted for such action. This being extraordinary action, the court said it would be incumbent on the officers in such circumstances to give special notice to all members that extraordinary measures were under consideration and would be voted on at the meeting.

State corporation law is in many cases found to have a bearing on church disputes, especially with regard to the congregational polity, as its members determine church policy. In most jurisdictions the "church" exists as two separate entities, one of which is the religious or ecclesiastical entity and the other the business or corporate entity.⁴² While the aims differ from other classes of corporations, this does not result in different legal consequences of incorporation. "They [religious corporations] are created for the purpose of managing church property, and are endowed with substantially the same rights, subject to substantially the same liabilities, and governed by substantially the same rules, as are other private corporations."⁴³ The prescribed powers, rules, and regulations of this corporate entity vary with the state corporation laws. It is beyond the scope of this Survey to attempt a description of each state statute. Suffice it to say that most of the cases involved in this area are decided by interpreting the particular statute involved.⁴⁴

Two cases that have arisen since the last Survey exemplify the close affinity between state corporation statutes and the congregational polity. In *State ex rel.*

37 *Id.* at 627.

38 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 725 (1871).

39 At times there may be difficulty in interpreting what the majority did by a particular action, e.g., *First Independent Missionary Baptist Church of Chosen v. McMillan*, 153 So. 2d 337 (Fla. Dist. Ct. App. 1963), where the abandonment of the "church" by the majority was not construed as the abandonment of all church property.

40 See, e.g., *Hayes v. Board of Trustees of Holy Trinity Baptist Church of Amityville*, 15 App. Div. 2d 816, 225 N.Y.S.2d 316 (1962). *Contra*, *Brown v. Mount Olive Baptist Church*, 124 N.W.2d 445 (Iowa 1963), where a minority church faction was expelled at a meeting that followed a regular church service. The minority contended that this was a peremptorily called business meeting with no advance notice as to the special matter to be taken up, no charges, no hearing, and no opportunity to be heard, the court refused to entertain these contentions on grounds that they involved procedure and did not involve fundamental principles basic to the doctrines or beliefs of the church.

41 366 S.W.2d 545 (Tenn. Ct. App.); cert. denied, 366 S.W.2d 545 (Tenn. 1963).

42 See generally ZOLLMANN, *AMERICAN CIVIL CHURCH LAW* 38-110 (1917) and ZOLLMANN, *AMERICAN CHURCH LAW* 102-94 (1933).

43 ZOLLMANN, *AMERICAN CHURCH LAW* 132 (1933).

44 E.g., *Evans v. Criss*, 39 Misc.2d 314, 240 N.Y.S.2d 517 (Sup. Ct. 1963) (corporation laws prescribed meeting procedure and the notice to be given members of an impending meeting); Cf., *Straughter v. Holy Temple of Church of God and Christ*, 150 So. 2d 124 (La. Ct. App. 1963) (board of trustees of the church signed a note but not at a formal meeting and the court allowed the plaintiff to recover for his services, holding that the board of trustees though not legally and regularly elected were "de facto trustees" within the purview of the state corporation laws).

Nelson v. Ellis,⁴⁵ there was an attempt by one faction of a Baptist sect to oust the other faction by amendments to the charter of the religious corporation. The court held that amendments to the charter were illegal because they were adopted at a meeting which excluded eighty-one qualified members and also because they contravened the nonprofit corporation laws by giving the pastor a life term and vesting in him all corporate authority in lieu of a board of trustees. In *Veltman v. DeBoer*,⁴⁶ the plaintiffs contended that they did forfeit membership and thereby lose their right to notice, pursuant to the articles of incorporation, of the proposed disposition of real property, by holding services at another location. In *Nelson*, then, the corporation laws limit the authority that the majority members may exercise, while in *Veltman* the articles of incorporation pursuant to the corporation laws prescribe notice requirements necessary for a certain mode of activity.

The most significant development in the area of the congregational polity lies in the continued judicial adherence to the fundamental-change rule.⁴⁷ By this rule, where the majority has fundamentally altered the structure or beliefs of the congregation, the minority will prevail over the majority in a dispute over the right to church property.⁴⁸

In *Huber v. Thorn*,⁴⁹ a local Baptist church was torn by a factional dispute. The defendant majority faction departed from historical customs and tenets of their church in voting to withdraw from the National American Baptist Convention and from other cooperating affiliates. The court held that a denomination of an autonomous Baptist church could not be changed by a mere majority vote of members for disaffiliation from the American Baptist Convention. This was viewed as a fundamental change which violated the tenets, rules, and practices of the church. "Even an autonomous Baptist Church, like other protestant churches, is apt to have practices, rules and beliefs which form part of the archives of the church after ninety years of operation."⁵⁰

In *Holiman v. Dovers*,⁵¹ the Supreme Court of Arkansas considered for the first time, and adopted, the fundamental-change doctrine, in a case where a congregation had become split when a majority faction embraced altered doctrines. The court took two factors into consideration in reaching a determination: (1) the intent of the donor when he conveyed the land to the church, and (2) whether the beliefs of the majority were at substantial variance with this intent. The dissenting judge advocated a disavowal of the fundamental-change rule and warned that adherence to such a rule necessitates deciding issues related to religious doctrine. Further, the dissenting judge advised strict acceptance of the *Watson* approach when intra-church disputes arise in congregational polities, saying, "Heretofore we have followed the principle of 'majority rule.' This is the only way I would dispose of all congregational church questions. . . ."⁵²

Is the fundamental-change rule consistent with the *Watson* approach? It

45 151 So. 2d 544 (La. Ct. App. 1963).

46 264 Minn. 248, 118 N.W.2d 808 (1962).

47 Twenty-eight states have held that a majority faction will be enjoined from devoting church property to purposes constituting a fundamental departure from traditional faith, customs, usages and practices of the church. They are Arkansas, Alabama, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia, Wisconsin.

48 *Whitley City Church of Christ v. Whitley City Christian Church*, 373 S.W.2d 423 (Ky. 1963) (former members of defendant church were not entitled to condemnation proceeds from original church property because the present members had not substantially changed their religious practices); *Philpot v. Minton*, 370 S.W.2d 402 (Ky. 1963) (facts did not demonstrate a deviation from the fundamental doctrine of the church by acceptance of a minister who allegedly was not qualified).

49 189 Kan. 631, 371 P.2d 143 (1962).

50 *Id.* at 146.

51 366 S.W.2d 197 (Ark. 1963).

52 *Id.* at 203.

may be argued that "in some respect" is a phrase that qualifies the "majority rule" as set out in *Watson*.⁵³ If a restrictive meaning is given to this phrase, to wit, that the majority rule is inapplicable in cases where there has been a fundamental alteration of church structure or beliefs, then this rule is not inconsistent with the *Watson* approach. This interpretation, however, would appear to be alien to the whole tenor of Mr. Justice Miller's approach in *Watson*. The theme permeating his opinion is one of setting forth a set of principles in order to limit the permissible scope of judicial activity in questions of a religious nature. Except in cases of an express trust, it attempts to "render to Caesar" by limiting the court's competence to property rights and leaving religious issues to ecclesiastical authorities. The fundamental-change doctrine, however, places upon the court the burden of interpreting ecclesiastical doctrine.

The phrase "in some respect" is found in a paragraph that denounces the implied trust doctrine. It is submitted that the fundamental-change rule is a restatement of this doctrine. The preservation of the status quo is involved and the recognition of a religious association as a static, unalterable polity is implicit. The court, as in the implied trust doctrine, finds itself determining what the "original" beliefs of the polity were and whether or not existing beliefs are in substantial conformity therewith. Finally, the concept of majority rule is destroyed by a policy that favors the minority if they have been faithful to the "original" tenets, beliefs, and church structure. If, then, the fundamental-change rule is but a restatement of the implied trust doctrine, it follows that it is inconsistent with the *Watson* approach.

The courts have unqualifiedly accepted the *Watson* approach as to hierarchical but not as to congregational polities.⁵⁴ This difference of approach may be accounted for on the basis of reliance. It seems unfair for a religious association to hold itself out as guardian of certain beliefs, with the result that people contribute money and services, and then abandon these particular beliefs and doctrines even if a majority desire change. Denominational stability is advanced by employing a rule such as the fundamental-change. The majority are usually not erudite in the basic religious doctrines of the denomination and often confuse issues when making determinations. Also, the "majority" is a fluctuating group, and from changed membership often flow changed doctrines in contrast to the doctrinal stability of the hierarchical scheme of permanent ecclesiastical judiciaries.⁵⁵ All of the above factors are reasons that militate against the adoption of the majority rule as one without qualification. Any or all of these factors may be why the courts have adopted the fundamental-change exception to the *Watson* approach.

A development which may revolutionize the law in the area of Church-State relations and more particularly in the intra-church dispute area is the Ecumenical Movement with its thrust toward Christian unity.⁵⁶ A noted author has observed

53 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 725 (1871).

This ruling admits of no inquiry into the legal existing religious opinions of those who compromise the legal or regular organization; for, if such was permitted a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed in *some respect* their views of religious truth. (Emphasis added.)

54 *E.g.*, *Huber v. Thorn*, 189 Kan. 631, 371 P.2d 143 (1962); *Holiman v. Dovers*, 366 S.W.2d 197 (Ark. 1963).

55 Casad, *The Establishment Clause and the Ecumenical Movement*, 62 Mich. L. Rev. 419 (1964).

56 *Id.* at 426.

The ecumenical movement is having an everwidening effect in changing basic, long-standing notions about the importance of denominational distinctiveness. It is inducing changes in theories as to the nature and role of

that there is "a presumption in favor of Christian disunity embodied in the law."⁵⁷ If the goal of Christian unity is to be attained in this country it will probably be accomplished by the vehicle of merger. In hierarchical polities there is little difficulty with the problem of mergers since the courts follow the decisions of the highest ecclesiastical tribunal. But in the congregational polity area, merger presents the problem of minority consent, as the courts recognize minority rights when there has been a fundamental change in the polity. Whether there is a basic presumption in our law in favor of Christian disunity may be open to debate but that the courts have not found a satisfactory answer to the challenge of the Ecumenical Movement in the congregational polity area seems evident. Whether the courts will be called upon to find a solution to this problem is dependent upon whether or not this movement is a potent force to be reckoned with or merely a pious hope.

The courts have formally accepted the *Watson* approach, but not without exception and difficulty. The law in the area of congregational polities with the fundamental-change rule appears at best ambiguous in light of the *Watson* approach. Whether the Ecumenical Movement will be a crystallizing force in this area is yet but conjecture. There have been no major changes in the law as to intra-church disputes since the *Kresnick*⁵⁸ ruling, which raised the *Watson* ruling as to hierarchical polities to constitutional status and cast doubt upon the constitutional status of the remaining *Watson* dicta. Recent cases have, however, helped to clarify problems. It appears that judicial solutions to these problems will be for future Surveys to relate.

2. Zoning — *A Hiatus*

Zoning is the power conferred by a state legislature upon cities or villages to divide their municipality into districts and to prescribe building qualifications and regulate land use within these districts. It is based upon the police power inherent in each state to provide for the health, safety, morals and general welfare of its citizens. This power takes on a special significance when prescriptions and regulations pursuant to it deal with churches or parochial schools. Previous Church-State Surveys have developed themes of "*A Favorable Treatment*,"⁵⁹ "*Toward Increasing Urban Mobility*,"⁶⁰ and "*In Search of a Standard*."⁶¹ Cases involving the zoning of religious institutions have been few in number since the last Survey and they reiterate previous Church-State themes. The theme of this consideration then becomes one of inactivity, a preservation of the status quo . . . a hiatus.

Zoning use ordinances as they affect churches have been classified into three groups: (1) those permitting churches in all residential districts, (2) ordinances permitting churches 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.⁶² The majority of jurisdictions follow either (1) or (2) while a minority adhere to (3).

Three arguments have been advanced for the type of use ordinance that permits churches in all districts. The first of these is founded upon the First Amend-

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 old and new, in which the state should really be neutral.

57 Stringfellow, *Law, Polity, and Reunion of the Church: The Emerging Conflict between Law and Theology in America*, 20 OHIO ST. L. J. 418 (1959).

58 *Kresnick v. St. Nicholas Cathedral*, 363 U.S. 190 (1960), 1960-62 *Church-State Survey*, *supra* note 3, at 650-56.

59 1955-57 *Church-State Survey*, *supra* note 1, at 418-20.

60 1958-59 *Church-State Survey*, *supra* note 2, at 406-12.

61 1960-62 *Church-State Survey*, *supra* note 3, at 655-60.

62 *Milwaukie Co. of Jehovah's Witnesses v. Mullen*, 214 Ore. 281, 330 P.2d 5, 9 (1958).

ment as applied to the states by the Fourteenth Amendment. The contention is that a zoning ordinance excluding churches may be an interference with the free exercise of religion.⁶³ This question has never been ruled upon by the United States Supreme Court. The second argument has applicability when an ordinance permits other uses even less compatible with residential areas than churches which it excludes. Such an ordinance has been attacked on the grounds that it involves discriminatory action violative of equal protection and due process.⁶⁴ The most commonly employed rationale for this type of use ordinance relates to the nature of the police power, to wit, to provide for the health, safety, morals and general welfare of a state's citizens. To exclude a church from a district, it is alleged, is not a valid exercise of the police power because to do so has no substantial relation to public health, safety, or the general welfare. Such a restriction is deemed a deprivation of property without due process of law. One of the foundations of such a contention is the premise that the very purpose for a church's existence is the promotion of the general welfare. An exclusionary ordinance would, therefore, thwart the very *raison d'être* of the police power, which is also the general welfare.⁶⁵

During the period of our Survey there have not been any cases directly involving this type of use ordinance ruled upon by state supreme courts. Such a situation seems indicative of the fact that this kind of ordinance has gained general acceptance from those people compelled to live under it. The second type of zoning ordinance establishes basic uses that are allowed in a particular zoned district. Coupled with these established basic uses are usually provisions that enumerate uses permitted pursuant to the approval of the local zoning board. Generally, churches are included within these enumerated permitted uses. This type of zoning ordinance gives to the zoning board discretion in determining whether or not a particular permit will be issued and the degree of discretion will depend upon the particular jurisdiction. If the philosophy of a state is that acceptance of a church is *per se* a furtherance of the general welfare, the courts will scrutinize carefully any determination by a local zoning board that denies a permit.⁶⁶ In a recent Illinois case,⁶⁷ a religious institution brought suit for the review of the action of the board of appeals denying its application for a special use permit pursuant to the zoning ordinance. The court held that the denial of the special use permit was arbitrary and capricious, and bore no substantial relation to public health, safety and welfare. In reaching its decision the court said, "[T]he right of freedom of religion, and other first amendment freedoms, rise above mere property rights. They rise 'far above mere public inconvenience, annoyance, or unrest.'"⁶⁸ The court examined the circumstances involved, weighing the possibility of congested parking and traffic conditions and claims of damage to neighboring commercial establishments against the right of the congregation to use its property for church purposes. Rather than make a determination as to the allegations of unconstitutionality, the court based its decision on the abuse of the board's dis-

63 See, *Congregation of Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451, 455 (Mo. 1959).

64 *North Shore Unitarian Society v. Plandome*, 200 Misc. 524, 525 109 N.Y.S.2d 803, 804 (Sup. Ct. 1951). The court said,

[T]his ordinance is arbitrary and discriminatory in that it excludes churches and places of public worship although permitting uses including village and municipal buildings, railroad stations, public schools and club houses which would entail in an equal or greater degree the harmful or undesirable results which, defendants argue, may flow from the use of the plaintiff's property for the erection of a church.

65 *E.g.*, *State ex rel. Synod of Lutheran Church v. Joseph*, 139 Ohio St. 229, 38 N.E.2d 515 (1942). See also Note, *Churches and Zoning*, 70 HARV. L. REV. 1428, 1429-30 (1957).

66 I RATHKOFF, *THE LAW OF ZONING AND PLANNING* ch. 19-13, 14 (1960).

67 *Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals of the City of Chicago*, 25 Ill.2d 65, 182 N.E.2d 722 (1962), quoting from *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

68 *Id.* at 71, 182 N.E.2d at 725.

cretion, after scrutinizing closely the factors that the board took into consideration in reaching its decision.⁶⁹

If a state does not manifest such strong feelings as to the allowance of churches in every district, the burden of proving to the satisfaction of the court that the zoning board's determination is arbitrary and unreasonable will be on the complaining church. In a state of this character there is a presumption in favor of validity when a zoning board denies a permit leaving wide discretionary power to the local board.⁷⁰ Questions of constitutional import may arise in regard to the permit type of zoning use ordinance. A recent California case⁷¹ illustrates these difficulties. The church petitioned the court for a writ of mandate to compel the board of supervisors to issue a variance or use permit to build a church in a residential district. Two churches were already present in the area. The church contended that a denial of the permit abridged its constitutional right of freedom of religion and that the ordinance, in not setting out specific standards for the issuance of an exception, was unconstitutionally vague. The court held that the provisions of the county zoning ordinance permitting churches in a restricted residential district only if a use permit was obtained were not an abridgment of the church's freedom of religion. As to the contention of vagueness, the court said, "By its very nature a variance is an exception to the fixed standards of a basic and specific zoning ordinance. Therefore, the variance provisions need contain no detailed, rigid standards and necessarily must vest a broad discretion in the planning commission and the appeals board."⁷²

A minority of jurisdictions allows the exclusion of churches from districts where residential use is itself restricted to certain types of dwellings.⁷³ According to this view churches are treated like any other property uses and are judged on their merits as they fit into the general scheme of comprehensive zoning which emphasizes the best and most reasonable utilization of the land. This minority approach differs from others in its interpretation of the "general welfare" concept which is the end of the police power. The traditional idea of the existence of a church as per se a means of promotion of the general welfare is replaced with the notion that the exclusion of churches from a district might be, after weighing all considerations, a furtherance of the general welfare.⁷⁴ There have not been any cases involving this type of ordinance that have reached the highest state courts in the period covered by this Survey, indicating public satisfaction with, or at least apathy toward, zoning ordinances as they affect churches.

The fact that a state will not allow the exclusion of churches by the employment of zoning ordinances does not preclude persons from accomplishing the same

69 74 A.L.R.2d 377-411 (1960) lists various factors which have been considered by courts in scrutinizing a local board's determination in granting or denying a permit. Among these factors are the following: (1) traffic conditions; (2) the effect of the church on property values; (3) the loss of tax revenue; (4) noise and other inconvenience; (5) the size of the congregation; (6) the validity, applicability, and the effect of, and sufficiency of compliance with, regulation imposed by zoning ordinances or administrative authorities; (7) sanitary facilities; (8) the setback requirements; (9) provisions as to the size of the building or area of the lot.

70 Two such jurisdictions appear to be Oregon, see *Milwaukie Co. of Jehovah's Witnesses v. Mullen*, 214 Ore. 281, 330 P.2d 5 (1958), and Connecticut, see *West Hartford Methodist Church v. Zoning Board of Appeals of Town of West Hartford*, 143 Conn. 263, 121 A.2d 640 (1956).

71 *Mathews v. Board of Supervisors of County of Stanislaus*, 203 Cal. App.2d 800, 21 Cal. Rptr. 914 (1962).

72 *Id.* at 916.

73 The two minority jurisdictions are California, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, 90 Cal. App.2d 656, 203 P.2d 823 (1949), and Florida, *Miami Beach United Lutheran Church v. Miami Beach*, 82 So.2d 880 (Fla. 1955). Wisconsin maintains another minority position that received extensive coverage in a previous survey. 1960-62 *Church-State Survey*, *supra* note 3, at 656-58 (1962).

74 See generally, Comment, *Zoning for Churches*, 13 HASTINGS L.J. 367 (1962); and Brindel, *Zoning Out Religious Institutions*, 32 NOTRE DAME LAW. 627 (1957).

result by the use of restrictive covenants. Restrictive covenants excluding churches have been universally enforced.⁷⁵ The rationale appears to be that personal interests in contract rights of this nature are paramount to any public interest in allowing a church to violate the restrictive covenant in question. An interesting restrictive covenant case came before the Louisiana Supreme Court in *Willis v. New Orleans East Unit of Jehovah Witnesses, Inc.*,⁷⁶ where the lot owners in a certain district petitioned the court for an injunction against the building of a church in their subdivision, basing their request on the existence of restrictive covenants excluding churches. The church argued that the lot owners had waived their objections to all churches by signing a waiver authorizing the erection of another church and church school. The court, however, held that the waiver as to one church was not an implied waiver as to all churches that wished to locate in the subdivision.

In *Shelley v. Kraemer*⁷⁷ the Supreme Court refused to enforce restrictive covenants against the sale of property to Negroes. *Willis* and *Shelley* are distinguishable. In *Shelley* the court was dealing with restrictive covenants that were on their face discriminatory, to wit, that Negroes were to be excluded. On the other hand, in *Willis* there was discrimination between churches. Unlike *Shelley*, where the covenants were discriminatory on their face, in *Willis* the covenants were not prima facie discriminatory. Individual action in the form of a waiver set the stage. The resemblance to *Shelley* lies in the fact that the result of judicial enforcement was that one church was allowed while another was refused entrance into the subdivision. The state action of enforcing the restrictive covenants can be viewed as a contributing force coupled with the waiver that results in discrimination. Granted that this is an extension of *Shelley* in that the covenants were not as such discriminatory, but such an extension does appear to be within the *Shelley* spirit of prohibiting state participation in discrimination. In both of these cases the courts are dealing with that which the Constitution has made sacrosanct, namely, the equality of all "men" and of all "religions."⁷⁸ It follows that the Louisiana court might well have employed the *Shelley* rule of nonenforcement in order to prevent discrimination between churches in this district.

A few cases have arisen with regard to zoning parochial schools.

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. It is customary to find the courts citing cases involving churches as authority for the position taken in cases involving church schools, since the latter are classed as an accessory use of the former.⁷⁹

There are two theories advanced upon which parochial schools have been allowed to locate in given districts in spite of zoning restrictions. Firstly, where there is a public school in the district, it is deemed unreasonable to exclude parochial schools, since they both teach substantially the same curriculum and fulfill the same function. Secondly, the exclusion of such a school has no relation to the purpose of the police power upon which zoning is based. As a result, any ordinance excluding a parochial school is frequently deemed arbitrary, capricious and unconstitutional.⁸⁰

A recent New Jersey case⁸¹ exemplifies the traditional approach of the courts when they review a zoning board's refusal to grant a permit to a parochial school

75 *E.g.*, *Hall v. Church of Open Bible*, 4 Wis.2d 246, 89 N.W.2d 798 (1958); *Bucklew v. Trustees Bayshore Baptist Church*, 64 Fla. 171, 60 So. 2d 182 (1952); *Housing Authority of Gallatin County v. Church of God*, 401 Ill. 100, 81 N.E.2d 500 (1948).

76 156 So. 2d 310 (La. App. 1963), cert. denied, 157 So. 2d 232 (1963).

77 334 U.S. 1 (1948).

78 See the United States Constitution, the first, thirteenth, fourteenth and fifteenth amendments.

79 1 RATHKOPF, *THE LAW OF ZONING AND PLANNING* ch. 18-7 (1960).

80 *Id.* at ch. 18-20.

81 *Trinity Evangelical Lutheran Church v. Board of Adjustment of Borough of Morris Plains*, 72 N.J. Super. 425, 179 A.2d 45 (1962).

in a given district wherein a public school is located. The test applied by the court was "that the special exception criteria of this ordinance could not reasonably be applied to exclude a public school at this location and under the facts here shown, we must also hold, under the statute, that denial of the use cannot be justified on such criteria in relation to an application by this private day school."⁸²

Some courts have had to resort to some adroit reasoning in order to reach a particular determination and yet stay within the mainstream of parochial school zoning cases. In *St. John's Roman Catholic Church Corp. v. Town of Darien*,⁸³ the question arose as to the validity of zoning laws governing the location of parochial schools but which were not applicable to public schools. The court held that in order to treat the parochial and public schools on the same footing it must treat them differently. The public schools were under the supervision of the planning board commission and the legislative body of the municipality. The parochial schools, however, were not subject to that authority or to any public authority. The court believed that equality of treatment would result from subjecting parochial schools to supervision of the zoning ordinance. The Supreme Court of New Jersey employed a subtle distinction in *St. Cassian's Catholic Church v. Allen*⁸⁴ in determining the validity of a zoning provision that limited school enrollment in the parochial schools to one child for every hundred square feet of playground space without imposing like requirements upon public schools. The lower court had held that there was not reasonable or legal basis for this restriction imposed on the parochial school in light of a New Jersey statute that precluded discrimination in zoning or in planning ordinances.⁸⁵ But the Supreme Court of New Jersey reversed the decision⁸⁶ and in its reasoning elicited a distinction between formal and substantial discrimination. The Supreme Court grounded its decision on a showing that the public schools in the district had a hundred square feet of playground space for each child enrolled. As a result, even though the public schools were not within the purview of this ordinance, the parochial school was not in fact being discriminated against.⁸⁷

There have been no major changes in the zoning area with reference to churches and parochial schools. How long such a period of inactivity, and with it a preservation of the status quo, is to continue is open to speculation. There are unsolved problems, especially the constitutional problem of possible interference with the exercise of religion if a church is excluded from a particular district. The diversity of approach among the states remains, some prohibiting the exclusion of churches and others allowing it. As long as the public is satisfied with the particular approach that their state has adopted, or at least remains apathetic, there is not apt to be a major development in this area. If, however, there is a demonstration of public interest, by the bringing of lawsuits, for example, the state legislatures may be forced to review their enabling acts and the courts their decisions. Until such a manifestation of concern it would appear that the hiatus will continue.

3. Taxation — *Discontent and Defense*

While the controversy continues over what are necessary concomitants to our traditional church-state relationship in America,⁸⁸ the tax exemption for religious

82 *Id.* at 432, 179 A.2d at 49.

83 184 A.2d 42 (Conn. 1962).

84 40 N.J. 46, A.2d 667 (1963).

85 77 N.J. Super. 99, 185 A.2d 420 (1962).

86 40 N.J. 46, 190 A.2d 667 (1963).

87 *Id.* at 51, 190 A.2d 670 (1963):

[t]he record furnishes no fair support for the charge of discrimination. Since the public schools are maintaining playground areas of at least 100 square feet per child, the plaintiff's claim must fail. Nothing we have said will . . . bar a later application for relief in the event the then prevailing circumstance indicates unlawful discrimination.

88 See, *Religion in the Public Schools*, *infra* p. 323, test in Schempp decision.

institutions remains an integral and well-solidified part of that relationship.⁸⁹ Even the current criticism is primarily aimed at the practice of tax-exempt churches competing with private businesses, not the fundamental concept of tax exemption for religious institutions.

According to some writers, there is no definite and identifiable basis for tax exemption of religious organizations; rather, the practice remains as an unquestioned carry-over from "pre-separation" days.⁹⁰ The origin of exemptions can actually be traced back to ancient times,⁹¹ and today remains firmly rooted in our nation's tax policies.⁹² However, "the prevalence of church tax exemptions in every American jurisdiction, despite the diversities of historical and cultural experience from which the nation emerged, strongly suggests that history alone does not provide an adequate explanation for the phenomenon."⁹³ The basically religious nature of our people seems to offer the primary explanation for its existence and promises its continuation.

Although the cases and treatises are replete with discussions as to "strict" or "broad" interpretation of tax exemption statutes, to attribute the decisional law solely to such a philosophical adherence would seem incorrect. As pointed out in the previous Survey,⁹⁴ what the divergence in the decisional law often signifies is a difference in the legal materials the state courts have at hand in deciding cases.⁹⁵ To attempt to understand the seemingly contradictory case decisions, the variations in state constitutions and statutes must be considered, along with the disposition of the courts toward religious tax exemptions. At the present time, fifteen state constitutions make the tax exemption to religious institutions mandatory and thereby immune from legislative withdrawal.⁹⁶ Another fifteen permit tax exemptions to be granted to religious organizations.⁹⁷ The existing statutory provisions, which are often the determining factor, may be categorized as follows: those exempting "places of worship,"⁹⁸ those exempting "property used for religious purposes,"⁹⁹ and a smaller number of statutes allowing exemptions for property "owned by a religious organization."¹⁰⁰ For an institution to qualify as tax exempt, some states require a combination of these while others seemingly require all of the aforementioned characteristics.

Although the "places of worship" type of statute is the most restricting, a recent Ohio Court of Appeals decision, *St. Paul's Evangelical Luth. Church v. Board of Tax App.*,¹⁰¹ allowed for a somewhat broad interpretation in favor of tax exemption. Pursuant to the Ohio constitution, the General Assembly enacted a statute exempting "houses used exclusively for public worship . . . and the ground attached to such buildings necessary for the proper occupancy, use, and enjoyment thereof."¹⁰² It was contended by the church that a parish house adjacent to the main church property came within the broad purview of the statute. The Ohio

89 PFEFFER, CHURCH, STATE, AND FREEDOM (1953); Konvitz, *Separation of Church and State: The First Freedom*, 14 LAW & CONTEMP. PROB. 44 (1949).

90 ZOLLMANN, AMERICAN CHURCH LAW § 343 (1933).

91 There were instances of favorable tax treatment of the established clergy in biblical times. See Genesis 47:26; Ezra 7:24.

92 3 STOKES, CHURCH AND STATE IN THE UNITED STATES 427 (1950).

93 Van Alstyne, *Tax Exemption Of Church Property*, 20 OHIO ST. L.J. 461, 462 (1959).

94 1960-62 *Church-State Survey*, *supra* note 3.

95 *Supra* note 93, at 465.

96 Alabama, Arkansas, Kansas, Kentucky, Louisiana, Minnesota, New Jersey, New Mexico, New York, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, and Virginia.

97 Arizona, Florida, Georgia, Illinois, Indiana, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Pennsylvania, Tennessee, Texas and West Virginia.

98 See, e.g., GA. CODE ANN. § 92-201 (1961): "The following property shall be exempt from taxation, to wit: All public property, places of worship or burial. . . ."

99 See, e.g., ILL. STAT. ANN. ch. 120 § 500(2) (Smith-Hurd 1954): "All property exclusively used for religious purposes, or used exclusively for school and religious purposes. . . ."

100 See, e.g., N.M. CONST. art. 8, § 3: "All church property. . . ."

101 114 Ohio App. 330, 182 N.E.2d 330 (1955).

102 OHIO REV. CODE § 5709.07 (1954).

Board of Tax Appeals had, however, refused to exempt from taxation a certain part of the parish house since it was used by the custodian and his wife as a residence. Upon review, the court stated that the custodian's presence upon the extensive church property involved was "reasonably necessary for the protection and care of the property and also for the purpose of meeting the needs and reasonable requirements of the members and the public in the use of the church facilities for public worship. . . ."¹⁰³ Thus it held the custodian's apartment to be both incidental to and necessary as a part of the building being maintained for the purposes of public worship. A broader wording of the statute, *i.e.*, beyond just an allowance of exemption for "places of public worship," would seem to have facilitated the court's decision favoring exemption.

Several cases have arisen out of statutes exempting property "used for religious purposes." In *City of Nashville v. State Board of Equalization*,¹⁰⁴ the issue confronting the court was whether realty owned and used by a religious institution for an automobile parking lot, a cafeteria, and a snack bar for the convenience of its employees, but in competition with other like tax-paying businesses, was property "used exclusively" for a religious purpose within the exemption provisions of the statute.¹⁰⁵ Here the State Board of Equalization had upheld the Sunday School Board of the Southern Baptist Convention by allowing the exemptions. The Sunday School Board had argued that by enhancing the convenience of its employees through nonprofit activities it was promoting the efficiency of its religious work. It further contended that these portions of its property were within the statutory exemption because their use for other purposes was only incidental to their primary use for religious purposes. This latter contention is based on the premise that the property of a religious institution may be used for two purposes, one business and the other religious. Because the business purpose results in benefits to the religious purpose, the former should be treated as only incidental to the primary religious objectives. Therefore tax exemption for the entire property would be justified. The Supreme Court of Tennessee, however, rejected the concept of a two-purpose use of a religious institution's property. They reasoned that the statute exempts only "property physically used in the work of the institution; and that the act refers to the direct and immediate use of the property itself and not to any indirect and consequential benefit to be derived from its use."¹⁰⁶ In refuting the contention that the enhanced efficiency of the employees in performing their religious work justified tax exemption, the court said "if the Board may operate the parking lot and restaurant businesses tax-free, why may it not also operate other businesses tax-free, such as a housing project, clothing store, automobile repair shop, etc., for its employees?"¹⁰⁷ In the court's eyes this clearly could not be justified. The court's strict interpretation of the "used for religious purpose" type statute was underscored by this recitation:

The policy of tax exemption of religious institutions, established when they were struggling to get along, has enabled them, during the last quarter of a century, to acquire large real estate holdings and to accumulate great wealth; and many of them are engaged in operating various kinds of secular businesses tax-free, in competition with other like businesses that are taxed. This development creates inequities and endangers both the churches and the state.¹⁰⁸

The growing trend of narrowing the coverage of tax-exemption statutes for religious institutions was also alluded to in *Trinity Lutheran Church of Des Moines v. Browner*.¹⁰⁹ The Supreme Court of Iowa had to decide if a church-owned house

¹⁰³ *St. Paul's Evangelical Lutheran Church v. Board of Tax App.*, 114 Ohio App. 324, 325, 182 N.E.2d 330, 331 (1955).

¹⁰⁴ 360 S.W.2d 458 (Tenn. 1962).

¹⁰⁵ TENN. CODE ANN. § 67-502(2) (1955).

¹⁰⁶ *City of Nashville v. State Board of Equalization*, 360 S.W.2d 458, 468 (Tenn. 1962).

¹⁰⁷ *Ibid.*

¹⁰⁸ *Id.* at 469.

¹⁰⁹ 121 N.W.2d 131 (Ia. 1963).

used as a residence for the church's teaching minister was exempt from taxation. Feeling bound by precedent to allow the exemption because of a decision some eighty-five years ago,¹¹⁰ the court still had this comment: "The current trend throughout the country as shown by recent decisions is to curb and restrict exemptions such as we have here. Adherence to what is now the majority rule would deny exemption to the property involved on the ground that a residence is a place in which to live and as such is not used solely for religious purposes."¹¹¹ However, the decision in favor of exemption reflected the majority of the judges' view that the changing of tax exemption law is for the legislature. *Browner* seems illustrative of the importance of statutory language even in light of strong contrary policy.

Several rather interesting cases have arisen under statutes best categorized as requiring both "ownership by a religious organization" and use "for religious purposes." In a recent Wisconsin Supreme Court case, *Missionaries of Our Lady of La Salle v. Michalski*,¹¹² a religious order owned and operated the premises involved as a dwelling for six priests and one lay brother. None of the priests performed any religious services at the "mission house," but rather they furnished assistance to nearby parishes as needed. The court held the religious order liable for back-taxes on the property under its statute¹¹³ because the dwelling was not used exclusively for religious purposes. The court felt bound by a particular decision in which it was held that this particular "mission house" was being used as a private residence and did not violate a zoning ordinance limiting the area to single family dwellings. This classification of it as a private residence precluded a determination that it was used exclusively for religious purposes and thereby exempt from taxation.¹¹⁴

An approach more favorable to tax exemption for religious institutions was taken in *Saint Germain Foundation v. Siskiyou County*.¹¹⁵ An Illinois corporation, organized and operated for religious purposes, sought to recover taxes paid the California county for the three tax years under protest. The applicable statute required that to be tax-exempt, property be used exclusively for religious purposes and be owned and operated by foundations or corporations organized and operated for religious purposes.¹¹⁶ The California District Court of Appeals affirmed the lower court's decision that a house which was rented to a tenant, some vacant land, some cultivated garden and orchard land, and several bookstores operated by a concessionaire were taxable. The remaining properties were held to be tax-exempt. They included a snack bar, gift shop, and beauty shop. These latter facilities, so the court reasoned, were operated not primarily to make money but rather to serve the convenience of persons assembled for religious purposes. The court's rationale seems persuasive, but note the conflict between this reasoning and that of *City of Nashville v. State Board of Equalization*.¹¹⁷ There the Tennessee Supreme Court held that a cafeteria and a snack bar maintained for the convenience of the religious institution's employees were not religious activities "but are secular business enterprises, carried on in competition with other like businesses that pay taxes to the state, the county, and the city."¹¹⁸

This distinction is clearly not predicated exclusively on statutory differences. The courts of California in *Saint Germain Foundation*¹¹⁹ are pursuing a policy

110 *Trustees of Griswold College v. State of Iowa*, 46 Iowa 275 (1877).

111 *Supra* note 109, at 133.

112 15 Wis.2d 593, 113 N.W.2d 427 (1962).

113 Stat.; Wis. L. 1953 c.402.

114 This situation was remedied in 1955, too late to affect the result in *Michalski*, by an amendment which now covers the property. WIS. STAT. ANN. § 70.11(4) (1957).

115 212 Cal. App.2d 911, 28 Cal. Rptr. 393 (1963).

116 Cal. Rev. & Tax Code § 214(1-6).

117 *Supra* note 104.

118 *City of Nashville v. State Board of Equalization*, 360 S.W.2d 458, 469 (Tenn. 1962).

119 *Supra* note 115.

determination which is far more favorable to religious organizations than that followed by the Tennessee courts. Whether one adopts an attitude favoring tax exemptions for religious institutions or one depriving such institutions of the exemption privilege, it seems clear that the magnitude of the problem is increasing.¹²⁰ Some proponents of religious tax exemption base their views on the "public burden" or "humanitarian goals" concepts, others on the "public benefit" or "quid pro quo" rationale discussed in a past Survey.¹²¹ Some proponents argue that "as long as the humanitarian policy justifies exemptions to such organizations as drama schools, women's clubs, labor temples, and temperance societies, exemptions to churches seem at least similarly justifiable."¹²² Such an argument is subject to criticism. The "public burden" theory analogizes to hospitals and other eleemosynary institutions which afford a social service otherwise the obligation of the state.¹²³ More preferable would be a "public benefit" type rationale that religious institutions are of prime importance in the development of individuals who will, through enhanced morality, become better suited to contribute socially, economically and politically to our individual and community interests. As John Stuart Mill once stated it to be: "the first element of good government . . . to promote the virtue and intelligence of the people themselves."¹²⁴

The criticism of the states' policies of tax exemption often is that this practice places an undue burden upon nonchurch members,¹²⁵ that these inequalities become more unjust and oppressive as the tax burden grows,¹²⁶ and that morality should not be fostered by a discriminatory advantage of tax exemption not afforded private businesses.¹²⁷ The critics include many businessmen who feel that tax exemptions subsidize church-owned businesses in competition with private enterprise. But some of the loudest voices being raised against the religious institutions receiving exemptions while engaging in business are those of churchmen.¹²⁸ Dr. Eugene Carson Blake, the former president of the National Council of Churches, has said: "We must seriously ask ourselves whether Christianity's lofty goals are not severely compromised by our tax exemptions."¹²⁹

The federal government, although subject to constitutional limitations,¹³⁰ also confers benefits upon religious institutions. It utilizes both tax exemptions and tax deductions in assisting religious organizations. Under section 501 of the Internal Revenue Code of 1954 "corporations, and any community chest fund, or foundation organized and operated exclusively for religious . . . purposes"¹³¹ are exempt from taxation on their income.¹³² There are also unemployment tax exemptions for religious personnel¹³³ and for services performed in the employ of tax exempt religious organizations.¹³⁴ An excellent example of the special consideration of religious institutions is the exemption of churches¹³⁵ from the tax on unrelated

120 Wall Street Journal, Oct. 29, 1963, p. 1, col. 8.

121 1958-59 *Church-State Survey*, *supra* note 2.

122 *Church And State — Taxation Of Religious Organizations — Benefits Granted by Federal and State Governments*, 5 VILL. L. REV. 255, 268 (1959-60).

123 See generally, PFEFFER, CHURCH, STATE, AND FREEDOM (1953); Zollmann, *Tax Exemptions of American Church Property*, 14 MICH. L. REV. 646 (1916); Note, 64 HARV. L. REV. 288 (1950).

124 MILL, REPRESENTATIVE GOVERNMENT 337 (1952).

125 See Stimson, *The Exemption of Church From Taxation*, 18 TAXES 361 (1940).

126 Trinity Lutheran Church of Des Moines v. Browner, 121 N.W.2d 131, 135 (Iowa 1963).

127 *Should Church Property Be Taxed*, TOGETHER, April, 1962, at 28-30.

128 *Supra* note 120.

129 *Supra* note 127.

130 U.S. CONST. amend. I "Congress shall make no law respecting establishment of religion. . . ."

131 INT. REV. CODE of 1954, § 501(C)(3).

132 INT. REV. CODE of 1954, § 501(a).

133 INT. REV. CODE of 1954, § 3121(b)(8)(A).

134 INT. REV. CODE of 1954, § 3121(b)(8)(B).

135 INT. REV. CODE of 1954, § 511(a)(2)(A).

business income.¹³⁶ Church groups argue that they need the income from such business ventures to finance religious activities, but these enterprises are stimulating further controversy over church-state relations.¹³⁷ The deductions afforded by the federal government often take the form of charitable contributions which reduce the taxable income for a tax paying entity.¹³⁸ It seems apparent that were it not for tax deductibility, religious institutions would never realize the donative revenue they now receive.

Although the decisions are often explainable in light of the applicable state statutes, the reasoning utilized expresses a growing trend of criticism of churches claiming tax exemption while engaging in entrepreneurial ventures. If the criticism continues it could affect settled doctrines of religious exemption in the future. As for the federal constitutional question, the Supreme Court may well avoid any decision on the matter, at least until the clamor abates from the recent school prayer cases,¹³⁹ and perhaps permanently. The Court could utilize the lack of a "justiciable issue" to avoid a decision on the merits.¹⁴⁰ Any changes relating to federal tax exemptions will likely result from a congressional policy determination because of this "standing" problem. If such changes were to be made, Congress would probably strive to eliminate the competitive advantages of the religious institutions engaged in private businesses. An extensive alteration of our religious tax exemption practices does not seem imminent or desirable at the present time. As long as we believe that our nation will be improved through enhanced morality in our people, then we ought to facilitate our churches' attempts to accomplish this by rendering them at least indirect assistance through tax exemption, especially where they are not competing with private businesses.

4. Tort Liability—*Toward Uniformity*

The doctrine of charitable immunity is no longer the majority view among the states.¹⁴¹ The modern trend has been toward abrogation of the judicially-created doctrine, but in the process of this change, the law has become a conglomeration of those rules that have abolished the doctrine, those that have qualified it in some way, and those that retain it. Thus, the present state of the law is one of disagreement among states and confusion within states as agitation for change increases.¹⁴² It is not our task to examine the entire field of charitable immunity but only that area of it that affects religious institutions. The rationales

136 INT. REV. CODE OF 1954, § 511(a)(1).

137 *Supra* note 120.

138 INT. REV. CODE OF 1954, § 170(b).

139 p. 327 *infra*.

140 *Frothingham v. Mellon*, 262 U.S. 447 (1923).

141 Twenty-six jurisdictions have abolished the charitable immunity doctrine. They are Alabama, Alaska, Arizona, California, Delaware, District of Columbia, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey (up to \$10,000 by statute), New York, North Dakota, Oklahoma, Rhode Island, Utah, Vermont, Washington, Wisconsin. There are twenty-two states that retain the judicially created doctrine. They are Arkansas, Colorado (not immune when insured), Connecticut, Illinois (not immune when insured), Indiana, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, Wyoming. Three jurisdictions have not ruled on the charitable immunity doctrine. They are New Mexico, South Dakota, and Hawaii.

142 Mr. Justice Rutledge, in *President and Directors of Georgetown College v. Hughes*, 76 App. D.C. 123, 130 F.2d 810, 812 (App. D.C. 1942), commented on the state of the law in this area as follows:

Paradoxes of principle, fictional assumptions of fact and consequence, and confused results characterize judicial disposition of these claims. From full immunity, through varied but inconsistent qualifications to general responsibility is the gamut of decisions. The cases are earmarks of the law in flux. They indicate something wrong at the beginning or that something has become wrong since then. They also show that correction, though in process, is also incomplete.

employed by its proponents and opponents, however, are uniformly applicable to any charitable institution whatever its nature.

Proponents of the charitable immunity doctrine have devised a number of ingenious theories upon which they rationalize the existence of the doctrine. According to the trust theory,¹⁴³ funds given by a donor to a charity are limited to uses which accomplish the purposes for which the particular charity was set up. To employ such funds for payment to a party injured by the tortious conduct of a charity's agent, or employees is to use charitable funds for a purpose for which they were not intended and which is, therefore, violative of the trust. It is reasoned that the employment of these funds for such a purpose would discourage donors from giving to a nonprofit institution. The respondeat superior theory holds that since a charitable organization receives no direct benefit from its agents or employees it should not be liable for their torts.¹⁴⁴ Often this theory is qualified by making a nonprofit organization liable for negligence in appointing an incompetent servant. The waiver theory holds that one who accepts the benefits of a charity waives his right to collect damages for the torts of a charity's servants or agents.¹⁴⁵ Occasionally, immunity is defended on the ground that since governmental agencies are given immunity and these charitable organizations are engaged in quasi-governmental activities this should be a basis for the imputation of immunity to them as well.¹⁴⁶

An attempt has been made to justify the immunity doctrine on public policy grounds, that it is better that an injured individual bear the loss than the charitable institution that is engaged in activity that benefits society as a whole. To diminish the funds of such an institution will correspondingly leave less to be used in aiding the general public.¹⁴⁷ Finally, it is contended that to abolish the charitable immunity doctrine is a matter of public policy which must be left to the state legislature.¹⁴⁸

Critics of the charitable immunity doctrine emphasize the changed nature of charities since the period when the doctrine was established. They contend that the change in financial position has resulted in a change in the kind of nonprofit organization with which the courts are dealing and that, therefore, an alteration in the law as to these organizations is in order. Charitable institutions are no longer small and in need of judicial protection but are vast enterprises that can afford to bear the losses which individuals suffer at their hands. The availability of insurance is also a factor to consider in balancing the equities between the injured person and the charitable institution whose agents or employees caused the injury. The charitable organization does not have to pay for every such injury but has to pay only the fee assessed by the insurance company for coverage.¹⁴⁹ Such innovations as workmen's compensation laws, social security, and the increased scope of governmental liability evidence a trend toward social consciousness. Finally, opponents of charitable immunity contend that since this is a judicially

143 This theory was first propounded in *Lord Cottenham's* famous dictum in *The Feoffes of Herriot's Hospital v. Ross*, 12 Clark & F. 507, 8 Eng. Rep. 1508 (1846).

144 *Southern Methodist Hospital and Sanatorium v. Tucson v. Wilson*, 51 Ariz. 424, 77 P.2d 458 (1938), rev'd, *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951); *Emery v. Jewish Hospital Ass'n*, 193 Ky. 400, 236 S.W. 577 (1921). 145 *Wilcox v. Idaho Falls Latter Day Saints Hosp.*, 59 Idaho 350, 82 P.2d 849 (1938); *Saint Vincent's Hosp. v. Stine*, 195 Ind. 350, 144 N.E. 537 (1924).

146 *Fordyce & McKee v. Woman's Christian Nat'l Library Ass'n*, 79 Ark. 550, 96 S.W. 155 (1906).

147 *Andrews v. Young Man's Christian Ass'n of Des Moines*, 126 Iowa 374, 284 N.W. 186 (1939).

148 *Richardson v. St. Mary's Hosp., Inc.*, 191 N.E.2d 337 (Ind. Appl. 1963). For a rebuttal of the arguments for charitable immunity see PROSSER, *LAW OF TORTS* 784-88 (2d ed. 1955).

149 *Avellone v. St. John's Hosp.*, 165 Ohio St. 467, 135 N.E.2d 410 (1956); *Missionary Baptist Hosp. v. Holmes*, 214 Miss. 906, 55 So. 2d 142 (1951).

created doctrine, the courts have power to abolish it.¹⁵⁰ Recent cases exemplify the changing character of the law in this area and the diversity of approach that exists among the states.

A few recent cases have reaffirmed the charitable immunity doctrine. In an Indiana case¹⁵¹ a woman brought suit against a religiously affiliated hospital to recover for injuries sustained when a marble partition wall fell on her. She contended that a distinction could be made between holding a charitable institution exempt from liability for the torts resulting from the negligence of its employees and holding it liable in its capacity as a corporation. In refusing to accept the distinction, the Supreme Court of Indiana did not attempt to justify the charitable immunity doctrine by employing any of the commonly used rationales. The paramount reason for its holding appears to be a deference to legislative authority, since the legislature in 1959 refused to abolish immunity as to eleemosynary institutions. The court seemed to feel that even to qualify the doctrine would be judicial legislation and a usurpation of authority. It appears that the doctrine of charitable immunity will remain in Indiana until the legislature decides to abrogate it.

In *Makar v. St. Nicholas Ruthenian (Ukrainian) Greek Catholic Church*,¹⁵² the constitutionality of a New Jersey statute that had enacted the judicially created doctrine was put in question. The plaintiff contended that the statute, to the extent that it related to religious institutions and made a gift (of immunity) to a church organization violated the constitutional prohibition against legislation respecting an establishment of religion. He further averred that such legislation was an interference with the free practice of religion by churchgoers, and that it was repugnant to the equal protection and due process or privileges and immunities provisions of the federal and state constitutions. The court rejected the argument of unconstitutionality as to the immunity statute saying that, "the creation and granting of charitable immunity is within the province of the Legislature. . . ."¹⁵³ Although the United States Supreme Court has not specifically ruled as to the constitutionality of such statutes, this decision handed down by a state court is encouragement to those who would advocate the establishment of charitable immunity by statute.

Although there has been explicit reaffirmation of the charitable immunity doctrine in a few states, the law has continued to move toward the abrogation or qualification of the doctrine and the extension of liability. In *Widell v. Holy Trinity Catholic Church*,¹⁵⁴ the plaintiff brought suit against the church for injuries received when he tripped on a kneeler located in the church. The church defended on the ground that it was a charitable institution and, therefore, immune from liability, but in a well-reasoned opinion the court rejected the defense and abolished the doctrine in Wisconsin. Charitable immunity, according to the court, was an exception to the common law rule of liability for common law negligence. It had been interwoven with the granting of immunity to governments and public charities, but these bodies had since lost their immunity in Wisconsin. While the immunity doctrine was based upon the respondeat superior theory that a master or principal had to derive some benefit from its agents or employees, the court preferred to look at the organization's right of control and direction over its agents and employees. Thus respondeat superior was eliminated as a basis for the existence of immunity and was instead employed as a basis of liability. For many years in Wisconsin

150 Two recent law review articles set out the problem of charitable immunity and propose its abrogation. Friedman, *Charitable Institutions — A Re-Examination of the Doctrine of Immunity from Tort Liability*, 24 GA. B.J. 201 (1961); Toth, *Church Liability for Negligence*, 11 CLEV.-MAR. L. REV. 119 (1962), interesting from the point of view that it was written by a clergyman.

151 *Richardson v. St. Mary's Hosp., Inc.*, 191 N.E.2d 337 (Ind. App. 1963).

152 78 N.J. Super. 1, 187 A.2d 353 (1963).

153 *Id.* at 8, 187 A.2d at 356.

154 19 Wis.2d 648, 121 N.W.2d 249 (1963).

there had been a gradual chipping away of charitable immunity and the court felt that it was illogical and inconsistent to hold a religious institution liable for nuisance, for example, and not for negligence. The defendant church contended that immunity was necessary so that its good work would not in any way be hindered. The real question as the court saw it was "whether the benefit to the many should be at the expense of the innocent sufferer of injuries caused by the negligence of an agent of the religious institution."¹⁵⁵ In answer the court said,

When an institution owes a duty of care to another and, as a result of carrying on its activities through agents whether the enterprise or activity involves financial gain or not and no matter how lofty the purpose or motive, injures another either directly or through agents the breach of duty ought not be excused or justified on the grounds of the laudable purpose or the public benefit of the activity causing the injury. . . . Natural justice finds a legal basis and expression in the normal uncurtailed operation of respondeat superior. The disposition of a person to recognize and render to every man as an individual his due, so neither may gain by the other's losses is but commutative justice. Certainly institutions teaching divine justice, the dignity of man and obligations to his fellowman and of his Creator would not claim on the basis of their teachings that they ought to be exempt from repairing the injury done by themselves or their agents to another.¹⁵⁶

The court made the new ruling abolishing immunity of religious institutions prospective as of July 1, 1963. Causes of action arising before that date were to be governed by the old rule but the new rule was to apply to the case at hand. The court did not appear to be concerned by the fact that such a ruling applied retroactively to the defendant and this matter-of-course attitude may have been the result of the fact that the defendant was insured.

In *Mullikin v. Jewish Hosp. Ass'n of Louisville*,¹⁵⁷ the Kentucky Court of Appeals abolished the charitable immunity doctrine. In stating its decision the court employed rather strong language.

It has not been right, is not now right, nor could it ever be right for the law to forgive any person or any association of persons for wronging any other person. * * * Upon applying the simple test of right and wrong we are forced to the conclusion that the charitable nature of a wrongdoer should create no exception to the rule of liability.¹⁵⁸

In *Sheppard v. Immanuel Baptist Church*,¹⁵⁹ the doctrine set forth in *Milliken* was made applicable to churches, so that the demise of charitable immunity in Kentucky is now complete.

In a recent Kansas case¹⁶⁰ the plaintiff brought a wrongful death action against the church for the death of his son who had tripped over a rock or other obstruction on a walk along the rear of the church cabin. It was alleged that the boy fell into an unguarded stairway of the cabin and that death resulted from the fall. The Supreme Court of Kansas had, in *Noel v. Menninger Foundation*,¹⁶¹ abolished charitable immunity as to charitable hospitals. In this case *Noel* was broadly construed to include church institutions.

In some of the states that formally adhere to the charitable immunity doctrine, such adherence has been qualified by exceptions. A charitable institution may be liable for negligence in choosing its agents.¹⁶² If the religious polity has insurance this may be construed as a waiver of its right to charitable immunity.¹⁶³ The existence of these exceptions complicates the already diverse approaches that the states take to

¹⁵⁵ *Id.* at 254.

¹⁵⁶ *Id.* at 254.

¹⁵⁷ 348 S.W.2d 212 (Ky. 1961).

¹⁵⁸ *Id.* at 932.

¹⁵⁹ 353 S.W.2d 212 (Ky. 1961).

¹⁶⁰ *McAtee v. St. Paul's Mission of Marysville*, 190 Kan. 518, 376 P.2d 934 (1954).

¹⁶¹ 175 Kan. 751, 267 P.2d 934 (1954).

¹⁶² *Norfolk Protestant Hosp. v. Plunkett*, 162 Va. 151, 173 S.E. 363 (1934).

¹⁶³ *Fairall v. Sisters of Third Order of St. Francis St. Mary's Hosp.*, 38 Ill. App. 2d 280, 187 N.E.2d 15 (1962).

the charitable immunity doctrine. The result is a present state of law that is almost impossible to assemble into any sort of uniform pattern.

For the first time this Survey can report that a majority of the fifty-one jurisdictions have abolished the charitable immunity doctrine. The trend of the law has been toward the rejection of this doctrine. Even in states that maintain immunity for these institutions, exceptions have been introduced. In cases that have reaffirmed the doctrine, the commonly employed rationales for the continued existence of the doctrine are strikingly absent. The foundation for reaffirmation appears to be *stare decisis* or, as in Indiana, the belief that this is a matter for legislative determination. Religious institutions have a vested interest in the survival of the doctrine and as such might be expected to be among its leading proponents. But among these groups there is a division of opinion, based upon moral considerations, as to the desirability of continuance of the charitable immunity doctrine.¹⁶⁴ Various religious institutions have recognized moral responsibility to compensate injured parties by waiving their right of immunity through the purchase of liability insurance. Thus it can be seen that the charitable immunity doctrine is not dead and that there is a diversity of approach and application among the states that adhere to the doctrine, but the movement toward uniformity through abrogation continues apace.

B. EDUCATION

The "interregnum," discussed in the previous Survey,¹⁶⁵ has passed. Federal constitutional limitations have been applied against the state established policies of religious exercises by public school children. Engel¹⁶⁶ and Schempp¹⁶⁷ are the law of the land.

We live in an era of controversy and of change, one in which many of our older values have been questioned and altered. The Supreme Court, by the very nature of its function, stands in the midst of this controversy. It must determine far-reaching questions of policy which often alienate segments of the American polity. The Court does not, however, decide these questions under a shield of immunity from criticism. This has remained true of their decisions in the *School Prayer Cases*. When the Court decides cases of great importance such as these, there remains the challenge of reasonably and dispassionately assessing the propriety of the decisions and determining the extent of their impact on our relationship between church and state.

In its monumental decisions concerning the role of the state in relation to religious exercises for public school children, the Supreme Court has decreed a certain limit of allowable conduct on the part of the state. Prayer in the public schools is not to be allowed. Thus it appears that parents seeking any religious orientation in the formal education of their children must now utilize parochial schools. For many, the finances will not be available to choose parochial education. Some, because of geographical location, will find no religious schools available. Those who do choose parochial education, have the necessary finances, and find a religious school nearby will add to the financial difficulties increasingly plaguing the parochial schools. The economic problems of parochial schools include a growing scarcity of space and lack of qualified members of religious orders who have traditionally taught for little pay. The result has been a drain on parochial school finances.

When the financial difficulties of parochial schools are considered in conjunction with the constitutional bars to assisting them found in many state constitutions, it seems apparent that the time is proper for a federal determination of the question. However, an early federal determination may not be forthcoming in light of the constitutional uncertainty of aid to parochial education following the *School Prayer Cases*.

164 Toth, *supra* note 10.

165 1960-62 *Church-State Survey*, *supra* note 3.

166 Engel v. Vitale, 370 U.S. 421 (1962).

167 School District of Abington Township, Pa. v. Schempp, 374 U.S. 203 (1963).

1. Religion in the Public Schools — *Constitutional Proscription*

In *Engel*, the stage was set by a directive of the Board of Education of Union Free School District No. 9 of Hyde Park, New York. It provided for saying the following prayer aloud by each class, in the presence of the teacher, at the beginning of each school day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." This prayer was composed by the State Board of Regents of New York, who were vested with broad powers over the state's public school system. Petitioning the court were the parents of ten students who were enrolled in the schools of the district and which group included Jews, Unitarians, members of the Society of Ethical Culture, and one nonbeliever. They asserted that the use of this official prayer in the public schools was contrary to the beliefs, religions, or religious practices of both themselves and their children, and thus violates the first amendment. The trial court upheld the power of New York to use the Regents' prayer as a part of the daily procedures of its public schools so long as the schools did not compel any pupil to join in the prayer over his parents' objection.¹⁶⁸ This decision was sustained by the New York Court of Appeals.¹⁶⁹

Mr. Justice Black speaking for the Supreme Court of the United States stated that New York had adopted a practice wholly inconsistent with the establishment clause of the first amendment. The court thought that there was no doubt that the practice was a religious activity since it was a solemn avowal of divine faith and supplication for the blessings of the Almighty. Then the court stated: "[W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."¹⁷⁰ The court then discussed the historical basis for so holding. Perhaps expecting the controversy that was to follow, the court said: "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."¹⁷¹ Then the court specified that the encouragement of our children to recite historical documents or anthems was beyond the reach of this opinion.¹⁷² Although Justice Douglas concurred separately,¹⁷³ the lone dissenter was Justice Stewart who stated: "I cannot see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of the Nation."¹⁷⁴

Those who announced the view that the court meant to ban more than a state composed prayer were vindicated with the Supreme Court decision in *School District of Abington Township, Pa. v. Schempp*.¹⁷⁵ Embraced within the court's ruling were two cases. One was an appeal by the School District of Abington Township from a lower court order enjoining enforcement of a Pennsylvania statute providing for Bible reading in the public schools.¹⁷⁶ The students and parents were advised that the student may absent himself from the classroom or, should he elect to

168 *Engel v. Vitale*, 18 Misc. 2d 659, 191 N.Y.S.2d 453 (Sup. Ct. 1959).

169 *Engel v. Vitale*, 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 (C.A. 1961).

170 *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

171 *Id.* at 435.

172 *Ibid.*

173 "Yet for me the principle is the same, no matter how briefly the prayer is said, for in each of the instances given the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution." *Id.* at 441.

174 *Id.* at 445.

175 374 U.S. 203 (1963).

176 *Schempp v. School District of Abington Township, Pa.*, 201 F. Supp. 815 (E.D. Pa. 1962).

remain, not participate in the exercises. They were adherents of the Unitarian faith. In the other action, a parent and her son were appealing on the basis that the Baltimore Superior Court should have compelled the school board to rescind the rule providing for opening exercises in public schools embracing reading of the Bible, or recitation of the Lord's Prayer.¹⁷⁷ In this Maryland case, the petitioners were professed atheists who claimed that readings from the Bible placed a premium on belief as against nonbelief. The rule in question here had been amended to permit the children to be excused upon request by the parent.

The Supreme Court in both cases held that the laws involved required religious exercises and that such exercises were being conducted in direct contravention of the rights of the appellees in the Pennsylvania case and petitioners in the Maryland case. Again basing the decision on the establishment clause, Justice Clark speaking for the court said:

As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years, and with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. 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.¹⁷⁸

Under the establishment clause, the fact that individual students may absent themselves upon parental request would not mitigate the unconstitutionality of the religious exercises. The court thought the distinction between the free exercise clause and the establishment clause of the first amendment was apparent—"[a] violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."¹⁷⁹ In *Schempp*, concurring opinions were written by Justices Douglas, Brennan, and Goldberg, while Mr. Justice Stewart dissented. Justice Stewart felt that since there was no coercion of the nonparticipants, this was not the type of support of religion barred by the establishment clause.¹⁸⁰

With *Engel* and *Schempp*, the Supreme Court seems to have disposed finally of the school prayer question. However, this was not accomplished without criticism of the methods which they utilized. In relying on pre-Revolutionary history, Justice Black first attempts to demonstrate the practice of governmentally established prayer in sixteenth century England as one of the reasons for our early colonists leaving England. At that time the Book of Common Prayer was utilized to specify the accepted form and content of prayer and other religious ceremonies.¹⁸¹ He also refers to the Virginia Bill for Religious Liberty by which all religious groups were placed on an equal footing so far as the state was concerned.¹⁸² In so doing, Justice Black overlooks several pertinent considerations. Twentieth century America is not an age when sectarian differences within the Christian faith are regarded as grounds for persecution, murder, and civil and international war,¹⁸³ as was the situation in sixteenth century England. We do not have a union of the state with a church as the English did then, nor are we confronted by an attempt of the federal government to establish a church which our founding fathers feared in eighteenth century America. In fact, as pointed out by Justice Stewart in his dissent,¹⁸⁴ Justice Black overlooked the American history of religious commitment and religion in our public life. It would seem that a better explanation of the

177 *Murray v. Curlett*, 228 Md. 239, 179 A.2d 698 (1962).

178 *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 222 (1963).

179 *Id.* at 223.

180 *Supra* note 175, at 316.

181 *Engel v. Vitale*, 370 U.S. 421, 425-26 (1962).

182 See 12 Hening, *Statutes of Virginia* (1823), 84, entitled "An act for establishing religious freedom."

183 See 57 Nw. U.L. REV. 578, 586 (1962).

184 *Engel v. Vitale*, 370 U.S. 421, 449 (1962).

underlying policy reasons for a decision overturning traditional and important practice could have been given.

The Court's choice of a basis for rendering the school prayers unconstitutional was crucial in *Engel* and *Schempp* for other reasons as well. It said that the practices involved constituted an establishment of religion. By so doing, and by avoiding calling it a restraint on free exercise, the Supreme Court has invoked a lesser requirement for "standing to sue" in this area. As the court stated in *Engel*, "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."¹⁸⁵ There was no showing of even indirect coercion in either case, nor was there any proven injury in the plaintiff's capacity as a taxpayer. Under the court's rationale, the particular plaintiff may be unimportant. It may even be that any community member may be able to allege that he has a legitimate interest in the matter. The standards for the determination of standing are not absolute,¹⁸⁶ and in this area the Court has not contributed to their ascertainment by avoiding a proper discussion of the problem. The decision predicated on the establishment clause will further serve to facilitate its adoption in the local school districts. A decision on the free exercise clause "would presumably have meant that the prayer programs were constitutionally unobjectionable unless and until challenged, and, therefore, that school boards would have been under no discernible legal obligation, as assuredly they now are, to suspend ongoing prayer programs on their own initiative."¹⁸⁷

Engel and *Schempp*, particularly the former, have stimulated a rash of public comment. Many school systems will undoubtedly refuse to comply with what is now the law of the land until they are targets of court decrees.¹⁸⁸ Even with the opinions based on the establishment clause which is less restrictive as to "standing" requirements, it is quite possible that in many communities there will be no willing plaintiffs.¹⁸⁹ According to one estimate, the Supreme Court's verdict in these cases will affect forty-one per cent of the nation's school districts.¹⁹⁰ One Pennsylvania school board, after *Engel* and *Schempp*, voted to make daily Bible reading mandatory in its classrooms.¹⁹¹ It placed the Bible in the "literary" and "historical" field and requires each teacher to devote fifteen minutes daily to its reading. If challenged, the validity of the practice would seem questionable. Another attempt to mitigate the harshness of the prayer proscription in *Engel* and *Schempp* is requiring a daily period of meditation for public school children. Such a bill was recently passed by the Maryland General Assembly. If signed by the Governor, it would also present a constitutional question.

Besides the state activities attempting to circumvent *Engel* and *Schempp*, there have been several lower court decisions which seem to reveal an attempt to limit their application. In *Lawrence v. Buchmueller*,¹⁹² a number of parents of school children sought a declaration that the board of education had no legal or constitutional authority to permit the erection or display on school premises or property of any and all symbols of any deity or semi-deity belonging to any and all religions. The Board had permitted a small group of taxpayers to erect a creche or Nativity scene on the school grounds during the Christmas recess when school was not in session and at no cost to the school district. At issue was whether the establishment

185 *Id.* at 430.

186 Brown, *Quis Custodiet Ipsos Custodes? — The School-Prayer Cases*, THE SUP. CT. REV. 1, 15 (1963).

187 Pollack, *Public Prayers In Public Schools*, 77 HARV. L. REV. 62, 70 (1963).

188 Life, Nov. 8, 1963, p. 53.

189 *Supra* note 187, at 62.

190 American Civil Liberties Union Report, 32 (1963).

191 Chicago Daily News, Feb. 18, 1964, p. 6.

192 40 Misc. 2d 300, 243 N.Y.S.2d 87 (Sup. Ct. 1963).

clause of the first amendment had been violated. The New York trial court determined that the resolution of the school board permitting the erection of a creche under the circumstances there present did not constitute the establishment of religion.¹⁹³ Unlike *Engel* or *Schempp*, which concerned active involvement by government in religious exercises, the present case constitutes, at most, merely a passive accommodation of religion. The court further added:

To grant the broad relief requested by the plaintiffs . . . would, in the opinion of the court, be tantamount to sanctioning judicially a policy of nonrecognition of God in the public schools resulting in a denial that religion has played any part in the formulation of the moral standards of the community. In such circumstances the State's declared purpose of fostering in the children of the State "moral and intellectual qualities," would be thwarted.¹⁹⁴

Although a strict interpretation of the test¹⁹⁵ given by the Supreme Court in *Schempp* could hold the primary effect of the school board resolution as an advancement of religion, this would not seem a proper analysis. Rather the New York court recognized that what was allowed was the opportunity to display one aspect of the religious traditions of a large body of our people. Children were not involved. There was no coercion, no cost, no refusal to allow other religions similar opportunity during the important periods of their religious season. To refuse this opportunity would require more than a neutrality toward religion, it would be a preferring of nonreligion over religion.

*Sheldon v. Fannin*¹⁹⁶ also followed *Engel* and *Schempp*. It arose in Arizona where the plaintiffs, Jehovah's Witnesses, relying on these cases contended that the National Anthem contains words of prayer, adoration, and reverence for the Deity, and that a state's prescription of participation therein amounts to a prohibited "establishment of religion." The court rejected the contention stating, "The singing of the National Anthem is not a religious but a patriotic ceremony, intended to inspire devotion to and love of country. Any religious references therein are incidental and expressive only of the faith which as a matter of historical fact has inspired the growth of the nation. . . . The Star Spangled Banner may be freely sung in the public schools, without fear of having the ceremony characterized as an 'establishment of religion' which violates the First Amendment."¹⁹⁷ To hold otherwise would be characterizing a patriotic espousal which serves to engender love for our nation and a better understanding of our historical traditions, including our faith in God, as a forbidden form of corporate expression. There is no necessity for such a denial of our religious history. The Supreme Court does not seem to have intended this.¹⁹⁸

If anything, these cases reveal a groping by our lower courts for guidelines on the *Engel* and *Schempp* doctrines. Certainly the impact of these decisions on other areas of the church-state relationship has not yet been felt. Some may even question the allowance of a "released time" program as in *Zorach v. Clauson*¹⁹⁹ under the test in *Schempp*.²⁰⁰ In *Zorach*, the court relied on the fact that the religious instruction took place outside the school and that the public school teachers were not utilized. But could it be said that the legislative purpose was secular and that the primary effect neither advanced nor inhibited religion? Both of the questions require an affirmative answer. This does show the inherent difficulties of applying a constitutional test in a different factual context. With its language of withdrawal of legislative power in the field of religious beliefs and expressions, the traditional state allowance of tax exemption for church property and the federal

193 *Ibid.*

194 *Id.* at 88.

195 p. 328, *supra*, test in *Schempp* case.

196 221 F. Supp. 766 (D.C. Ariz. 1963).

197 *Id.* at 774.

198 *Engel v. Vitale*, 370 U.S. 421, n.21 at 435 (1962).

199 343 U.S. 306 (1952).

200 p. 328, *supra*, test in *Schempp* case.

government's allowance of a deduction for religious donations are brought into question. So also are the Sunday Closing laws and the state practice of released time for school children on religious holidays. If released time were not permitted, this would undoubtedly raise free exercise problems.

The problems inherent in and arising out of *Engel* and *Schempp* are merely indicative of the religiously pluralistic society in which we live. We are basically a religious people and this is ever manifested in our history, tradition, and in the beliefs of the great majority of our people. Insofar as *Engel* and *Schempp* require a neutrality in the schools by disallowing religious exercises, they may well serve to emphasize the need for religious training by parents and the organized churches, thus not disserving our religious heritage. If, however, their ethos goes beyond this and promotes a governmental favoring of nonreligion over religion or fosters an antireligious attitude, then their validity would be questionable.

We in America have always found it difficult to ascertain a common ground upon which to manifest our religious convictions in our national life. Perhaps some common ground will be found in respect to the religious manifestations which believers in a deity will insist remain a part of American life. While our political order seeks to protect the religious dissenter, we ought not go so far as to impair our religious traditions or stifle our religious beliefs. These values gave birth to this nation and nurtured its growth and prosperity. The desire to protect these religious commitments resulted in the inclusion of religious protections in our governmental order. The decreeing of secularism or secular humanism as a form of public orthodoxy does not seem a necessary concomitant of such religious protections. This would never be in accord with the religious disposition of the great majority of our people. Accepting *Engel* and *Schempp* as prohibiting prayer in the schools for public school children, this majority may justifiably be concerned about the future ramifications of their doctrines. It is submitted that *Engel* and *Schempp* need not be controlling in an attempted overturn of state or federal religious tax exemption, nor in review of federal assistance to parochial education, nor in attempts to remove from our public life the many manifestations of belief in God.

2. Aid to Parochial Education — *Educational Enigmas*

Aid to parochial education remains the crucial problem for our determination in assessing the proper relationship between church and state on the American educational scene. Although much of the recent controversy has centered around aid from the federal government, the states are also confronted with problems as to the constitutionality of aid to religious education under their respective constitutions. In fact, at the present time any provision for direct state aid to parochial education would surely be attacked on establishment clause grounds.²⁰¹

At the federal level, the positions of the two major influencing forces involved were recently delineated. The Roman Catholic Bishops stated that they would oppose any proposed legislation for federal aid to education that does not include aid to parochial schools.²⁰² At the same time the Kennedy-Johnson administrations have opposed such aid to parochial schools on constitutional grounds. Seemingly as a result of this disagreement, there have been no massive federal aid to education bills passed in the interval since the last Survey.²⁰³

Moreover, at the state level, there has been relatively little litigation concerning aid to parochial schools. The litigation that has arisen, however, has been significant

201 Twenty-nine constitutions expressly prohibit such aid. See, e.g., ALASKA CONST. art. VII, § 1; CAL. CONST. art. IV, § 30; ILL. CONST. art. VIII, § 208; PA. CONST. art. X, § 2.

202 N.Y. Times, Mar. 3, 1961, p. 1. "The bishops of the Catholic Church in the United States . . . have made it unequivocally clear that they will oppose any proposed legislation for federal aid to education which does not include provisions for parochial schools." Pfeffer, *Federal Aid to Parochial Schools?* No. 37 NOTRE DAME LAW. 309 (1962).

203 1960-62 *Church-State Survey*, *supra* note 3.

in that it continued the pattern of denying parochial school children the right to utilize public school transportation. For example, in *State v. Nusbaum*,²⁰⁴ a Wisconsin statute was amended to provide for transportation of public and nonpublic school children to the public schools.²⁰⁵ Nonpublic school children thus availed themselves of this opportunity when their schools were nearby the public schools. Under the statute's provisions, certain pupils attending 500 nonpublic schools would have been allowed free transportation to and from the nearest public school they were entitled to attend. The objecting taxpayer contended that the act was invalid under the Wisconsin constitution, which prohibits the expenditure of any public funds "for the benefit of religious societies, or theological seminaries."²⁰⁶ The court, in holding the statute unconstitutional, felt that the parochial schools which were now paying part or all of the cost of transportation of their pupils stood to benefit financially by the operation of the new act. Some would also have gained through increased enrollments due to the enhanced convenience and lessened cost of transporting children. The court reasoned it was illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and the furnishing of books, accommodations, and other facilities are aids. Although the legislation worded the statute to cover private schools, the court was not persuaded because under the facts of the case it was the parochial schools which stood to benefit. Another argument which was urged before the Supreme Court of Wisconsin was that providing transportation to parochial school pupils entails no more expenditure than would be required if these pupils were to attend public schools. In summarily dismissing this contention the court stated "[W]e are certain that the determination of whether religious schools receive a prohibited benefit from public funds is not dependent on whether the overall cost to the public treasury would be less or greater by reason of the operation of such schools than would be the case if all the pupils thereof were to attend public schools."²⁰⁷ In response to a further contention of the Attorney General that the act was sustainable on the basis that the transportation of parochial school pupils would promote their health and welfare, the court said: "It could also be argued with equal plausibility that a direct grant in aid of public funds to parochial schools promotes the general welfare of the pupils of such schools because it aids in their education."²⁰⁸ The court could have relied on the reasoning of *Bowker v. Baker*²⁰⁹ where the California courts upheld an act providing for transportation of parochial school children, under a similar constitutional provision. There the act was considered a proper promotion of the welfare of the children. Instead the court relied on six other decisions under similar constitutional provisions including the recent case of *Matthews v. Clinton*,²¹⁰ all of which had voided acts providing for transportation of parochial school pupils at public expense.²¹¹ Thus it held the amended act violative of the Wisconsin statute.

In an Oklahoma case, *Board of Education for Independent School District No. 52 v. Antone*,²¹² a taxpayer sought to enjoin the transportation of parochial school children to and from school each day in the public school buses. He alleged

204 17 Wis.2d 148, 115 N.W.2d 761 (1962).

205 Stat.; Wis. Laws 1961, ch. 648: "The school boards of all school districts . . . shall provide transportation only to and from the public school which they are entitled to attend, for all pupils, attending public and non-public schools. . . ."

206 Wis. CONST. art. I, § 18.

207 *State v. Nusbaum*, 115 N.W.2d 761, 767 (Wis. 1957).

208 *Ibid.*

209 73 Cal. App. 2d 653, 167 P.2d 256 (1946).

210 362 P.2d 932 (Alaska 1961).

211 *McVey v. Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (1953); *Visser v. Nooksack Valley School Dist.*, 33 Wash.2d 699, 207 P.2d 198 (1949); *Gurney v. Ferguson*, 190 Okla. 254, 122 P.2d 1002 (1941), *cert. denied*, 317 U.S. 588 (1942); *Judd v. Board of Education*, 278 N.Y. 200, 15 N.E.2d 576 (1938); *State ex rel. Traub v. Brown*, 36 Del. 181, 172 A. 835 (1935).

212 384 P.2d 911 (Okla. 1963).

that this constituted a violation of the state constitution.²¹³ The Board of Education based its appeal on the contention that the practice promoted the "public welfare" at no additional expense to the public. The Supreme Court of Oklahoma in denying the validity of the practice stated:

The law leaves to every man the right to entertain such religious views as appeal to his individual conscience, and to provide for the religious instruction and training of his own children to the extent and in the manner he deems essential or desirable. When he chooses to seek for them educational facilities which combine secular and religious instruction, he is faced with the necessity of assuming the financial burden which that choice entails.²¹⁴

Then relying on a previous decision,²¹⁵ the court reasoned that "if the cost of school busses and the maintenance and operation thereof is in aid of the public schools, then it would seem to necessarily follow that when pupils of parochial schools are transported by them such service is in aid of that school."²¹⁶ Such aid or benefit, whether direct or indirect, is prohibited by the Oklahoma constitution.

Because of the state constitutional barriers to assistance for parochial schools, some advocates of religious education have tried to devise compromise plans. One such interesting plan to avoid the problems of direct aid while retaining the benefits of parochial education is the "shared time" program now receiving limited trial in western Pennsylvania,²¹⁷ and under consideration in Chicago, Illinois.²¹⁸ It would shift a part of the financial burden now borne by parochial schools to the general community, thereby lessening the formers' need for increased facilities and reducing their expenditures for teachers' salaries. Under such a plan, so called "objective" courses such as mathematics and the natural sciences would be taken in the public school. Other "value content" courses such as religion and social studies would be taken in the parochial school. It is contended that since children have a right to attend the public schools full time, there should be no objection to this part time plan. It seems somewhat like the "released time" program allowed in *Zorach v. Clauson*²¹⁹ in that the religious training is not on public school property. This type program would lessen the concern of those who feel that the segregation of children into public and parochial schools is divisive. It might be preferable to the abandonment of one of the lower levels of parochial education.²²⁰

The fact that state constitutions are often explicitly opposed to any expenditure of public funds to assist sectarian education should clearly not be determinative of the federal question. In actuality, the state prohibitions have led many to seek federal assistance. Although early Catholic opposition was predicated on the belief that federal aid would mean federal control and perhaps manifestations of anti-Catholicism,²²¹ the current increase in education costs is inducing many Catholic leaders to give up that view. The National Catholic Welfare Conference has now committed itself to the proposition that federal aid is both necessary and consti-

213 OKLA. CONST. art. II, § 5: "No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any . . . sectarian institutions as such."

214 Board of Education for Industrial School District No. 52 v. Antone, 384 P.2d 911, 913 (1963).

215 Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941), cert. denied, 317 U.S. 588 (1942).

216 *Supra* note 214, at 913-14.

217 See Cassels, *A Way Out of our Parochial-Public School Conflict*, Look, Aug. 28, 1962, p. 54; news article, *A.M. Science, P.M. God*, Time, Sept. 21, 1962, p. 38.

218 Chicago Daily News, Apr. 6, 1964, p. 1.

219 343 U.S. 306 (1952). There the public schools did no more than accommodate their schedule to a program of outside religious instruction.

220 Note, *Disestablishment In Public Schools*, 57 NW. U.L. REV. 578, 594-95 (1962).

221 See generally, Mitchell, *Religion and Federal Aid to Education*, 14 LAW & CONTEMP. PROB. 113 (1949).

tutional.²²² However, these proponents of federal assistance have found little encouragement as concerns direct aid for two principal reasons. First, Administration opposition seems a bar to the necessary Congressional policy determination. Secondly, Justice Douglas' opinions in *Engel* and *Schempp* foretell deep constitutional trouble for proposals to appropriate federal funds to aid church-related schools. In his concurring opinion in *Schempp*, Justice Douglas stated: "[T]he Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone."²²³ Thus he felt that the prayer practices must be declared unconstitutional for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. "The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools."²²⁴ Financing a church either in its religious or other activities, in his view, is unconstitutional as an establishment of religion.²²⁵

When the Douglas analysis is combined with the reasoning of the court in *Everson v. Board of Education*,²²⁶ the constitutional question becomes more acute. In *Everson*, Justice Jackson in a well known dictum stated:

The "establishment of religion" clause of the First Amendment means at least this. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."²²⁷

One opponent of federal aid for parochial schools, Leo Pfeffer,²²⁸ contends that:

[S]hould the campaign to open the federal treasury to church schools succeed, it will inevitably be followed by similar campaigns aimed at state and municipal treasuries, with the ultimate goal of making public and church schools equal partners in the American educational system. This represents the most serious threat to the principle of separation of church and state in the history of our nation.²²⁹

He further argues that if we force any group to pay taxes which go to support another religious sect, we are using the power of government to coerce individuals into violating their consciences by paying for the propagation of another faith.²³⁰ Aid to parochial education in his opinion would also risk our cherished religious freedoms through an imposition of federal control over religious instruction.²³¹

The proponents of direct federal assistance to parochial schools argue that we cannot afford to ignore the more than 5,000,000 elementary and secondary parochial students.²³² They would predicate such assistance on the "public purpose" concept by pointing to the fact that the parochial school curriculum does comply with the state requirements.²³³ The graduates of parochial education have the same basic

²²² National Catholic Welfare Conference, *The Constitutionality Of The Inclusion Of Church-Related Schools in Federal Aid To Education* (1961), as reprinted in 50 GEO. L.J. 397 (1961).

²²³ *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 229 (1963).

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ 330 U.S. 1 (1947).

²²⁷ *Id.* at 15-16.

²²⁸ General Counsel, American Jewish Congress.

²²⁹ Pfeffer, *Federal Funds For Parochial Schools? No*, 37 NOTRE DAME LAW. 309, 310 (1962).

²³⁰ *Id.* at 318.

²³¹ *Id.* at 319.

²³² Hays, *The Constitutional Permissibility Of The Participation Of Church-Related Schools In The Administration's Proposed Program Of Massive Federal Aid To Education*, 11 DE PAUL L. REV. 161 (1962).

²³³ See Reed, *The "Permeation" Issue In Federal Aid To Education*, 8 CATHOLIC LAW. 197, 202 (1962).

aspirations for their future as those of the public schools. They may desire to be scientists, doctors, or teachers, and through these needed professions to serve their God, country, and families. The proponents feel it is difficult to understand how these individuals will fail to keep pace with other graduates in fulfilling the national need for such trained people in the post-Sputnik era. Federal grants to religious institutions,²³⁴ and to qualified veterans for use at public or parochial schools,²³⁵ supply them with precedent for their contentions. In fact the National Defense Education Act of 1958 provided for loans to college students on a nondiscriminatory basis.²³⁶

The lack of success in achieving direct federal aid has led many proponents of aid to center their attention on indirect assistance through utilization of the tax mechanism for allowing tax credits²³⁷ or tax deductions²³⁸ from federal income tax returns. Although the numerous tax credit proposals have thus far only encompassed expenditures toward higher education, the policy could be expanded to embrace school taxes and secondary school tuitions thus benefitting primary and secondary schools as well as colleges and universities. Dr. Roger A. Freeman of the Hoover Institution at Stanford University advocates both a sliding tax credit schedule for tuition payments up to a maximum of \$420, and a 100% tax credit for donations to institutions of higher learning up to a stated maximum.²³⁹ Tax credit proposals have been advocated by representatives of all shades of political thought. These proposals have been criticized as causing Congress to lose control of public funds, further cutting into our already eroded tax base, and increasing the complexity of our federal tax laws. However, either tax credits or the less desirable tax deduction would engender federal contributions without federal domination and would utilize the already existent tax mechanism rather than necessitating the creation of a new administrative department for distributing federal benefits.²⁴⁰ They would also facilitate a more realistic choice by parents of the type of education a child should receive. Proponents of the tax credit device, meritorious though it may be, suffered a setback in the recent defeat of a tax credit proposal in the Senate finance committee after it had been passed by the House.²⁴¹ It will undoubtedly be reoffered and should it receive administration support it could be enacted.

The past two years have brought little encouragement to those seeking assistance for parochial education. The state decisions on transportation of parochial school children and the Supreme Court decisions in *Engel* and *Schempp* seem to have raised higher the somewhat mystical "wall of separation" between church and state. In the legal commentary we have seen some exposition of views both favoring and opposed to federal assistance. The activity of proponents of indirect federal assistance to education through the use of the tax mechanism, even in light of the recent committee defeat, has still been the most encouraging development in the past two years. As important as it is to American parochial education, 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.

234 National Defense Education Act, 20 U.S.C. § 421 (1958); National School Lunch Act, 42 U.S.C. § 1751 (1958); College Housing Amendments, 12 U.S.C. § 1749 (1958).

235 58 Stat. 284 (1944), as amended, 66 Stat. 663 (1952), as amended, 72 Stat. 117, 38 U.S.C. §§ 1601-56 (1958).

236 *Supra* note 232, at 175-76.

237 A tax credit is a direct reduction in the computed tax payable to the federal government.

238 A tax reduction is a reduction in the amount of taxable income upon which the tax is based. It is less desirable since it would yield the greatest benefit to those in the highest brackets who need it least.

239 The Chicago Tribune, Dec. 1, 1963, p. 28.

240 Note, *Federal Tax Incentives For Higher Education*, 76 HARV. L. REV. 369, 386-87 (1962).

241 The Chicago Tribune, Jan. 22, 1964, p. 9.

III RELIGIOUS VALUES

A. SUNDAY CLOSING — *Sabbatarian Question Revisited*

In 1961, The Supreme Court upheld the constitutionality of the Sunday Closing Laws of Maryland, Pennsylvania, and Massachusetts.²⁴² The statutes were held to be not violative of the establishment clause, nor offensive to the equal protection or due process clauses.²⁴³ The effect of these decisions was to declare that Sunday Closing Laws were a valid exercise of the state police power. The court discussed the religious origin of these statutes but was of the opinion that they had subsequently taken on a valid secular nature which the states could enforce.²⁴⁴

The majority of cases which have been decided since then have dealt with the multitude of other problems still involved with these laws. A prime source of litigation is challenging the validity of the classifications made by the statutes and the prohibition of certain activities so classified. These classifications have been upheld so long as they are in good faith and bear a reasonable and logical relationship to the end sought—that is, preventing violations in a particularly susceptible area.²⁴⁵ An Illinois court struck down a statute which closed car dealers on Sunday on the ground that a law could not single out one class of persons unless that class is substantially different from classes exempted.²⁴⁶ Likewise, the question of whether or not a certain activity falls within a given classification is also a prominent one.²⁴⁷ In *Vornado Inc. v. R. H. Macy & Co.*,²⁴⁸ several department stores were advertising in the Sunday newspapers and maintaining a telephone order service for the receipt of orders on Sunday. The court held this service was not in violation of a state statute prohibiting selling, offering to sell, or engaging in selling on Sunday.²⁴⁹

Sunday Closing laws are often attacked for vagueness,²⁵⁰ and one of the principal victims of this attack is the exception for works of necessity which many of these statutes contain. In *Commonwealth v. Arlan's Department Store of Louisville*,²⁵¹ this phrase was upheld on the theory that the term was sufficiently understandable within the context of the Sunday Closing law. A strange situation arose with regard to the Missouri statute. *State v. Katz Drug Co.*²⁵² upheld the validity

242 *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kosher Market*, 366 U.S. 617 (1961).

243 These cases are fully discussed in the 1960-61 *Church-State Survey*, *supra* note 3, at 680-86.

244 *Contra*, *State v. Grimes*, 23 Ohio Op. 2d 96, 190 N.E.2d 588 (1963). In this case, the judge, citing Douglas' dissent, declared Sunday Closing Laws to be unconstitutional because of their religious effect.

245 *State v. Rogers*, 180 A.2d 735 (Del. Super. Ct.); *Bargain City USA Inc. v. Dilworth*, 407 Pa. 129, 179 A.2d 439 (1962).

246 *Courtesy Motor Sales v. Ward*, 24 Ill. 2d 82, 179 N.E.2d 692 (1962).

247 *State v. Gilfether*, 89 Ohio L.Abs. 89, 184 N.E.2d 673 (1962) and *City of Euclid v. MacGillis*, 117 Ohio App. 281, 179 N.E.2d 131 (1962), both held that a sale of food was not directly connected with recreation; *Commonwealth v. Levy*, 197 Pa. Super. 297, 178 A.2d 858 (1962), shoes are included within classification "clothing and wearing apparel"; *State v. Herwald*, 118 Ohio App. 79, 193 N.E.2d 525 (1963), television antenna is not incidental to entertainment.

248 78 N.J. Super. 102, 187 A.2d 620 (1963).

249 The court so held because title to the goods had not passed, nor had the risk of loss, nor were the goods available for sale on Sunday, since advertisements do not constitute an offer to sell (*id.* at 623).

250 *G.I. Surplus Stores v. Hunter*, 257 N.C. 206, 125 S.E.2d 764 (1962) declared 1961 North Carolina Sunday Closing Law unconstitutional (GEN. STAT. N.C. § 14-346-2).

251 369 S.W.2d 9 (Ky. Ct. App. 1963). For examples of activities regarded as works of necessity see *State v. Bunin*, 91 Ohio L.Abs. 150, 187 N.E.2d 630 (1963), holding that a drugstore is a work of necessity but a modern drugstore which sells almost everything could not be authorized to sell on Sunday any items other than those which could be found in a traditional drugstore; *State v. Applebaum*, 90 Ohio L.Abs. 246, 187 N.E.2d 526 (1963), held a car washing establishment is a work of necessity.

252 352 S.W.2d 678 (Mo. Sup. Ct. 1961).

of the phrase, "or other articles of immediate necessity." The Missouri statute had been adopted in Kansas, and in 1962 the same phrase which was upheld in the *Katz* case, was struck down by the Kansas court in *State v. Hill*.²⁵³ However, the following year the Missouri Supreme Court followed suit and declared the statute unconstitutionally vague.²⁵⁴ In general, the validity of this exception must be determined by the context in which it is used within the particular statute.

A provision in the statute which allows communities within the state to vote as to their voluntary exemption from the coverage of the statute (local option) has also been upheld.²⁵⁵

Another sore spot in this body of law which seems to be festering is that of enforcement. Persons prosecuted under these laws will often argue the discriminatory enforcement of them. The burden of showing this discriminatory application of the law is upon the defendant.²⁵⁶ And still, in *Moss v. Hornig*,²⁵⁷ the court ruled that even though the statute had only been applied four times since 1940, this in itself did not show discriminatory enforcement.

In deciding the *Bondy* case,²⁵⁸ the court severely criticized the existing situation of which many of us are aware. That the Sunday Closing laws are not universally enforced is a well known fact. Such a fact leads to a growing disrespect for the law which is a dangerous situation in a democracy such as ours.

[I]t must be emphasized that there is a "crying and immediate need" for the enactment of a Sunday Blue Law which will receive uniform enforcement throughout the State. For unless some uniformity and equality in enforcement is effectuated, the only other solution will be to repeal the law in its entirety, rather than having it remain on the books, be enforced unequally, and risk the people losing faith in our American system of jurisprudence.²⁵⁹

One of the more troublesome problems involved with these Sunday Closing Laws deals with their effect on merchants who close their shops on a day of the week other than Sunday in compliance with their own religious beliefs. Is a closing law which makes no exception for them constitutional? In *Braunfeld v. Brown*²⁶⁰ the Supreme Court upheld just such a statute. The merchants in that case were all Orthodox Jews who were required by the tenets of their religion to close their shops from sundown Friday until sundown Saturday. They all opened their shops on Sunday and had a substantial Sunday business. Mr. Braunfeld contended that if he were forced to close his shop on Sunday, he would either have to change his religion or go out of business. The Court recognized that this statute would result in a financial hardship being placed upon these merchants. However, the Court held that "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."²⁶¹ The statute here was not making unlawful any religious activity or belief but as applied

253 189 Kan. 403, 369 P.2d 365 (1962).

254 *Harvey v. Priest*, 366 S.W.2d 324 (Mo. Sup. Ct. 1963). In discussing the *Katz* decision the court said, "but the construction we placed on 'or other articles of immediate necessity' returns to haunt and mock, and will continue to do so" (at 328). This decision was handed down only two months after a three-judge federal court sitting in Missouri had upheld this same statute, with one judge dissenting. *Cardinal Sporting Goods Co. v. Eagleton*, 213 F.Supp. 207 (E.D. Mo. 1963). The majority relied on the *Katz* case, while the dissent favored the *Hill* rationale.

255 *State v. Fantastic Fair*, 158 Me. 450, 186 A.2d 352 (1962).

256 *City of South Euclid v. Bondy*, 92 Ohio L.Abs. 108, 192 N.E.2d 139 (1963). See also *People v. Paine Drug Co.*, 39 Misc. 2d 824, 241 N.Y.S.2d 946 (Monroe County Ct. 1963). In this case the indictment was dismissed when the defendant was able to prove discriminatory enforcement; *People v. Utica Daw's Drug Co.*, 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (1962), conviction reversed where the trial court refused to admit evidence as to discriminatory enforcement.

257 214 F.Supp. 324 (D. Conn. 1962), *aff'd*, 314 F.2d 89 (2d Cir. 1963).

258 *City of South Euclid v. Bondy*, 92 Ohio L.Abs. 108, 192 N.E.2d 139 (1963).

259 *Id.* at 144.

260 366 U.S. 599 (1961).

261 *Id.* at 603.

to these merchants it "operates so as to make the practice of their religious beliefs more expensive."²⁶² The Court discussed several situations in which the state could make laws which burdened some religions, but which were valid laws because they served a legitimate state purpose.

If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.²⁶³

The merchants argued in favor of an exception being carved out to make provision for people like themselves. With regard to this exception Chief Justice Warren in the majority opinion said, "[A] number of States provide such an exception, and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation, but with its constitutional limitation."²⁶⁴ Justice Frankfurter was also of the opinion that no matter how preferable one might feel such an exception to be, there was nothing in the Constitution which compelled such an exception.²⁶⁵

Thus the Supreme Court has decided that even though a man may be driven out of business by his religious practice of observing a day other than Sunday, the state may still impose this closing law so long as it serves a substantial secular state purpose. The harshness of this decision is immediately evident and it is questionable as to how long the Supreme Court will allow such a doctrine to exist. Admitting the constitutionality of the closing laws, ought not an exception be carved out for the benefit of such people who observe another day? *Commonwealth v. Arlan's Department Store of Louisville*²⁶⁶ upheld this exception because it does not affirmatively prefer any religion nor amount to an establishment of one, but rather seeks to avoid penalizing economically someone who observes another day of the week. In the recent *Sherbert* case²⁶⁷ the *Braunfeld* decision was commented upon. In *Sherbert* the Court ordered the state to carve out an exception for persons who observed a day other than Sunday in connection with unemployment benefit payments. The majority opinion cited *Braunfeld* and said in that case a stronger state interest was being served (uniform day of rest) and that there was also less direct burden upon the appellants in that case. Justice Stewart in a concurring opinion felt that this decision was inconsistent with that in *Braunfeld*. Mr. Braunfeld was being forced to go out of business while the woman in *Sherbert* was only losing 22 weeks of unemployment checks. Justice Harlan in a dissenting opinion felt that this decision overruled the decision in *Braunfeld*. The court went to some lengths to distinguish this case from *Braunfeld*, and relied heavily on the theory that the state in *Braunfeld* had no other way of accomplishing the desired state purpose. However, it seems obvious that the spirit exhibited in *Sherbert* is a much more sympathetic one than that evinced in *Braunfeld*, and it may well be that if the question as presented in *Braunfeld* comes before the court again, it may be decided in a different manner.

²⁶² *Id.* at 605.

²⁶³ *Id.* at 607.

²⁶⁴ *Id.* at 608.

²⁶⁵ In discussing the exception both Chief Justice Warren and Justice Frankfurter considered some of the arguments against it, for example: the possible competitive advantage to those enjoying the exception by allowing them to remain open on Sunday when others were closed, the added difficulty of enforcing the law, the problem of inquiring into the religion of people, and the disturbing influence of stores that are open on Sunday upon the general atmosphere of rest and tranquility.

²⁶⁶ *Commonwealth v. Arlan's Department Store of Louisville*, 357 S.W.2d 708 (Ky. Ct. App. 1962).

²⁶⁷ *Sherbert v. Verner*, 374 U.S. 398 (1963).

B. DOMESTIC RELATIONS

1. Separation and Divorce Problems — *Religion Ignored*

a. Divorce. When the problem of the church-state relationship rears its head in the divorce courts, the approach to it has been rather consistent. The general rule is that courts will not grant a divorce based on strictly religious grounds. There must be evidence of some "overt acts of cruel, harsh, or unkind treatment."²⁶⁸ Mere difference of religious beliefs will not support a divorce decree.²⁶⁹

In *Frantzen v. Frantzen*,²⁷⁰ the husband sued his wife for a divorce and custody of their two children on the grounds that his wife had espoused the Jehovah's Witnesses religion, the tenets of which prohibit such things as swearing allegiance to any country, serving in any armed forces, and granting permission for blood transfusions. As a result of his concern for the family relationship and the welfare of the children, the husband alleged that he had suffered loss of sleep and appetite, and serious impairment of his health. In denying the husband's petition the court held "that differences of the spouses in religious faith, teaching, and practice are not grounds for a divorce."²⁷¹ The court sought overt acts of cruelty and found that his "suffering is entirely mental and emotional brought about by a difference of religious faith and belief."²⁷²

A divorce was granted, however, in a case²⁷³ where the wife became obsessed with a religious zeal. She spent large amounts of time at church services throughout the week. Finally her husband demanded that she choose between the religion and the home. Saying that she was going to do the work of the Lord, the wife left the house. The court ruled this was desertion and granted the husband's petition for divorce.²⁷⁴

The attitude of the courts has been not to treat the religious grounds independently, but rather to search for some other grounds such as cruelty or desertion upon which to justify the divorce. When the religious issue touches upon such legal grounds as these, then it is given effect, but only in light of these legal concepts.

b. Child Custody. The question of custody of children may arise as a result of an adoption or a divorce proceeding. When it does, the overriding influence upon the court's decision is an attempt to do that which will be for the best interests and welfare of the child. Religious education and training are also subject to this philosophy.

In adoption proceedings "matching the religion of the child and the adoptive parents remains relatively strong policy,"²⁷⁵ but even this may be tempered by the rule as to the best interests of the child.

Where the question of custody arises as a result of a divorce proceeding, however, the religious point is generally not so important. Here, again, the courts fall back on the best-interests doctrine. In a New York case, *Miles v. Liebolt*,²⁷⁶ a man sought to force his former wife to bring their children up in his religion, according to their agreement. The wife had subsequently remarried, changed her religion to that of her new husband, and was rearing the children in that faith. In refusing to so order, the court viewed the present situation in which they were

268 *Frantzen v. Frantzen*, 349 S.W.2d 765, 767 (Tex. Civ. App. 1961).

269 See generally 2 JOURNAL OF FAMILY LAW 61 (1962).

270 349 S.W.2d 765 (Tex. Civ. App. 1961).

271 *Id.* at 767.

272 *Ibid.*

273 *Wood v. Wood*, 227 Md. 211, 176 A.2d 229 (1961).

274 See also *Bench v. Bench*, 199 Pa. Super. 405, 185 A.2d 664 (1962). The husband drove his wife from the house with his constant attacks upon her religion. He offered to reconcile if she would consent to joining his religion and renouncing her own. In denying his petition for divorce the court held that the wife's actions did not constitute desertion since the husband had consented to it and his offer of reconciliation was not in good faith.

275 1960-61 *Church-State Survey*, *supra* note 3, at 694.

276 230 N.Y.S.2d 342 (Sup. Ct. 1962).

living, as the picture "of a warm happy family life which would be disrupted by the exercise of a compulsion that these children be distinguished from the others with whom they reside in the manner of their religious upbringing."²⁷⁷ The court was of the opinion that to so distinguish the children from the rest of the household would not be in their best interests.

In *Stern v. Stern*²⁷⁸ this conflict of religion was again presented. The divorced parents had agreed in a court order that, while the mother was to have custody, the father could arrange for the schooling of their son in a Jewish Sunday School. The mother, meanwhile, had enrolled the boy in a Lutheran school and wanted also to enroll him in a Protestant Sunday School. The court ordered the mother to place the boy in the public school system and also to permit his being enrolled in a Jewish Sunday School. On appeal, the lower court's order was upheld because it would not be in the best interests of the child to attend the schools of two different faiths.

These two cases serve to illustrate the courts' determination to seek the child's best interests. In both cases the parents' agreement had been incorporated into a court order. In *Stern* the court order was enforced. There the mother and child were living alone. But in *Miles*, the order was not enforced because the court felt it would disrupt the harmonious surroundings in which the children were being raised.

A Missouri court²⁷⁹ speaking on the matter of the children's religious training after a divorce said:

Ordinarily it is for the one who has the general custody of very young children, and, hence, the basic burden and responsibility of rearing them to be fine men and women who, subject always to the paramount general consideration of the children's welfare, has the privilege of deciding what church the young children should attend until they are mature enough to decide for themselves.²⁸⁰

The religious issue is also present in situations where the problem is not so much a conflict of religions but is rather one of radicalism of the religion. In a recent Maryland case²⁸¹ the father sought to remove custody from his former wife after she became a Jehovah's Witness. One of the children had become dangerously ill and she had refused permission for a blood transfusion.²⁸² The court refused the petition for change of custody, being of the opinion that the best interests of the children dictated leaving them in maternal care.²⁸³ However, the mother's custody was restricted. While she had freedom to believe what she wanted, she could not interfere with the welfare of her children because of these beliefs. The court suggested amending the lower court's order denying the petition in such a manner as to make unnecessary the mother's permission for a blood transfusion. "Where a child's right to live and his parents' religious belief collide, the former is paramount, and the religious doctrine must give way."²⁸⁴

The religious issue, then, is a very real one with which the courts must deal in these custody proceedings; but it is not the primary determining factor in the courts' decisions. The courts are seeking to piece together lives already shattered in one manner or another and certainly all best efforts ought be made to make this new start a good start. The religious issue ought not be read out entirely but

²⁷⁷ *Id.* at 344.

²⁷⁸ 40 Ill. App. 2d 374, 188 N.E.2d 97 (1963).

²⁷⁹ *Hirsch v. Hirsch*, 366 S.W.2d 484 (Mo. App. 1963).

²⁸⁰ *Id.* at 490.

²⁸¹ *Levitsky v. Levitsky*, 231 Md. 388, 190 A.2d 621 (1963).

²⁸² The hospital managed to get in touch with the child's father, who then gave permission for the blood transfusion which was credited with saving the child's life.

²⁸³ See also *Smith v. Smith*, 90 Ariz. 190, 367 P.2d 230 (1961) in which the court held that the fact of the mother's being a member of the Jehovah's Witnesses did not justify a change of custody to the father.

²⁸⁴ *In re Clark*, 21 Ohio Op. 2d 86, 185 N.E.2d 128 (C.P. 1962).

should be rationally considered in the light of the best interests and welfare of the child.

c. *Agreements Concerning Religious Training.* The general rule on ante-nuptial agreements regarding the religious upbringing of children is that they are unenforceable.²⁸⁵ However, cases to the contrary can be pointed out.²⁸⁶ In *Wood v. Wood*²⁸⁷ the court refused to enforce the agreement due to the impossibility of enforcement and the general reluctance of courts to engage in ecclesiastical matters. A contrary theory would encourage enforcement under a simple contract. While Williston's 1938 edition states that such agreements are usually enforceable, the 1963 supplement cites cases to the contrary.²⁸⁸

Many times these agreements will be incorporated into the divorce or separation decree. However, even here they are not guaranteed enforcement, for the overriding influence of the child's best interests once again comes into play.

We have already seen two cases²⁸⁹ in which agreements were incorporated into the divorce decree. In one the agreement was enforced,²⁹⁰ while in the other, enforcement was denied.²⁹¹ The theory of the courts once again was looking after the welfare of the child.

Another recent New York case, *Gluckstern v. Gluckstern*,²⁹² held a mother in contempt of court when she violated the agreement incorporated in the divorce decree. It provided that the father could arrange for the religious training of the child and the mother was not to interfere with such training. The mother had remarried, to a member of the Christian Scientist religion, and she was taking the child to church services of this faith. The judge concluded that "she has contemptuously violated the agreement and the decree of this court."²⁹³

In *Miles v. Liebolt*,²⁹⁴ the court refused to interfere with the "happy family situation" in which there was a unanimity of religion even though the mother's action was in violation of the agreement according to the divorce decree. But in *Gluckstern*, the court found such conduct to be contemptuous.

The status of the law regarding these agreements regarding the religious education of children seems to remain much the same now as it was in the periods covered by previous Surveys. Ante-nuptial agreements are generally not enforceable. When these agreements are incorporated into divorce and separation decrees they acquire the status and dignity of court orders. They are not then lightly to be disregarded. However, where the general welfare and best interests of the child seem to dictate a decision to the contrary, the courts will set these agreements aside.

The argument for the enforcement of these ante-nuptial agreements based on a contract theory seems to be of some value. Marriage is a valid consideration for a contract.²⁹⁵ Frequently, a person will enter into marriage in reliance upon these agreements. However, two states have held that to enforce such a contract would be in violation of their state constitutions.²⁹⁶

285 *Wood v. Wood*, 168 A.2d 102 (Del. Ch. 1961).

286 MARTIN, *Enforceability of Ante-Nuptial Promises to Raise Children in a Particular Religion*, 7 THE CATHOLIC LAWYER 50 (1961).

287 *Wood v. Wood*, 168 A.2d 102 (Del. Ch. 1961).

288 6 WILLISTON ON CONTRACTS § 1744 A (note 3) (1938 ed., Supp. 1963).

289 *Miles v. Liebolt*, 230 N.Y.S.2d 342 (Sup. Ct. 1962); *Stern v. Stern*, 40 Ill. App. 2d 374, 188 N.E.2d 97 (1963).

290 *Stern v. Stern*, *supra* note 289.

291 *Miles v. Liebolt*, 230 N.Y.S.2d 342 (Sup. Ct. 1962).

292 31 Misc. 2d 58, 220 N.Y.S.2d 623 (Sup. Ct. 1961).

293 *Id.* at 624.

294 230 N.Y.S.2d 342 (Sup. Ct. 1962).

295 1 WILLISTON ON CONTRACTS § 110 (rev. ed. 1957).

296 *McLaughlin v. McLaughlin*, 20 Conn. Supp. 274, 132 A.2d 420 (Super. Ct. 1957); *Hackett v. Hackett*, 78 Ohio L.Abs. 485, 150 N.E.2d 431 (Ct. App. 1958).

2. ANTIMISCEGENATION — *Abolishing Anachronisms*

The status of the antimiscegenation statutes is generally unchanged since the date of the last Survey. They are still seen as statutes which are upheld in state court decisions. However, there has been some activity in the state legislatures. Of the twenty-four state statutes cited in the last Survey,²⁹⁷ four states have repealed these antimiscegenation statutes.²⁹⁸ This may well indicate a substantial trend of the state legislatures to settle this problem without its having to be done by the courts.

While there have been no cases directly involving one of these miscegenation statutes, there has been one case of a somewhat analogous character.²⁹⁹ Florida has a statute which prohibits fornication in general. However, it also has a special statute which imposes a more severe punishment when the fornication is between members of different races. On appeal the convictions in this case were affirmed and the statute was upheld. The court relied upon the 1882 Supreme Court Case of *Pace v. Alabama*³⁰⁰ which upheld just such a statute. The court said that if the law was to be changed, that was for the legislature or for another court. That may well be the case, for the appeal has been placed on the Supreme Court docket.³⁰¹ A decision here might help to speed the demise of these antimiscegenation statutes. The argument in favor of these statutes that it is a valid exercise of state police powers to prevent the mingling of the races would not seem too valid in view of the Supreme Court's recent trend toward avoiding such regulations.³⁰²

3. BIRTH CONTROL — *Controversy Persists*

a. Artificial Insemination. The law in the area of artificial insemination is, to a large degree, in a tumult. It is an area in which the law is still trying to find itself and is beset on all sides with legal, moral, and social considerations. Some of the legal problems presented are: does the act of artificially inseminating the mother constitute adultery? If it is with the husband's consent? If it is without the husband's consent? Is the child so conceived legitimate? If it is with the husband's consent? If it is without the husband's consent? Should the practice of artificial insemination be regulated by legislation? The morality of the practice is criticized by the Roman Catholic Church and the Anglican Church. But a hue and cry is raised to consider the married couples who cannot on their own have children. When a marriage is deprived of a child it seems not to be attaining a major purpose, and is not truly fulfilled.

The two methods of artificial insemination are, Artificial Insemination Husband (A.I.H.) and Artificial Insemination Donor (A.I.D.). In the former the semen of the husband is used, whereas in the latter the semen of a third party donor is used to effectuate the insemination. It is in this area of A.I.D. that the legal problems are involved.

A recent case on the subject has failed to shed much light on the situation. In *Gursky v. Gursky*,³⁰³ the court ruled that a child conceived through A.I.D., even though with the consent of the husband, was an illegitimate child. In that case the husband of the mother had agreed in writing to the insemination of his wife. The court dismissed as dictum an earlier New York case,³⁰⁴ which held that where the insemination had taken place with the consent of the husband, he had semi-

297 1960-61 *Church-State Survey*, *supra* note 3, at 697 n.396.

298 Arizona, Colorado, Nevada, and Utah have recently revoked their statutes.

299 *McLaughlin v. State*, 153 So. 2d 1 (Fla. 1963).

300 106 U.S. 583 (1882).

301 *McLaughlin v. Florida*, *appeal docketed*, 32 U.S.L. Week 3168 (U.S. Oct. 28, 1963) (No. 585).

302 For a discussion of the antimiscegenation laws in light of some recent Supreme Court decisions see WALTON, *The Present Status of Miscegenation Statutes*, 4 WILLIAM AND MARY L. REV. 28 (1963).

303 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

304 *Strnad v. Strnad*, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

adopted the child, and therefore the child became legitimate. Instead, the decision was based upon the Illinois case of *Dornboss v. Dornboss*,³⁰⁵ where A.I.D. was held to result in an illegitimate child, whether done with or without the husband's consent. In *Gursky*, the court was of the opinion that legislative action would be required to change the historical concept of illegitimacy. However, the court held that the husband was not entirely free of obligation. His actions and declarations regarding the A.I.D. implied a promise on his part to furnish support for the child.

The law in this area, as has been stated, is still seeking to find itself. Whether or not this will be accomplished by legislation is still an open question. Judging from the amount of litigation on the problem, it is not now a critical one, although the scarcity of cases seems to add to the confusion of the law in this area. As was suggested in the last Survey, the wisest course from a legal point of view "may well be abstention from positive legislation, with the exception of the imposition of stringent control on the medical and biological factors involved in order to prevent such dangers as incestuous impregnation."³⁰⁶

b. Contraception. The question of the constitutionality of a statute prohibiting the sale of contraceptives has been raised by two New Jersey cases. In the first case, cited in a previous Survey,³⁰⁷ the state statute³⁰⁸ was declared unconstitutional for vagueness. The attack in that case was aimed at the phrase "without just cause." In 1963, however, the New Jersey Supreme Court, in *Sanitary Vendors Inc. v. Byrne*,³⁰⁹ criticized this earlier decision in a lower court. In the *Sanitary Vendors* case the plaintiff sought a declaratory judgment to declare the state statute³¹⁰ void for vagueness. The plaintiff is a corporation engaged in the automatic vending machine business, and had installed several of its machines throughout the state. The machines deliver a package of prophylactics when the proper coinage is deposited in the machine. Throughout the state many of the machines had been confiscated or arrest had been threatened by law enforcement officers on the state, county, and local level if the machines were not removed. The court refused to grant the plaintiff's petition and upheld the statute as constitutional. It stated that when this statute was enacted, the legislature did so with an understanding of the federal cases³¹¹ which had interpreted the federal law (18 U.S.C. § 1461) against the mailing of contraceptive devices. The rationale of these cases was that the statute was aimed at preventing the illegal use of contraceptives, and not their proper medical use. The earlier New Jersey case had stated that personal social, economic and religious beliefs of the couple might determine just cause. However, the court in *Sanitary Vendors* dismissed these contentions with a view that the legislature, based on their knowledge of the federal decisions, never intended any such result. Commenting on the federal decisions the court said, "[T]hose decisions spoke not in terms of personal morality but in terms of lawfulness and legality."³¹² The New Jersey Supreme Court ruled this a nonmarginal case in which the indiscriminate sale of contraceptives by a vending machine could not be with just cause. At the same time the court warned that when presented with a marginal case in which "judicial definition is sought for purposes of retroactive

305 No. 54-S-14981 Super. Ct. Cook Cty. (1954).

306 1960-61 *Church-State Survey*, *supra* note 3, at 699.

307 *State v. Kinzel Building Drug Store*, 56 N.J. Super. 37, 151 A.2d 430 (1959).

308 "Any person who, without just cause, utters or exposes to the view of another, or possesses with intent to utter or expose . . . or to sell the same, any instrument, medicine or other thing, designed or purporting to be designed for the prevention of conception or the procuring of abortion . . . is a disorderly person." N.J. STAT. ANN. 2A: 170-76 (1953).

309 40 N.J. 157, 190 A.2d 876 (1963).

310 N.J. STAT. ANN. 2A: 170-76 (1953), *supra* note 308.

311 For a discussion of these cases see 1960-61 *Church-State Survey*, *supra* note 3, at 700.

312 *Sanitary Vendors Inc. v. Byrne*, 40 N.J. 157, 190 A.2d 876, 880 (1963).

application"³¹³ it might have more trouble in interpreting the general language of the statute.

A recent Arizona case, *Planned Parenthood Comm. v. Maricopa County*,³¹⁴ dealt with the constitutionality of a state statute prohibiting the advertising of any methods of procuring abortions or preventing conception.³¹⁵ The plaintiff sought a declaratory judgment to declare the state statute unconstitutional. The court rejected this attack holding that the statute was not a prior restraint, nor was it a violation of due process if some substantial state interest necessitated his restriction on freedom of speech.

In our estimation the statute could reasonably protect both the morals and the health of the community inasmuch as stimulation of sales of contraceptives might lead to greater sexual activity among unmarried persons. Whether the statute was directed toward discouraging illicit sex experience among young people, for moral reasons, or because of the venereal disease problem, we consider the public interest served by the statute substantial compared with the private interest in free speech through advertising which is restricted by the statute.³¹⁶

As the law stands now, states have the power to regulate the sale of contraceptive devices. There is pressure against these statutes and criticism of them and a final determination on their constitutionality may have to wait until the Supreme Court is presented with a case of sufficient "immediacy." In the meantime the state statutes will continue to serve this public interest of morality or public health.

C. OBSCENITY — *New Directions.*

1. Introduction: *Self-Help Reconsidered.*

To many religious institutions and organizations the problem of obscenity continues to be one of the more grave threats to the moral fabric of American life. The state, however, has been even more concerned about dangerous conduct than about immoral thoughts. Thus the unusual degree of activity of religious organizations in this field, which we have previously noticed,³¹⁷ is in part due to the historic reluctance of the state to act precipitously in an area in which the Constitution counsels, if not commands, restraint.³¹⁸

The landmark case of *Roth v. United States*³¹⁹ announced that "[O]bscenity is not within the area of constitutionally protected speech or press"³²⁰ and went on to enunciate the now famous legal test for obscenity of "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."³²¹ Only recently we observed in these pages that *Roth* marked the end of the great conflict between church and state over what is or is not obscene.³²² It now appears that that judgment may have been premature.

Four per curiam decisions of the Supreme Court following *Roth* suggested the narrow limits within which actionable obscenity would be confined.³²³ The new direction taken by the Court was made explicit in *Manual Enterprises, Inc. v. Day*³²⁴ in which Justice Harlan, who had objected to the sweeping language of Justice Brennan in *Roth*, enunciated a new requirement for the legal obscenity test.

313 *Id.* at 881.

314 92 Ariz. 231, 375 P.2d 719 (1962).

315 ARIZ. REV. STAT. § 13-213 (1956).

316 *Planned Parenthood Com. v. Maricopa County*, 92 Ariz. 231, 375 P.2d 719, 727 (1962).

317 1958-59 *Church-State Survey*, *supra* note 2, at 546.

318 1955-57 *Church-State Survey*, *supra* note 1, at 436-52.

319 354 U.S. 476 (1957).

320 *Id.* at 485.

321 *Id.* at 489.

322 1960-61 *Church-State Survey*, *supra* note 3, at 693.

323 *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958); *One, Inc. v. Oleson*, 355 U.S. 371 (1958); *Mounce v. United States*, 355 U.S. 180 (1957); *Times Film Corp. v. Chicago*, 355 U.S. 35 (1957).

324 370 U.S. 478 (1962).

Not only must there be an appeal to prurient interest, but the material must also be "patently offensive."³²⁵ This considerably narrows the scope of the definition.

It may fairly be anticipated that this case and others recently decided³²⁶ will induce redoubled efforts to self-help. Unfortunately, some of these efforts will tend to degenerate into the more crude forms of indiscriminating coercion as the letter-writing campaign replaces the lawyer's complaint, as the boycott supplants the reasoning of the brief, as the mysterious blacklist usurps the judicial determination.³²⁷

It is to be expected that advocates of *governmental* censorship will eschew the more primitive techniques of self-help, which so often alienate those sympathetic to the religious values at stake,³²⁸ and will seek to demonstrate the rational necessity for broader governmental action. The fact that available empirical data is insufficient to establish a causal relationship between obscenity and antisocial behavior should prompt a greater effort to probe the psychological and physiological dynamics of viewing obscenity.³²⁹ However, courts should not lose sight of the fact that the universal existence of obscenity laws ultimately needs no greater justification than common sense.³³⁰

2. Refining the definition: *Shifting Standards*.

Since *Roth* the Supreme Court has progressively narrowed the limits of actionable obscenity.³³¹ Lockart and McClure have speculated that the "concept of obscenity held by most members of the Court is probably hard-core pornography."³³² It is arguable that the speculation was confirmed in *Manual Enterprises, Inc. v. Day*.³³³ Justice Harlan indicated that for matter to be declared nonmailable by the Postmaster General as obscene, it must appeal to the prurient interest *and* must be patently offensive. Since the magazines, directed at a homosexual audience, were not patently offensive by contemporary notions of rudimentary decency they were mailable.³³⁴

a. Constant or Variable Test? *Manual Enterprises* represents something of a triumph for advocates of a constant obscenity test. A magazine for homosexuals is not adjudged obscene by reference solely to its effect upon its primary audience. Under such a test cases involving the receipt by scientists of clearly obscene materials for study purposes could possibly result in a fairly wooden finding of traffic in obscenity.³³⁵

325 *Id.* at 486-87.

326 *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *People v. Richmond County News*, 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961).

327 Bourke, *Moral Problems Related to Censoring the Media of Mass Communications*, 40 MARQ. L. REV. 57 (1956); Murray, *Literature and Censorship*, 14 BOOKS ON TRIAL 393 (1956); Fischer, "The Harm Good People Do," *Harpers*, Oct. 1956, p. 14; Murray, "The Bad Arguments Intelligent Men Make," *America*, Nov. 3, 1956, p. 120; 59 COLUM. L. REV. 387 (1959); Roy, "Catholicism & Protestantism," *The New Leader*, Jan. 20, 1964, p. 8; Flexner, "The Man Who Corrupted California," *Esquire*, March, 1964, p. 82.

328 Roy, *supra* note 327, at p. 10.

329 Cairns, Paul, and Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962).

330 Schmidt, *A Justification of Statutes Barring Pornography from the Mail*, 26 FORD. L. REV. 70, 91 (1957). The absence of empirical data need not make us "purblind to the decadence of paganism"; see Elias, *Obscenity: The Law, A Dissenting Voice*, 15 BAYLOR L. REV. 1 (1963).

331 *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958); *One, Inc. v. Oleson*, 355 U.S. 371 (1958); *Mounce v. United States*, 355 U.S. 180 (1957); *Times Film Corp. v. Chicago*, 355 U.S. 35 (1957).

332 Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 60 (1960).

333 370 U.S. 478 (1962). The argument for confirmation rests on the fact that none of the other justices disagreed with his formula and on the suggestion that a "patently offensive" test is virtually indistinguishable from a "hard-core pornography" test.

334 *Id.* at 486-89.

335 See generally *United States v. 31 Photographs*, 156 F. Supp. 350 (S.D. N.Y. 1957).

To be sure, a variable test for obscenity presents its own special problems centering upon careful delineation of the primary and the peripheral audiences and including difficult judgments about the nature of the appeal and the impact upon the primary audience.³³⁶ But such a test would not be impossible of application and it would permit the government to include material which is not hard-core pornography within the category of the constitutionally obscene.³³⁷ Thus protection would be afforded the immature and the deviate without impending access to the general adult public.³³⁸

b. Identifying the Relevant Community. The *Manual Enterprises* Court insisted upon a "national" standard in determining the relevant "community."³³⁹ Justice Harlan's explanation, that this result was compelled by the existence of a federal statute,³⁴⁰ may lead some state courts to infer the permissibility of employing local community standards in state actions. In *State v. Hudson County News Co.*³⁴¹ the trial court permitted a lay witness to testify that Jersey City had a "very, very high moral standard as compared to other areas that I have visited."³⁴² In affirming the conviction the superior court oddly reasoned that defendant was not harmed since "[i]t is to be presumed that the community standards of morality in Hudson County are the same as those in any other county in the State or Nation."³⁴³ The New Jersey Supreme Court found reversible error in permitting the jury to decide the question based upon local standards.³⁴⁴

The problem of the proper community will undoubtedly recur until the day the Supreme Court speaks. On that day it may very well consider the argument that a national standard is too parochial³⁴⁵ and that an exception should be carved out for "classics" which have survived many "communities."³⁴⁶ The practical difficulties involved in such an extension of the relevant community will militate against liberalization. For example, "to carve out an exemption for 'old and standard works' is obviously to invite wide disagreement as to the boundary between the lawful and criminal: Is Boccaccio or Beaudelaire standard; is Shelley old enough?"³⁴⁷

c. The Average Man. Since the decision in *Manual Enterprises* was based on grounds other than appeal to prurient interest, the Court never reached the question of whether the magazine must be found to have appealed to the prurient interest of the average man or of the average homosexual.³⁴⁸ We have observed that the "patently offensive" test has some resemblance to a constant obscenity concept.³⁴⁹ This is so because to apply the test to a variable primary audience is to conduct

336 Lockhart & McClure, *supra* note 332, at 77-79.

337 *Ibid.*

338 This would seem to solve the problem raised by Elias, *supra* note 330, at 3.

339 370 U.S. 478, 488 (1962).

340 72 Stat. 962, 18 U.S.C. § 1461 (1958).

341 41 N.J. 247, 196 A.2d 225 (1963).

342 *Id.* at 233.

343 78 N.J. Super. 327, 188 A.2d 444, 447 (1963).

344 41 N.J. 247, 196 A.2d 225, 235 (1963).

345 Bantam Books v. Melko, 25 N.J. Super. 292, 96 A.2d 47, 57 (1953). See generally MODEL PENAL CODE § 207.10 comment (Tent. Draft. No. 6, 1957), cited in the Joint Committee's DRAFTING AN OBSCENITY STATUTE 92-101 (1961).

346 Joint Committee, *op. cit.* *supra* note 345, at 98.

347 *Ibid.*

348 Justice Harlan was joined by Justice Stewart in an opinion which took the position that it was not necessary to consider "prurient interest" since the matter was not "patently offensive." Chief Justice Warren and Justice Douglas concurred in an opinion by Mr. Justice Brennan pitched on the narrow procedural ground that the Postmaster General had under the circumstances acted ultra vires the statute in closing the mails to defendant. Mr. Justice Black, without opinion, noted his concurrence in the result. Mr. Justice Clark dissented. Justices Frankfurter and White did not sit.

349 *Supra* text at note 335.

a futile inquiry into whether the average homosexual is "offended" by material calculated to pander to his sexual appetites. On the other hand, it is equally useless to ask the fact-finder if the suspect material appeals to the prurient interest of the average heterosexual. Accordingly, the emerging test would appear to be to ask the fact-finder to determine: (1) if the material is patently offensive to the average person in the community and, if so, (2) whether the material appeals to the prurient interest of the average member of the primary audience.³⁵⁰

Given the existing confusion about the "average man" it is not at all clear that the courts are prepared for such a subtle distinction between the functions of differing average viewers. One court expressed concern about the seeming abdication of responsibility involved in judicial deference to the hypothetical average person.³⁵¹ Another court belittled the importance of testimony by literature experts noting that they were not expert regarding the "average person" with respect to whom the "average policeman, judge, or general medical practitioner would probably have come much closer to being an expert."³⁵² On the other hand a New Jersey court has suggested that "[n]o witness can *qualify* as an 'average man,'" and that accordingly a lay witness would ordinarily be incompetent to give opinion testimony.³⁵³ One lower court has wondered why an appellate court's perception of the "average person" should be any more competent than the trial court.³⁵⁴ Finally, there is the unsettled question of whether the judge or the jury has the better insight into the heart of the "average person."³⁵⁵

d. Considering the Material as a Whole. It was early anticipated that this part of the *Roth* test would be particularly troublesome. To the censorious this requirement seemed to be an unnecessary and dangerous concession to the abstract proposition that the artistic whole cannot be infected by some of its parts.³⁵⁶ Moreover they did not appreciate the veiled suggestion that only prudes or philistines would object to such an approach to art criticism.³⁵⁷

In the comment to the Model Penal Code an attempt is made to explain this requirement to the optimal satisfaction of all parties:

However, "consideration as a whole" does not mean that a grossly pornographic picture is exempt from criminal sanctions merely because it is sandwiched in between unobjectionable reproductions, that an excessively bawdy skit is immune because it constitutes only one scene in a musical review, or that one obscene short story is saved by the propriety of the rest of the anthology. It does mean that a novel like *Ulysses* could not be condemned on the basis of fifty pages of soliloquy and fantasy by one of the characters, even assuming these fifty pages standing alone would violate the law, *since this portion of the story is integral with the rest* and the total appeal of the work is not prurient. Obviously this calls for subtle discrimina-

350 Lockhart & McClure have suggested that "hard-core pornography," which necessarily is *repulsive* to the average man, can never simultaneously *appeal* to the average man's prurient interest and, therefore, logically remains outside the *Roth* definition of obscenity. *Supra* note 332 at 67-68. One critic has responded that *Roth* "does not require that the matter . . . actually appeal to the average person; it requires only that the average person decide *what* appeal the matter does, in fact, have." Wilson, *California's New Obscenity Statute: The Meaning of "Obscene" and the Problem of Scierter*, 36 So. CAL. L. REV. 513, 523 (1963). After *Manual Enterprises* conflict between *repulsiveness* and prurient *appeal* is less obvious because the viewer may regard the material as being "patently offensive," *i.e.*, repulsive, without failing to notice its studied appeal to the prurient interest of its primary audience.

351 *Stengel v. Smith*, 236 N.Y.S.2d 569, 578 (Sup. Ct. 1963).

352 *State ex rel. Beil v. Mahoning Valley Distributing Agency*, 116 Ohio App. 57, 186 N.E.2d 631, 632 (1962).

353 *State v. Hudson County News Co.*, 41 N.J. 247, 196 A.2d 225, 233, n.9 (1963).

354 *Stengel v. Smith*, 236 N.Y.S.2d 569, 578 (Sup. Ct. 1963).

355 Wilson, *supra* note 350, at 534.

356 See Lockhart & McClure, *Obscenity in the Courts*, 20 LAW & CONTEMP. PROB. 587, 602 (1955).

357 *Ibid.* Elias, *supra* note 330, at 3.

tion in deciding what is the unit to be considered "as a whole," what things are "integrally" related so as to call for an overall judgment.³⁵⁸

Commentators have perceived that difficulties will arise when material is claimed to be irrelevant, or relevant but unnecessary to the theme.³⁵⁹ Judge Clark rejected the argument that there was an unnecessary use of "four-letter" words in *Lady Chatterley's Lover*, noting that the "passages to which the Postmaster General takes exception—in bulk only a portion of the book—are subordinate, but highly useful elements to the development of the author's central purpose."³⁶⁰

Usually those who argue irrelevancy or lack of necessity have in mind excision or substitution, not a ban of the whole work. Thus frequently foreign-made movies will be "doctored" or "cleaned up" for the American viewer. Violations of the spirit, if not the letter, of this part of the *Roth* test occur more often in film than in book censorship.³⁶¹ Thus the rape scene in *Virgin Spring* was sufficient to justify a finding that the dominant theme of the film appealed to prurient interest.³⁶² Some argue that cutting a rape scene from *Virgin Spring* or deleting the words "rape" and "contraceptive" from *Anatomy of a Murder*³⁶³ is justified by a balancing test.³⁶⁴ Others maintain that the "consideration as a whole" test bars such piecemeal editing. With the advent of *Manual Enterprises* this latter argument of the literati may be replaced by the broader libertarian contention that "all regulation of obscenity" is doomed.³⁶⁵

While it is true that the courts heed the "consideration as a whole" test more faithfully when ruling on the alleged obscenity of books, they tend to apply it in a mechanical fashion by weighing the number of obscene pages against the number of unobjectionable pages. *Tropic of Cancer* has particularly suffered from this kind of approach.³⁶⁶ Of course the trouble with this "bulk" test is that the court is supposed to be judging the obscenity of a *book*, not of discrete pages or passages. "Consideration of the whole" does not mean consideration of each part in a series of isolated judgments; it does mean consideration of parts in *relation* to the whole.³⁶⁷

e. The Necessary Intent and Knowledge. The intent or purpose of the author or creator would not seem to be relevant to the issue of obscenity under either the "prurient interest" test of *Roth* or the "patently offensive" test of *Manual Enterprises*. This is because the fact-finder is concerned with the material-as-perceived and not with the material-as-conceived, with objective effect and not subjective intention.³⁶⁸ Nevertheless, the courts will talk about the "serious purpose" of the

358 Joint Committee, *op. cit. supra* note 345, at 98-99.

359 Lockhart & McClure, *supra* note 332, at 91.

360 Grove Press, Inc. v. Christenberry, 276 F.2d 433, 438-39 (2d Cir. 1960).

361 Joseph Burstyn, Inc. v. Wilson, 342 U.S. 495, 502 (1952), suggests that different standards may apply to films. For excellent discussion by the Chairman of the Motion Picture Appeal Board of the City of Chicago see Mulroy, *Obscenity, Pornography and Censorship*, 49 A.B.A.J. 869 (1963). See also Kauper, *Obscenity and Censorship: Protecting the Public Morals, CIVIL LIBERTIES AND THE CONSTITUTION* 52, 74-89 (1962). Part of the problem, according to Professor Kauper, lies in the confusion as to whether the states "are limited by the Due Process Clause or by the First Amendment." *Id.* at 85.

362 Janus Films, Inc. v. City of Fort Worth, 354 S.W.2d 597 (Tex. 1962).

363 Elias, *supra* note 330, at 3.

364 *Ibid.*

365 Mulroy, *supra* note 361, at 875.

366 *E.g.*, People v. Fritch, 13 N.Y.2d 119, 192 N.E.2d 713, 716-17 (1963) in which the court at n.5 identifies by page number each and every page containing "obscene" passages.

367 Grove Press, Inc. v. Christenberry, 276 F.2d 433, 438-39 (2d Cir. 1960).

368 St. John-Stevas, *OBSCENITY AND THE LAW* 1 (1956) ("Obscenity" . . . has no . . . correspondence to a tangible object, being a relative and subjective term, describing the reaction of the human mind to a certain type of experience."); *Contra*, Wilson, *supra* note 350 at 523 ("Appeal" here does not refer to the effect or impact on the reader but to a quality in the matter itself.).

author³⁶⁹ or the "reputation" of the publisher.³⁷⁰ Some commentators contribute to the confusion by suggesting that pornography be identified by a "main purpose . . . to stimulate erotic response in the reader."³⁷¹

Similarly, evidence adduced to show that the procurer's purpose or intended use was of a scientific character is not relevant to the issue of obscenity under either *Roth* or *Manual Enterprises*. Still, courts will fret that unless the obscenity test include an examination of the subjective intention of the procurer the law will be saddled with a "constant obscenity test" which will work injustice in certain well-defined cases.³⁷² There are two answers to this supposed problem, both of which would leave intact the objective *Roth* test, as modified by *Manual Enterprises*. We have described this test as involving two equally objective inquiries: (1) as to whether the material patently offends the average person of the community; and (2) as to whether it appeals to the prurient interest of the primary audience.³⁷³ Therefore, it can be argued that though the material be patently offensive, it appeals not to the prurient but to the scientific interest of the average member of the primary audience. Application of the test in this fashion would result in a finding that the material is not within the legal definition of obscenity.

Suppose it is rejoined that the scientific community is not the primary audience (e.g., patently offensive homosexual magazines, intended for a primary audience of deviates, which are acquired by the Kinsey Institute)³⁷⁴ or that since scientists are human a prurient appeal is not precluded by a scientific interest? Conceding, for the sake of argument, that a finding of obscenity would then be required, the procurer would nevertheless be permitted to plead in *justification* his special purpose. This is the position taken by the Model Penal Code³⁷⁵ and it would not be inconsistent with the *Roth-Manual Enterprises* test.

Since *Smith v. United States*³⁷⁶ made it clear that scienter on the part of the accused was required, a series of state court decisions have dealt with the problem. One court has held that mere possession of pornographic material for one's own gratification was not a legal wrong.³⁷⁷ An Ohio court has held that a statute making it a misdemeanor to have possession of an obscene motion picture film, without a finding of knowledge or scienter on the part of the accused, was unconstitutional.³⁷⁸ However, that court, in another case decided the same day, was willing to save a different statute by implying these necessary elements.³⁷⁹ Circumstantial evidence was sufficient in a case which also cited with approval the Model Penal Code's presumption against one who disseminates or possesses obscene material in the course of his business.³⁸⁰

In the comment to the Model Penal Code "the principal objective" of the proposed obscenity statute is said to be the prevention of "commercial exploitation of . . . psychosexual tension."³⁸¹ Schwartz has observed that these Code provisions

369 Attorney General v. Book Named "Tropic of Cancer," 184 N.E.2d 328, 334 (Mass. 1962).

370 Larkin v. G. P. Putnam's Sons, 242 N.Y.S.2d 746, 747 (Sup. Ct. 1963).

371 Kronhausen, PORNOGRAPHY AND THE LAW 18 (1959).

372 State v. Andrews, 150 Conn. Supp. 92, 186 A.2d 546, 555 (1962).

373 Under this analysis it is clear that an obscenity test, though concerned with effect upon variable audiences, can nevertheless be objectively applied.

374 This argument presupposes that the primary audience must be the intended audience and not merely the actual or a derivative audience.

375 Joint Committee, *op. cit. supra* note 345, at 91.

376 361 U.S. 147 (1959). For a discussion of some of the problems remaining after *Smith* see Wilson, *supra* note 350, at 539-43.

377 State v. Coleman, Ohio Op. 2d, 193 N.E.2d 198 (1963).

378 State v. Warth, 173 Ohio St. 15, 179 N.E.2d 772 (1962).

379 State v. Wetzel, 173 Ohio St. 16, 179 N.E.2d 773 (1962), *appeal dismissed*, 371 U.S. 62 (1962).

380 State v. Andrews, 186 A.2d 546, 552 (Conn. 1962). See MODEL PENAL CODE, § 251.4(2).

381 Joint Committee, *op. cit. supra* note 345, at 95.

provide a type of regulation that expresses "the moral impulses of the community in a penal prohibition that is nevertheless pointed at and limited to something else than sin," namely, a "disapproved form of economic activity."³⁸² The government attorneys on the brief in *Roth* submitted a chart of "comparative value of different kinds of speech" based largely upon the purpose of the speaker. "Political speech" was listed first and "commercial pornography" last.³⁸³ There is authority for the proposition that "we may litter the streets with handbills extolling the most dangerous and immoral of philosophies, but not with handbills extolling the most innocuous of soaps."³⁸⁴ It may be argued that the "commercial exploitation of . . . psychosexual tension," much more than the commercial exploitation of soap, should be subjected to close regulation for no more compelling reason than the instinctive feeling that such communications are unworthy of unfettered access to the consuming public.

Although this approach is interesting, there remain unresolved problems. Initially, there is the significant problem of identification, of separating "commercial exploitation" from "literary or social exposition." Furthermore, it is not clear how one would resolve an obscenity prosecution for material disseminated both by an author, who is trying to express a serious idea, and by a publisher, who is obviously using the author's work to exploit commercially the reader's psychosexual tension.³⁸⁵

f. The Necessary Effect. After *Manual Enterprises* the legal obscenity test, at least for federal courts, would appear to require an effect of patent offensiveness upon the average person of the community and an effect of predominant prurient interest upon the primary audience. While the "patently offensive" requirement is the ground advanced by Justice Harlan in an opinion in which only Justice Stewart joined, the other concurring judges did not object to this significant modification of *Roth*. Nor is it clear that these judges would oppose such a pro-libertarian test, especially when one considers the impetus to the approach provided by the American Law Institute's definition of obscenity.³⁸⁶

The effect of patent offensiveness describes the invariable reaction of the average person to so-called "hard-core pornography." Yet Justice Harlan expressly refused to say that the Court was adopting a hard-core pornography test.³⁸⁷ However, we have it on the authority of Lockhart and McClure that the "concept of obscenity held by most members of the Court is probably hard-core pornography."³⁸⁸ Several states have recently embraced the test under the theory that the *Roth-Alberts* test tracks the first amendment limits upon that which can be prohibited as obscene but speaks not at all concerning the right of a state to exercise its police power in this area with self-imposed restraint.³⁸⁹ Accordingly, it becomes important to understand the meaning of "hard-core pornography" in the context of the developing case law.

382 Schwartz, *Moral Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 677 (1963).

383 Joint Committee, *op. cit. supra* note 345, at 99-100.

384 Rodes, *The Passing of Nonsectarianism — Some Reflections on the School Prayer Case*, 38 NOTRE DAME LAWYER 115, 134 (1963), commenting on *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

385 *Kahm v. United States*, 300 F.2d 78 (5th Cir. 1962).

386 MODEL PENAL CODE, § 207.10(2), (Tentative 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.] Mr. Justice Brennan referred to the Code's definition approvingly in *Roth v. United States*, 354 U.S. at 487, n.20. Mr. Justice Harlan in *Manual Enterprises* commented that "[t]he thoughtful studies of the American Law Institute reflect the same twofold concept of obscenity." 370 U.S. at 485.

387 *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 489 (1962).

388 *Supra* note 332, at 60.

389 *People v. Richmond County News*, 9 N.Y.2d 578, 175 N.E.2d 681 (1961); *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 383 P.2d 152 (1963).

Lockhart and McClure cite the Kronhausens as authoritative.³⁹⁰ They distinguish between erotic realism (protected) and hard-core pornography (subject to prohibition) based upon the author's "overall intent."³⁹¹ These guidelines are provided:

Is the author asking the reader . . . to disregard the plot, to disregard the theme and merely to keep on turning the pages to look for "dirt for dirt's sake"? Or did he intend to awaken in the reader a desire to pursue the story because of sobering and provocative thoughts of one nature or another — including reflections upon sex and sexual relations?³⁹²

While there is authority for this "intention" test,³⁹³ it should be noted that the emphasis upon the author's artistic or scientific purpose rather than upon the reaction of the audience³⁹⁴ is strikingly different from the effect-oriented approach of the *Roth-Manual Enterprises* decisions.³⁹⁵ The Kronhausens tell us that "the effect [of erotic realism and of hard-core pornography] are at times identical."³⁹⁶ Thus the ascendancy³⁹⁷ of a "hard-core pornography" test, so understood,³⁹⁸ would change the existing inquiry significantly.

The "patently offensive" test is really "hard-core pornography" test if hard-core pornography can be said to exhaust the category of the patently offensive. Given this understanding of the legal meaning of obscenity, a judge would apparently be required in every case to make an independent review of the material. The purpose would be to prevent the jury from finding material to be "patently offensive" although it is not as a matter of law "hard-core pornography." Thus, under a fully matured hard-core pornography test the jury would still gauge "effects" but the judge would retain a veto power. However, such a view would diminish the role of the jury by upsetting verdicts not clearly against the weight of the evidence—a curious result given the ostensible purpose of discovering "community" and "average person" standards.³⁹⁹

3. Policing the Definition—*Shifting Procedures.*

As Justice Brennan pointed out in his concurring opinion in *Manual Enterprises*, the methods whereby obscenity is condemned are as important as the standards to use.⁴⁰⁰ After concluding that the Postmaster General acted ultra vires because Congress did not authorize the closing of the mail, Brennan conceded that he was "greatly influenced by constitutional doubts" but that the case did "not require a decision as to whether any establishment of administrative censorship could be constitutional."⁴⁰¹ His doubts centered on the "suggestion that Congress

390 Mulroy, *supra* note 361, at 874.

391 Kronhausen, *supra* note 371, at 18.

392 *Id.* at 150.

393 See authorities cited in concurring opinion of Judge Desmond in *People v. Richmond County News*, 9 N.Y.2d 578, 175 N.E.2d 681, 687.

394 *Supra* text at note 368.

395 And, it may be observed, different from the approach of many moralists and theologians. 1960-61 *Church-State Survey*, *supra* note 3, at 688.

396 Kronhausen, *supra* note 371, at 18.

397 Several states have already limited the meaning of obscenity under their statutes to "hard-core" pornography. *E.g.*, *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 383 P.2d 152 (1963); *Attorney General v. Tropic of Cancer*, 345 Mass. 11, 184 N.E.2d 328 (1962); *People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 175 N.E.2d 681 (1961). *But cf.* *State v. Andrews*, 150 Conn. 92, 186 A.2d 546 (1962); *Monfred v. State*, 226 Md. 312, 173 A.2d 173 (1961), *cert. denied*, 368 U.S. 953 (1962); *State v. Chobot*, 12 Wis.2d 110, 106 N.W.2d 286 (1960), *appeal dismissed*, 368 U.S. 15 (1961).

398 The meaning of "hard-core pornography" in spite of the analysis by the Kronhausens is not free from conceptual difficulties. See the opinions of Judges Proctor and Jacobs in *State v. Hudson County News Co.*, 41 N.J. 247, 196 A.2d 225, at 228 and at 235 (1963).

399 See *Halsey v. New York Soc. for the Suppression of Vice*, 234 N.Y. 1, 136 N.E. 219, 220 (1922).

400 370 U.S. 478, 497 (1962).

401 *Id.* at 499.

may constitutionally authorize any process other than a fully judicial one."⁴⁰²

Two other post office cases of interest were decided within the period under study. *Kahm v. United States*⁴⁰³ presents the interesting question of whether a defendant can be convicted for mailing advertisements of a book that is not obscene. Defendant had lifted the most vivid passages from *Peyton Place* and other books. The court held that since defendant had seen to it "that his readers are not subjected to any book as a whole," in finding him guilty there was no need for the jury to consider the "dominant theme of the material taken as a whole."⁴⁰⁴ Since only the advertisement was under consideration the government was not required to call witnesses to testify regarding the book. The decision requires the publisher for his own safety either to mail the whole book or to advertise the contents with more discrimination. The court's willingness to hold those interested in such commercial exploitation to a higher standard is clearly justifiable.

In *United States v. Darnell*⁴⁰⁵ the court held that a private letter written to a married woman discussing the writer's homosexual relations with her husband was "at least filthy" if not obscene.⁴⁰⁶ If the case stands for the proposition that "filthy" means something other than obscene it creates a needlessly confusing dual standard.⁴⁰⁷ What is more disturbing is the possibility that the law is compensating the wife for an injury to the marital relation or punishing the writer for the homosexual relations and not for a communication which, if given orally by phone or face-to-face, would not have been actionable.

Paul and Schwartz have suggested that all determinations of censorship should be left to the courts.⁴⁰⁸ The post office should confine itself to the initial investigation and the recommendation of prosecution to the Justice Department.⁴⁰⁹ Failing this, they advise that administrative discretion should be more severely limited.⁴¹⁰ A beginning would be to require the hearing examiner to take expert testimony which of all the safeguards "seems the easiest to provide and the least disruptive of the adjudicative process."⁴¹¹

The inherent dangers of casual prior restraint,⁴¹² which motivated these critics of postal censorship, prompted the Supreme Court in *Bantam Books, Inc. v. Sullivan*⁴¹³ to declare unconstitutional the informal system of censorship conducted by the Rhode Island Commission to Encourage Morality in Youth. Justice Brennan described the Commission as voluntary and nongovernmental, but observed that in practice it acted with an air of official authority since it would circulate lists of undesirable books with the thinly veiled threat that the prosecutor would deal with any book dealer who sold them. The work of the Commission was procedurally defective in that the publisher or distributor was not entitled to notice and hearing. Justice Brennan reminded the Rhode Island legislators, whose mandate to the Commission was vague and uninformative, that administrative determinations of obscenity have been upheld only where they have "operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint."⁴¹⁴

Bantam Books now takes its place with *Marcus v. Search Warrant*⁴¹⁵ as a

402 *Id.* at 519.

403 300 F.2d 78 (5th Cir. 1962).

404 *Id.* at 83.

405 316 F.2d 813 (2d Cir. 1963) *aff'd per curiam*.

406 *Id.* at 814.

407 49 IOWA L. REV. 552, 559 (1964).

408 Paul & Schwartz, FEDERAL CENSORSHIP OBSCENITY IN THE MAIL 136-37 (1961).

409 *Id.* at Part V, Ch. 7.

410 *Id.* at Part V, Ch. 8.

411 58 N.W. U.L. REV. 664, 684 (1963).

412 *E.g.*, *K. Gordon Murray Productions, Inc. v. Floyd*, 217 Ga. 784, 125 S.E.2d 207, 209 (1962).

413 372 U.S. 58 (1963).

414 *Id.* at 70.

415 367 U.S. 717 (1961).

warning to those more zealous to suppress and impound than to advise and hear.⁴¹⁶ Unfortunately, Mr. Justice Brennan does not explain with sufficient specificity the requirements for acceptable administrative censorship.⁴¹⁷ The remark that law enforcement officers may maintain "informal contacts" with suspected violators for the purpose of giving "legal advice" restores ambiguity to this area of the law.⁴¹⁸ The danger remains that even advice will restrain "because of its aura of legal sanction."⁴¹⁹ Finally, the Court's failure to strike down the statute (only the "activities" and the "informal system of censorship" are declared unconstitutional) may serve to encourage other such procedurally inadequate statutes for the ostensible purpose of "advice."

4. Interpreting the Definition — *Shifting Responsibility*.

We have noted that a fully matured hard-core pornography test could result in a shift of effective fact-finding from the jury to the judge. The primary reason for this is the test's built-in libertarian bias in favor of free circulation except for the "sexually morbid, grossly perverse and bizarre."⁴²⁰ It may be predicted that jury verdicts will be rejected for failure to distinguish between pornography and hard-core pornography, the perverse and the grossly perverse, the offensive and the patently offensive.

Harlan in his *Roth*⁴²¹ and *Manual Enterprises*⁴²² opinions has provided the stimulus for an increasing number of courts to announce the inescapable duty of the trial court judge and of the reviewing court⁴²³ to decide independently of the jury the issue of obscenity.⁴²⁴ Harlan maintains that the issue is not merely one of fact "but a question of constitutional judgment of the most sensitive and delicate kind."⁴²⁵ Dean Joseph O'Meara, on the other hand, has observed that the fact of obscenity is the kind of fact juries have always decided.⁴²⁶ One might suppose

416 *United States v. Peisner*, 311 F.2d 94 (4th Cir. 1962); *State v. Hudson County News Co.*, 41 N.J. 247, 196 A.2d 225 (1963).

417 *Compare William Goldman Theatres, Inc. v. Dana*, 405 Pa. 83, 173 A.2d 59 (1961), with *City of Atlanta v. Columbia Pictures Corp.*, 218 Ga. 714, 130 S.E.2d 490 (1963).

418 372 U.S. 58, 71-72 (1963).

419 49 IOWA L. REV. 161, 168 (1963).

420 *People v. Richmond County News*, 9 N.Y.2d 578, 216 N.Y.S.2d 369, 175 N.E.2d 681, 686 (1961).

421 *Roth v. United States*, 354 U.S. 476, 496-508 (1957).

422 *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 479-95 (1962).

423 Although Justice Harlan spoke only of the duty of the reviewing court, the extensions to the trial court judge have been made. The theory would seem to be that if the question of law in a mixed fact and law issue is sufficient to be dispositive on review it necessarily requires a ruling by the judge below. See 12 BUFFALO L. REV. 369, 377-78 (1963) where it is argued that "obscenity is a fact question at the trial level and only becomes a mixed question on appeal."

424 *E.g.*, *State v. Hudson County News Co.*, 41 N.J. 247, 196 A.2d 225, 230 (1963); *People v. Fritch*, 13 N.Y.2d 118, 192 N.E.2d 713 (1963).

425 *Roth v. United States*, 354 U.S. 476, 498 (1957).

426 Dean O'Meara's spirited defense of final jury determinations in obscenity cases has not been reduced to a published article. A survey of the scant literature on the subject of the jury's role in obscenity cases reveals the importance to the profession of such an article. This is especially true in view of the present trend away from effective fact-finding by the jury in obscenity cases. At one time the function of the jury as triers of the fact of obscenity was unquestioned. *Compare Zeitlin v. Arnebergh*, 383 P.2d 152 (1963) with *People v. Pesky*, 254 N.Y. 373, 374, 173 N.E. 227 (1930) wherein the Court of Appeals in a *per curiam* opinion said:

If those charged with the duty to pass judgment upon the facts might say not unreasonably that the book sold by the defendant was obscene, lewd or indecent beyond a reasonable doubt (Penal Law, § 1141), we are not at liberty to substitute our judgment for theirs, or to supersede their function as the spokesmen of the thought and sentiment of the community in applying to the book complained of the standard of propriety established by the statute.

A different question would be here if we could say as a matter of law that the writing is so innocuous as to forbid the submission of its quality to the triers of facts. We cannot say that here.

that the question of the insanity of Jack Ruby involves a "fact" at least as constitutionally significant, at least as "sensitive" and "delicate," as the question of the obscenity of *Pleasure Was My Business*.⁴²⁷ Moreover, whatever arguments could be advanced for the judge's determination of insanity because of the jury's lack of competence cannot be advanced in obscenity cases which necessarily involve an inquiry into "community" and "average person" standards.⁴²⁸

In some cases the shift from jury to judge seems to be a by-product of the statutory nature of the proceeding. Thus in a Kansas in rem proceeding the court overruled an objection that a statute authorizing destruction of obscene books was unconstitutional because it did not provide for jury trial.⁴²⁹ Thus also, in a New York declaratory judgment action the court ruled that the action could be maintained because obscenity presented a special variety of a law issue.⁴³⁰ The court somewhat confusingly suggested that since a fact issue was also present it would be possible to submit the question of obscenity to an advisory jury.⁴³¹ In a subsequent New York criminal case language from this declaratory judgment decision was cited out of context for the broad conclusion that the "obscenity of a particular book is a question of law."⁴³² The court then proceeded to find reversible error for the trial court's refusal to find the book not obscene as a matter of law.⁴³³

Judge Kiley has remarked that the Supreme Court in *Manual Enterprises* "had no alternative to justifying the mailing of *MANual*, *Trim* and *Grecian Guild Pictorial*" given the current state of our community standards.⁴³⁴ But the difficulty with this assessment is that it assumes that "community standards" are the same in every part of the United States at any given time, that all that was necessary was for the Supreme Court to look out of its own "windows" to see "what we were accepting as pleasing entertainment."⁴³⁵ In fact the diverse results returned by juries in obscenity cases indicate the contrary. Lockhart and McClure have objected to final jury determinations precisely because they tend to apply local community standards.⁴³⁶ It may be doubted that this objection can be overcome by resort to increased use of controversial instructions to apply national community standards or to give weight to this literary expert or to that psychologist because jurors invariably believe that the "average person in the community" thinks the way they do.⁴³⁷ Thus the supposed desirability of national uniformity of decisions contributes to the shift from jury to judge, from an unreviewable finding of fact to a reviewable question of law.⁴³⁸

427 *Tralins v. Gerstein*, 151 So. 2d 19 (Fla. 1963).

428 *Halsey v. N.Y. Society for the Suppression of Vice*, 234 N.Y. 1, 136 N.E. 219 (1922) (Censorship should not be "intrusted to men of one profession, of like education and of similar surroundings. Far better than we, is a jury drawn from those of varied experiences, engaged in various occupations, in close touch with the currents of public feeling, fitted to say whether the defendant had reasonable ground to believe that a book such as this was obscene or indecent."); *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N.E.2d 840, 844-45 (1945) (The test of obscenity is the effect it has in the community on "sex and sexual desire. . . . [I]t would seem that a jury of the time and place, representing a cross section of the people, both old and young, should commonly be a suitable arbiter.")

429 *State v. A Quantity of Books*, 191 Kan. 13, 379 P.2d 254 (1963), *prob. juris. noted*, 375 U.S. 919 (1963). The Supreme Court may take this opportunity to clarify the proper role of the jury in obscenity cases.

430 *Bunis v. Conway*, 17 App. Div. 2d 207, 234 N.Y.S.2d 435 (1962).

431 See excellent discussion of this case in 12 *BUFFALO L. REV.* 369, 379-83 (1963).

432 *People v. Fritch*, 38 Misc. 2d 333, 236 N.Y.S.2d 706, 708 (Onondaga County Ct.). See critique in 12 *BUFFALO L. REV.* 369, 379-83 (1963).

433 *Id.* at 709.

434 Kiley, "Obscenity and the Supreme Court," *The Critic*, Oct.-Nov. 1963, p. 46, 48.

435 *Ibid.*

436 Lockhart & McClure, *Censorship of Obscenity: the Developing Constitutional Standards*, 45 *MINN. L. REV.* 5, 109-10 (1960).

437 Wilson, *supra* note 350 at 525, 527.

438 This uniformity is said to be required by the first amendment. Thus in *State v. Hudson County News*, 41 N.J. 247, 196 A.2d 225, 235 (1963) the court said: "If a publication comes within the protected area, it cannot be suppressed any place where the First Amend-

The significance of this trend for religious values in contemporary America lies in the apparently irreversible character of the judicial precedents which, under the apprehension of "following" community standards, in fact ultimately *form* them. This would seem to be an inevitable result of a jurisprudence which deprecates the role of the jury in cases involving outcome-determinative "public attitudes, impulses and aspirations"; for then "the judge is at sea without a compass on a starless night."⁴³⁹

IV. FREE EXERCISE

A. THE FUNDAMENTAL CONFLICT

That there will always be occasions for conflict between the individual's free exercise of his religious beliefs and the state's interest in the health, safety and welfare of its citizens is a fact etched deeply in the history of church-state relations. It is equally true that an added source of inevitable conflict will exist in a pluralistic society dedicated to the proposition that the state can pass no laws "which aid one religion, aid all religions, or prefer one religion over another."⁴⁴⁰ In this Survey we shall be interested in considering the current state of that conflict with its several nuances in order to discover its presuppositions and its implications.

Perhaps the most obvious development, and yet for that reason the most difficult to perceive, is the changing nature of the conflict. The significance of the free exercise of religion as a constituent principle of American law is intimately related to the secular history of these several states. It should not be surprising that "freedom of religion" has meant one thing when our national commitment was Protestant, another when the influx of late nineteenth century Catholic immigrants changed the commitment to one more broadly Christian, and yet another when the articulate Jewish citizenry transformed it to Judaeo-Christian.⁴⁴¹ As each faith took its place in what Professor Rodes has called the "defining consensus" in American Society⁴⁴² it tended on the one hand to conform its institutional and liturgical forms to those consistent with the shared national commitment while at the same time it increasingly joined in rudimentary ceremonial observances under secular auspices designed to demonstrate the fraternal union fashioned by the new consensus.⁴⁴³

It has always been the lot of those religionists outside of the consensus to utilize with limited success the free exercise clause as a defense against compelled participation or prejudicial nonparticipation in these observances. Most recently, adherents of the Jewish faith, laying claim to membership in the defining consensus, have sought to eradicate "nonsectarian" observances thought to be relics from the days of Christian commitment.⁴⁴⁴ *Engel v. Vitale*, it can be argued, is at once an ac-

ment guarantee is in effect." But the first amendment does not protect material which is obscene as determined by jurors who will invariably apply local, even *personal* standards. Accordingly, the first amendment does not compel uniformity. Of course local censorship based upon prior restraint collides with the first amendment's national command precisely because the proscribed material, not as yet judicially determined to be obscene, remains protected. For a general discussion of the first amendment as applied to prior and post restraints see Kauper, *supra* note 361. See also the concurring opinion of Chief Judge Desmond in *People v. Fritch*, 13 N.Y.2d 119, 192 N.E.2d 713, 719 (1963): "Of course a jury cannot repeal the First Amendment but when a jury (as here) makes a finding of obscenity as to material not unreasonably deserving that epithet, there can be no violation of the Constitution."

439 O'Meara, *Natural Law and Everyday Law*, 5 NATURAL L. F. 83, 92 (1960).

440 *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

441 Rodes, *The Passing of Nonsectarianism — Some Reflections on the School Prayer Case*, 38 NOTRE DAME LAW. 115, 126 (1963).

442 *Ibid.*

443 For a general discussion of free exercise of religion in the United States, together with a recounting of the historical background, see Fernandez, *The Free Exercise of Religion*, 36 SO. CAL. L. REV. 546 (1963).

444 Pfeffer, *CHURCH, STATE, AND FREEDOM* 395 (1953), commenting on *Doremus v. Board of Education*, 5 N.J. 435, 75 A.2d 880 (1950): "Aside from the differences between the Protestant and Catholic versions of the Lord's Prayer, it would seem that characterizing the Lord's Prayer as nonsectarian constitutes a cavalier disregard of the conviction of adherents

knowledge of their asserted claim upon the consensus and an implicit mandate to enlarge the ceremonial manifestations of our national commitment to reflect properly the broadened consensus.⁴⁴⁵ Under this view *Engel* can be read as validating the "consensus" credentials of the Jewish faith⁴⁴⁶ much as *Torcaso v. Watkins*⁴⁴⁷ can be understood as a similar validation for nontheists. In short, the consensus as defined in theory by the Supreme Court now clearly includes non-Christian, nontheist religionists. The free exercise of their religion is now legally protected from discriminatory legislative graces and official rituals attuned to the old national commitment. Hereafter they will have the problem of implementation and accommodation, not the problem of recognition and protection.

This is not to suggest that the problems remaining for those of the Jewish faith or of a nontheist cult will forthwith be resolved. On the contrary, the aftermath of *Brown v. Board of Education*⁴⁴⁸ has made it abundantly clear that a new *de facto* consensus cannot be created by judicial fiat. There will be more "school prayer" litigation by Jews and more "conscientious objector" litigation by nontheists, both of which will be greeted by accusations of atheism or worse.⁴⁴⁹

Nevertheless, it would be a mistake to minimize the significance of these new developments in the law. For the Jew and the nontheist it means that the nature of the conflict to attain free exercise of their religion has changed. The Court has in effect extended to them *de jure* recognition as part of the defining consensus. Hereafter the Sabbatarian can expect a court of law to protect him from an unreasonable discrimination and the nontheist conscientious objector can expect similar fairness in seeking a draft exemption.

We must look elsewhere for the really problematic free exercise cases. These will not involve government-sponsored ceremony as in the prayer cases nor dogma as in the conscientious objector cases. Rather they will concern the historic attempts of religionists outside the *de jure* as well as the *de facto* consensus freely to exercise their religion in the face of inhibiting police regulations. In this category we will find the now familiar problems of the Muslims, Christian Scientists, Jehovah's Witnesses and the Amish. Having identified their claims as those of the historic "outsider," it is necessary to observe that their free exercise litigation may differ markedly from those of the past. A judiciary, in our day more sensitive to the rights of minorities⁴⁵⁰ and to the implications of ecumenicism,⁴⁵¹ will probably hear their grievances with a new sympathy for the alienated. Conformity with the consensus will not be demanded as an implicit precondition for standing or redress:

of the Jewish faith." Pfeffer's position is set out in more detail and is sympathetically analyzed in Rodes, *supra* note 441 at 117-18. Some members of the Jewish faith have expressed the fear that this eradication of nonsectarian government-sponsored prayer may have the undesirable long-term effect of damaging the "hallowed rituals of this land, that symbolically express our conviction in the numinous reality of God." Tenth Judicial Circuit Conference, 34 F.R.D. 29, 54 (1964).

445 In contrast for example to the "consensus" implications of the Sunday Closing Law Cases of *Braunfeld v. Brown*, 366 U.S. 599 (1961), and *Gallagher v. Crown Kosher Market*, 366 U.S. 617 (1961).

446 Pfeffer apparently regards *Engel* as a complete victory for his own position. See Rodes, *supra* note 441 at 117, n. 7, commenting on Pfeffer, *Court, Constitution and Prayer*, 16 RUTGERS L. REV. 735 (1962).

447 367 U.S. 488 (1961). In this case the Court held that a Maryland religious test for public office, requiring an affirmation of belief in God, was an unconstitutional invasion of *Torcaso's* freedom of belief and religion.

448 347 U.S. 483 (1954).

449 For example in conscientious objector cases many draft boards apparently feel that nontheism is inconsistent with the statutory requirement for "sincerity." Father Conklin thinks that the requirement of belief in a Supreme Being is a test of "sincerity" and not an unreasonable one at that. Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252, 279 (1963).

450 *Sherbert v. Verner*, 374 U.S. 398 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Baker v. Carr*, 369 U.S. 186 (1963); *Brown v. Board of Education*, 347 U.S. 483 (1954).

451 Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419 (1964).

that the ostracized Black Muslim be tolerant of whites; that the Christian Scientist or the Jehovah's Witness, stubbornly committed to another life, be astute to prolong this one; that the Amish, totally involved in their religion, be willing to settle for less for their children.⁴⁵²

The dynamism of the free exercise clause in the years ahead will derive from a new approach by the Supreme Court to the recurring conflict between religious practices and police regulations. No longer will the operative presupposition be that those outside the consensus must accommodate religion to regulation. Rather, under the new dispensation the Court will seek increasingly to accommodate the state's statute to the church's stricture. *Sherbert v. Verner*,⁴⁵³ the most significant free exercise case decided in the two years since our last Survey, may signal the start of this new era in church-state relations.⁴⁵⁴

B. PUBLIC HEALTH AND WELFARE.

1. Welfare Legislation.

In *Sherbert v. Verner*⁴⁵⁵ a Seventh Day Adventist took her claim for unemployment compensation to the Supreme Court after the courts of South Carolina had determined that her refusal to work from sundown Friday until sundown Saturday had made her unavailable for work within the meaning of the unemployment compensation statute.⁴⁵⁶ The decision below was based on several considerations.⁴⁵⁷ The statute, since it did not refer to particular days, was read to require availability for work on Saturday if required by one's usual trade or occupation.⁴⁵⁸ Complementing this interpretation was decisional law⁴⁵⁹ which, in general, stated the broad principle that one may not attach restrictions or conditions to availability merely because of one's particular needs or circumstances.⁴⁶⁰ Thus appellant exercised an uncoerced personal choice of her religion and of her trade or occupation, which choice had the incidental effect of rendering her unavailable. Nor was there "good cause" for her termination of employment since her religious commitment did not arise out of her work and since any supposed risk to her morals did not derive from the character of the work.⁴⁶¹

Mr. Justice Brennan, writing for the Court and reversing the Supreme Court of South Carolina, held that an otherwise valid law which has the indirect discriminatory effect of impeding the observance of one's religion is invalid absent a showing of the impossibility of an unobjectionable alternative regulation.⁴⁶² *Brauhfeld v. Brown*,⁴⁶³ the Sunday Closing Law case, was cited as authority for this holding.⁴⁶⁴ Neither can it be said that a state may attach conditions upon public benefits which operate to inhibit the free exercise of religion,⁴⁶⁵ nor can it be argued that by the removal of such a discriminatory condition the state is establishing a religion.⁴⁶⁶ Mr. Justice Douglas in a concurring opinion also rejected the

452 1960-61 Church-State Survey, *supra* note 3, at 710-17.

453 374 U.S. 398 (1963).

454 See comment by Rabbi Gilbert in Tenth Judicial Circuit Conference, 34 F.R.D. 29, 57 (1964): "[T]he Court, in its last decisions, both in the Murray and Schempp Case and the South Carolina Sabbatarian Case [*Sherbert*] has developed . . . an exciting new concept, that of 'wholesome neutrality.'"

455 374 U.S. 398 (1963).

456 S.C. Code § 68-113 (1952).

457 *Sherbert v. Verner*, 240 S.C. 286, 125 S.E.2d 737 (1963).

458 *Id.* at 742.

459 Unemployment Compensation Comm'n v. Tomko, 192 Va. 463, 65 S.E.2d 524 (1951); *Kut v. Albers Super Markets, Inc.*, 146 Ohio St. 522, 66 N.E.2d 643 (1946), *appeal dismissed*, 329 U.S. 827 (1946).

460 *Sherbert v. Verner*, 240 S.C. 286, 125 S.E.2d 737, 741-42 (1963).

461 *Id.* at 743-44.

462 *Sherbert v. Verner*, 374 U.S. at 403-10.

463 366 U.S. 599 (1961).

464 *Sherbert v. Verner*, 374 U.S. at 403.

465 *Id.* at 405.

466 *Id.* at 409.

argument based upon the establishment clause. He observed that the benefits would be paid to the woman as an unemployed worker, not as a Seventh Day Adventist, therefore granting no more benefit to that religion than would result from a salary paid to a co-religionist as a public employee.⁴⁶⁷ Mr. Justice Douglas contended that the position taken by the Court amounted to a retreat from the unfortunate teaching of *Braunfeld* "that a majority of a community can, through state action, compel a minority to observe their particular religious scruples so long as the majority's rule can be said to perform some valid secular function."⁴⁶⁸

Mr. Justice Stewart, also concurring, renewed the attack on the "establishment" argument. The legitimate free exercise of religion should not be frustrated by a "sterile construction of the Establishment Clause."⁴⁶⁹ In the past, Justice Stewart recalled, the Court has been "insensitive" in its interpretation of the free exercise clause, witness *Braunfeld*, and "wooden" in its construction of the establishment clause, witness *Engel*.⁴⁷⁰ After today's decision it should be understood that the "Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief."⁴⁷¹

In dissent Mr. Justice Harlan, in an opinion in which Mr. Justice White joined, returned to the reasoning of the South Carolina Supreme Court. The purpose of the act was to tide people over when work was not available. Clearly there was "no intent to provide relief for those who for purely personal reasons were or became *unavailable for work*."⁴⁷² Effectuation of the Court's holding, Justice Harlan predicted, will create difficulties in the administration of the act on a case-by-case method which the majority does not appreciate.⁴⁷³ It would be impossible to classify those unemployed because of religious convictions according to a distinction between "productive" and "nonproductive" religionists, between Tuesday unavailability and Saturday unavailability.⁴⁷⁴ Mr. Justice Harlan observed that the holding overrules *Braunfeld* because, if anything, the secular purpose is clearer here, the burden upon religion more remote.⁴⁷⁵ Finally, he expressed substantial agreement with Mr. Justice Stewart insofar as he described the Sabbatarian exemption as an "accommodation," not a constitutionally compelled carving, which departed from the *Schempp*⁴⁷⁶ principle of "neutrality."⁴⁷⁷ Such a departure, he felt, was needless here where the burden on religion was remote and the financial aid to a religion apparent.⁴⁷⁸ It is submitted that *Braunfeld* can be distinguished from *Sherbert*. In *Braunfeld* the Court was satisfied that there was no alternative regulation which would effectuate the secular purpose of the Sunday Closing Law without indirectly burdening Sabbatarians.⁴⁷⁹ In *Sherbert*, on the other hand, Justice Brennan observed that there had been no showing of the impossibility of an alternative regulation which would not infringe upon first amendment rights.⁴⁸⁰ Still, it is necessary to account for the striking difference "in the respective attitudes with which each Court approached the balancing test."⁴⁸¹ The *Sherbert* Court "applied the balancing test only after clearly pointing out that only the most compelling and vital state interest could justify a statute which indirectly infringed

467 *Id.* at 411-12.

468 *Ibid.*

469 *Id.* at 414.

470 *Ibid.*

471 *Id.* at 415-16.

472 *Id.* at 419.

473 *Id.* at 420-21.

474 *Ibid.*

475 *Id.* at 421.

476 *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

477 *Sherbert v. Verner*, 374 U.S. at 422.

478 *Id.* at 423.

479 32 GEO. WASH. L. REV. 387, 392 (1963) (*Braunfeld* not necessarily overruled); 25 U. PITT. L. REV. 91, 94 (1963) (*Braunfeld* not overruled).

480 *Sherbert v. Verner*, 374 U.S. at 407.

481 28 ALBANY L. REV. 133, 137 (1964).

appellant's religion."⁴⁸² All the talk in the opinions⁴⁸³ about a departure from the *Schempp* principle of "neutrality" and about a new spirit of "accommodation" is at least suggestive of the aforementioned new dynamism of the free exercise clause.⁴⁸⁴ Similarly, it can be argued that *Sherbert* puts to rest the "religion-blind" thesis⁴⁸⁵ propounded by Professor Kurland: "The freedom and separation clause should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden."⁴⁸⁶ Far from being "religion-blind," the Court has shown itself to be highly sensitive to the needs of a minority religionist occupying a position outside the consensus.⁴⁸⁷ If this is neutralism, it is the affirmative kind suggested by Mr. Justice Stewart, not the negative sort advocated by Professor Kurland.⁴⁸⁸

Sherbert is perhaps most significant in that it appears to achieve the maturation of the free exercise clause. Consider this pre-*Sherbert* analysis by a federal district court: "While extreme vigilance appears to be the rule in connection with the 'establishment' clause . . . the recent Sunday Closing Law cases indicate a much greater willingness on the part of the Court to defer to the wisdom of the states in matters involving the 'free exercise' clause."⁴⁸⁹ After *Sherbert* it cannot be maintained that the free exercise clause waits upon the secular purpose of legislation⁴⁹⁰ nor, for that matter, that it is subordinate to the establishment clause.⁴⁹¹

2. Public Health.

While *Sherbert* is a prime example of "judicial" accommodation of legislation to a religious tenet, it is clear that at times the legislature itself has been even more willing to accommodate. Witness the "immunities from police regulation" enjoyed by religious minorities "to which they have thus far been given no constitutional claim."⁴⁹² For example, a New Jersey statute provides that parents shall not be denied the right to treat or provide treatment for an ill child "in accordance with the religious tenets of any church."⁴⁹³ In *State v. Perricone*⁴⁹⁴ the court was confronted with the question of whether this provision was dispositive in an action

482 *Id.* at 138.

483 *E.g.*, *Sherbert v. Verner*, 374 U.S. at 415, 421-22.

484 Cf. text accompanying notes 452-54 *supra*.

485 The apt description was used by Pfeffer in a book review of Kurland's *RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT* (1962). Pfeffer may very well have "put to rest" Kurland's thesis even before the *Sherbert* Court. After detailing numerous situations in which Kurland's absolute would be impractical, Pfeffer concluded wryly: "Perhaps the reader may want to amuse himself by thinking up other instances in which application of the Kurland imperative would wreak havoc with existing practices and patterns." 15 *STAN. L. REV.* 389, 406 (1963).

486 Kurland, *RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT* 112 (1962).

487 One wonders just how sensitive the Court intends to be toward the minority religionist. Would a Muslim worker in a slaughterhouse who has religious scruples about slaughtering animals on Friday come within the *Sherbert* rationale? *Sherbert v. Verner*, 374 U.S. at 420, n.2. See Rabbi Gilbert's comment about Israel's three Sabbaths: Muslim, Jewish and Christian — Friday, Saturday and Sunday — in Tenth Judicial Circuit Conference, 34 *F.R.D.* 29, 53 (1964).

488 Kurland has reconciled the result in *Engel v. Vitale* with his thesis. Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."*, *SUPREME CT. REV.* 1, 32 (1962). However, it would seem impossible to achieve a similar reconciliation of the result in *Sherbert*.

489 *Williford v. People*, 217 F. Supp. 245, 250 (N.D.Cal. 1963).

490 Moore, *The Supreme Court and the Relationship Between the "Establishment" and "Free Exercise Clause,"* 42 *TEXAS L. REV.* 142, 145 (1963).

491 *Id.* at 185; see generally Pfeffer, *Some Current Issues in Church and State*, 13 *W. RES. L. REV.* 9, 32 (1961).

492 Rodes, *supra* note 441 at 127.

493 *N.J. STAT. ANN.* § 9:6-1.1 (1960).

494 37 *N.J.* 463, 181 *A.2d* 751 (1962), *cert. denied*, 371 U.S. 890 (1962).

charging Jehovah's Witnesses with neglecting their infant son in refusing to grant permission for necessary blood transfusions.

Although the child had died, the appellate court did not dismiss the case as moot. The court discounted the legislature's desire to accommodate the "religious tenets" of the parents and ruled that the parents had indeed been neglectful.⁴⁹⁵ Therefore, the appointment of a guardian for the purpose of consenting to the transfusions was a proper application of the common law doctrine of *parens patriae*.⁴⁹⁶ Citing *Prince v. Massachusetts*⁴⁹⁷ and *Cantwell v. Connecticut*,⁴⁹⁸ the court said that the religious principle requiring inaction must give way when the child is in "immediate and present danger."⁴⁹⁹ The New York Court of Appeals has reached a similar result in a recent case involving the meaning of "neglected" within the terms of the Family Court Act.⁵⁰⁰ The act defines a neglected child as one who is not adequately supplied with medical or surgical care by its parents.⁵⁰¹ Unlike the New Jersey statute, the Family Court Act appears to contemplate parental behavior clearly short of criminal neglect and by its terms would seem to justify a resort to vicarious consent in blood transfusion cases.⁵⁰²

It has been suggested that the control over children "for the protection of their health by the state seems almost limitless."⁵⁰³ Moreover, the cases support the state's right, even in the absence of an emergency, upon a showing that "the health, limb, person or future of the child be in jeopardy."⁵⁰⁴ This result is usually justified by the principle that while parents may be free to become martyrs themselves, they are not equally free in identical circumstances "to make martyrs of their children before they have reached the age of full and legal discretion."⁵⁰⁵ However, the argument for disregarding the religious beliefs of the parents becomes less convincing where the legislature has provided an exemption in deference to the free exercise clause, or where there is no "emergency" or no imminent danger to public health.⁵⁰⁶

One commentator has remarked that "it is obvious that the [*Perricone*] court properly exercised its power, since the treatment offered a substantial benefit to the child without a significant detriment to his health or longevity."⁵⁰⁷ This comment illustrates the dangers in a balancing test, concededly necessary in these cases, which omits from the data to be weighed a regard for the religious interests involved. In a proper case these interests may not be exclusively those of the parents. The salvation or damnation of the infant's soul, quite apart from his consent, may depend upon the doing of certain things to the body of the infant. This is the reason why Catholic parents are always anxious to secure an early baptism of their infant. It may be that, from the point of view of the child's religious interests, freedom from "blood-eating" is as important to the Jehovah's Witness as infant baptism is to the Catholic. Thus extreme sensitivity to the gravamen of the parents' religious objection — violation of a religiously compelled parental duty or danger to the child's soul — would seem to be essential to an acceptable balancing test.⁵⁰⁸ Such an approach would minimize the necessity of passing upon the reasonableness of the particular religious tenet.

495 *Id.* at 759.

496 *Id.* at 758.

497 321 U.S. 158 (1944).

498 310 U.S. 296 (1940).

499 *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962).

500 *In the Matter of Santos*, 16 App. Div. 2d 755, 227 N.Y.S.2d 450 (1962).

501 N.Y. FAMILY COURT ACT § 312 (1963). The act defines a neglected child as one who is not adequately supplied with medical or surgical care by its parents.

502 *Ibid.*

503 12 DE PAUL L. REV. 342, 346 (1963).

504 *Id.* at 345.

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

506 1960-61 *Church-State Survey*, *supra* note 3, at 712-13.

507 24 U. PITT. L. REV. 642, 646 (1963).

508 *Cf.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925): "The child is not the mere

While this analysis suggests that the volitional incapacity of the infant may not be determinative, it is not intended to minimize the importance of consent. Thus where the parents do not speak with one voice, the state should be free to order the necessary medical care.⁵⁰⁹ Thus also, where the subject is an adult, who in full control of his faculties refuses to consent to a blood transfusion, then it would seem incumbent upon a court to acquiesce in the individual's decision.⁵¹⁰ However, a reverence for human life would seem to require a showing that *involuntary* submission to a blood transfusion would be visited with the same grave spiritual deprivations as voluntary submission, that in either case the subject would violate a cardinal religious tenet which endangers the soul's salvation.

C. CONSCIENTIOUS OBJECTION.

If the greater sensitivity to the free exercise of religion, as espoused by the Supreme Court in *Sherbert*, will require in public health cases a difficult inquiry into the theological effects of involuntary submission, the reverse is true of conscientious objection cases under the Universal Military Training and Service Act.⁵¹¹ In the past the exemption has required a finding of religious training and belief in a Supreme Being on the theory that Congress would be justified "in refusing to defer to those individuals who merely invoke their own fallible judgment in opposition to that of the legislature; [but] less so with respect to those whose refusal to serve is based upon obedience to a power higher than that exercised by a mortal Congress."⁵¹² As we have pointed out in the discussion of the public health cases, a distinction based upon fear of eternal divine punishment is not unreasonable. However, in those cases the distinction is advanced as a basis for carving out an area of protected free exercise, whereas here it is insensitively used to narrow the exemptions based upon religious belief.

Thus it is not surprising in the wake of the new dynamism of the free exercise clause, as interpreted by *Sherbert*⁵¹³ and especially by the *Torcaso*⁵¹⁴ religious oath test case, that there should be expressions of doubt concerning the constitutionality of the "Supreme Being" limitation.⁵¹⁵ In *United States v. Jakobson*⁵¹⁶ the court observed that the policy behind the exemptions was the protection of the free exercise of religion. Given the teaching of *Torcaso*, that Congress may not "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs,"⁵¹⁷ the court ruled that Jakobson's religion of horizontal transcendence to Godness came within the statutory exemption.⁵¹⁸ A few months later the same court in *United States v. Seeger*⁵¹⁹ refused to extend the process of judicial evisceration of the "Supreme Being" requirement and declared flatly that the statutory classification was violative of the fifth amendment's due process clause.⁵²⁰

creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *But cf.*, 1960-61 *Church-State Survey*, *supra* note 3 at 712, n.539.

509 *Levitsky v. Levitsky*, 231 Md. 388, 190 A.2d 621 (1963) (at father's insistence the custody of children by mother was conditioned upon the right to give blood transfusions without mother's consent).

510 *Application of Georgetown College, Inc.*, 32 U.S.L. Week 2389 (D.C. Cir., Feb. 3, 1964).

511 62 Stat. 612 (1948), as amended 50 U.S.C. App. § 456(j) (1958).

512 *United States v. Seeger*, 326 F.2d 846, 852 (2d Cir. 1964).

513 *Sherbert v. Verner*, 374 U.S. 398 (1963).

514 *Torcaso v. Watkins*, 367 U.S. 488 (1961).

515 *Etcheverry v. United States*, 320 F.2d 873 (9th Cir. 1963) (court rejected suggestion that statute discriminated in favor of theists, indicating that it felt bound by prior decisions).

516 325 F.2d 409 (2d Cir. 1963).

517 *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

518 *United States v. Jakobson*, 325 F.2d 409, 416 (2d Cir. 1963).

519 326 F.2d 846 (2d Cir. 1964).

520 *Ibid.*

It may fairly be anticipated that the view taken by the *Seeger* court will ultimately be adopted by the Supreme Court. Any other result would be inconsistent with *Torcaso*.⁵²¹ Father Conklin, writing before the Second Circuit decided the *Seeger* appeal, has suggested that elimination of the belief in a "Supreme Being" requirement would amount to "validation of the atheist's claim to equal recognition and equal protection," would establish the absolute neutrality of the state, and would cause a "frustrated" Congress to "abolish the conscientious objector provisions entirely."⁵²² On the other hand, he has argued that retention of the requirement can be justified under Congress' war powers as a reasonably objective test of "sincerity" which effectively prevents "shirkers from avoiding their military duties."⁵²³

Father Conklin may have had in mind the Kurland "religion-blind" thesis when he spoke of the "dogma" of "absolute neutrality" triumphing in *Torcaso*.⁵²⁴ However that may be, the *Seeger* decision is surely not a victory for the "absolute neutrality" of the secular humanist, nor is it a vindication of Kurland's special kind of religion-blind indifferentism. Rather the case reveals an acute judicial awareness of the varieties of religious experience. The court observes that "today, a pervading commitment to a moral ideal is for many the equivalent of what was historically considered the response to divine commands."⁵²⁵

It is difficult to believe, as Father Conklin suggests, that the "belief in a Supreme Being" requirement was designed as a test of sincerity. That would be to attribute to Congress an undeserved naïvete. Congress does require in every case an independent finding of "sincerity" which is never satisfied by a mere affirmation of belief in a Supreme Being.⁵²⁶ It is not clear why Father Conklin should object to the enlargement of the exemption category to include nontheists.⁵²⁷ Such an expanded category would not be more difficult to administer because the big problems of administration in the past have centered upon detecting "shirkers"—the very kind of draftee who would falsely attest to a belief in a Supreme Being. There is no hard data to support the suggestion that such an enlargement will weaken our military establishment or will render ineffective the policing of the "sincerity" requirement. Nor is there any evidence that a politically realistic Congress will in frustration revoke all draft privileges heretofore granted to a consensus defined by theism.

The ministerial exemption,⁵²⁸ one of the most controversial in the light of *Torcaso*, is far from doomed.⁵²⁹ While this exemption will continue to provide difficulties in administration,⁵³⁰ Congress is not about to withdraw it, nor will the Supreme Court declare it unconstitutional unless Congress insists upon a narrowly theistic construction. In short, it is inaccurate to read *Torcaso* and its conscientious objector progeny as examples of new dogma of "absolute neutrality"⁵³¹ which will "wreak havoc with existing practices and patterns."⁵³²

Father Conklin's suggestion that the "Supreme Being" clause could be con-

521 Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252, 253 (1963).

522 *Id.* at 278, 282.

523 *Id.* at 280.

524 Conklin, *supra* note 521 at 278.

525 *United States v. Seeger*, 326 F.2d 846, 853 (2d Cir. 1964).

526 *United States v. Jakobson*, 325 F.2d 409, 416-17 (2d Cir. 1963).

527 Conklin, *supra* note 521 at 278. Apparently Father Conklin fears that such an enlargement will cause Congress in frustration to abolish the conscientious provision entirely to the great loss of the theist religionist. *Id.* at 282.

528 62 Stat. 611 (1948), 50 U.S.C. App. § 456(g) (1958).

529 *But see*, Conklin, *supra* note 521 at 252-53.

530 *E.g.*, *United States v. Stewart*, 213 F. Supp. 497 (D. Md. 1963); *United States v. Zasadni*, 206 F. Supp. 318 (W.D. Pa. 1962); *United States v. Willard*, 211 F. Supp. 643 (N.D. Ohio 1962).

531 Conklin, *supra* note 521 at 278.

532 Pfeffer, *supra* note 485 at 406.

strued as a legitimate exercise of the war power⁵³³ ignores the objection that the fifth amendment's due process clause is a bar to an unreasonable classification in war as in peace. It may be doubted that differentiating between theists and non-theists could aid the war effort by weeding out the shirker. On the other hand, a classification distinguishing religious convictions of the theist and the nontheist from philosophical, political, or economic motivations commends itself as a reasonable exercise of the war power. It is only the religiously motivated who can plead the policy behind the first amendment. Thus, a pacifist who can convince the draft board of his religious motivation may be entitled to an exemption. However, it does not follow that the religiously motivated pacifist may confuse privilege with right, may obstruct a civil defense drill⁵³⁴ or refuse to pay a portion of his income tax.⁵³⁵

In a context apart from the state's interest in peace and security under the war powers, we might expect the *Sherbert*⁵³⁶ spirit of accommodation to come to the aid of the conscientious objector. *In re Jenison*⁵³⁷ presented such a problem. Mrs. Jenison conscientiously objected to sitting on a jury in judgment on another human being contrary to the biblical exhortation: "Judge not, so you will not be judged." The trial court said that jury duty was "analogous to military duty in time of war" and to sanction disqualification for such reasons would be "to invite the erosion of every other obligation a citizen owes his community and his country."⁵³⁸ The Minnesota Supreme Court affirmed and the Supreme Court granted certiorari, then vacated and remanded the case for consideration in the light of *Sherbert*.⁵³⁹ The Minnesota Supreme Court, on reconsideration, *reversed* noting that there had been "an inadequate showing that the State's interest in obtaining competent jurors requires us to override Relator's right to the free exercise of her religion."⁵⁴⁰

Quite apart from the practical fact that compelled jury service in such a case would have a divisive and demoralizing influence on the other jurors,⁵⁴¹ and apart from the historical fact that such exemptions have been freely granted in the past,⁵⁴² the analogy to military service is far afield. The security of the nation is not threatened by Mrs. Jenison's religious scruple. Nor is it quite correct to describe the problem as involving an overriding interest in the free exercise of religion.⁵⁴³ Actually, both the state's interest in a fair trial and the individual's interest in religious freedom are best served by accommodating the legal duty to the moral obligation.

D. PRISONERS' FREEDOM TO PRACTICE RELIGION.

The most significant cases in this area involve the complaints of Black Muslim prisoners regarding alleged interferences by prison officials with their exercise of religion. Preliminarily, three questions arise which trouble the court: (1) Is Black Muslimism to be recognized as a "religion"? (2) If so, which of its activities entitled to protection under the first amendment survive the prison setting? (3) Finally, which determinations of prison officials should be reviewable and what findings of fact should be required?

533 Conklin, *supra* note 521 at 280.

534 State v. Congdon, 76 N.J. Super. 493, 185 A.2d 21 (1962).

535 United States v. Dr. Evans (D. C. Colo. 1963) Case noted at 123.28 of *Civil Liberties Docket* (Dec. 1963).

536 *Sherbert v. Verner*, 374 U.S. 398 (1963).

537 120 N.W.2d 515 (Minn. 1963).

538 *Id.* at 518.

539 375 U.S. 14 (1963).

540 Quoted at 112.26 of *Civil Liberties Docket* (Dec. 1963).

541 77 HARV. L. REV. 550, 551 (1964).

542 *Id.* at 552.

543 18 RUTGERS L. REV. 204, 207 (1963).

In *Williford v. People of California*⁵⁴⁴ a federal district court held that the State of California had the right to prohibit the exercise of the Black Muslim religion in the state prison pursuant to the maintenance of peace and order in the prison. The court noted that there had been an administrative determination that Black Muslimism was not a religion because their tenets of black supremacy, segregation and violent revolution deviated from true Islamic teachings.⁵⁴⁵ In acquiescing in this finding, the court explained that "the recent Sunday Closing Law cases indicate a much greater willingness on the part of the [Supreme] Court to defer to the wisdom of the states in matters involving the 'free exercise' clause."⁵⁴⁶ Further, it was said that the point was not crucial since even if Black Muslimism could be classified as a religion its activities could be prohibited for the sake of prison discipline.⁵⁴⁷ Total prohibition would be "substantially easier of enforcement" especially since a policy of separate investigations would lead to "continual harassment of the prison authorities by the Muslims."⁵⁴⁸

The position taken by the *Williford* court can be contrasted with that assumed in *Fulwood v. Clemmer*.⁵⁴⁹ In that case the court said that Black Muslimism is a religion entitled to equal treatment and absolute freedom of religious belief. "Nor is it the function of the court to consider the merits or fallacies of a religion or to praise or condemn it, however excellent or fanatical or preposterous it may be."⁵⁵⁰ The *Fulwood* court would seem to be authority for the proposition that a mere belief in a God is sufficient to support a finding of "religion."⁵⁵¹

A realistic evaluation of these cases must take notice of underlying factors which make a policy of accommodation to free exercise extremely difficult. The large proportion of Negroes in a prison may heighten the danger of a large-scale race riot. Black Muslimism is a target⁵⁵² and a breeding ground⁵⁵³ for prejudice. Therefore, given a significant number of Negroes in a prison, a tightly organized Muslim group will probably contribute to the potential for racial conflict. Finally, the fear of the *Williford* court that recognition would mean continual harassment of the prison authorities is reasonable in that the Muslims will undoubtedly utilize court victories over the white administrators to proselyte other inmates.

In the light of these facts it can be maintained "that any breach of discipline presents a 'clear and present danger' justifying severe repression" of the rights of speech, religion and assembly.⁵⁵⁴ However, the possibility that the activities of the Black Muslim will cause a "clear and present danger" does not justify repression or nonrecognition as a matter of policy even in the absence of a breach of discipline. Nor can any decisions of the Supreme Court justify a separate definition of religion for the purpose of making the administration of our prison system more efficient.⁵⁵⁵ In this connection *Fulwood's* liberal definition of religion is more in

544 217 F. Supp. 245 (N.D. Cal. 1963).

545 *Id.* at 247-48.

546 *Id.* at 250.

547 *Id.* at 251.

548 *Id.* at 251, n. 8.

549 206 F. Supp. 370 (D.D.C. 1962).

550 *Id.* at 373.

551 *Ibid.* But see, *Pierce v. La Vallee*, 212 F. Supp. 865, 869 (N.D.N.Y. 1962).

552 "[T]he Black Muslim Movement — strange, separatist, arrogant, anti-Christian, and Negro — is an extremely attractive target for prejudice." 62 COLUM. L. REV. 1488, 1491 (1962).

553 "[S]ince, in a country like this with a despotic anti-brother and anti-Muslim government, and in addition being inside the prison of the *enemy*, the more necessary it is to restrict the Muslim Brotherhood to persons who are sincere and going 'all the way.'" Excerpts from Muslim literature, with emphasis added, cited in *Pierce v. La Vallee*, 212 F. Supp. 865, 870 (N.D.N.Y. 1962).

554 62 COLUM. L. REV. 1488, 1502-03 (1962).

555 *Id.* at 1490-91. "As far as can be determined no state or municipal government has refused to recognize the status of the Black Muslims as a religious movement or declined to allow it the normal tax exemptions afforded churches and parochial schools. As of yet, the

accord with Supreme Court pronouncements than is the decision in *Williford*.⁵⁵⁶ Conceding the necessity for recognition of Black Muslimism as a religion,⁵⁵⁷ some attempt to distinguish between activities is desirable.⁵⁵⁸ It has been suggested that even private and contemplative activities may present serious discipline problems requiring broad proscription.⁵⁵⁹ However, it is not clear that reading a Muslim newspaper or even a Black Muslim version of the Koran could amount to a clear and present danger. In regard to impassioned sermons, the common law test of inciting to riot would seem to suffice as a constant check upon the more zealous.⁵⁶⁰ Finally, the importance of the religious interests involved and the constant possibility of prejudice would seem to require a factual foundation reviewable by the courts in every condemnation of a religious practice.⁵⁶¹

E. SUMMARY.

The free exercise cases in the period under study did not involve any notable clerical privilege cases, nor was there much litigation involving compulsory education⁵⁶² or religious peculiarities.⁵⁶³ There were some unusual cases which are difficult to categorize. In *Carr v. St. John's University*⁵⁶⁴ Catholic students were dismissed from the university for participating in a civil marriage which allegedly violated the promulgated requirement to conform to the ideals of Christian education.⁵⁶⁵ In holding that the action was within the unreviewable discretion of the university the court in effect decided the issue upon a fairly narrow but important procedural ground.⁵⁶⁶ If the gist of the complaint was interference by the university with the free exercise of complainants' Catholic religion it would appear that they would have the impossible burden of showing that the condemned activity was in accord with the tenets of that religion.

In *Sheldon v. Fannin*⁵⁶⁷ the free exercise of religion justified the refusal of the pupils to stand for the national anthem.⁵⁶⁸ *Sheldon* can perhaps best be explained as part of the new willingness of the courts to utilize the free exercise clause to accommodate statute or agency regulation to freedom of religion. In the earlier case of *West Virginia Board of Education v. Barnette*,⁵⁶⁹ where the compulsory recitation of the Pledge of Allegiance was held unconstitutional as applied to a Jehovah's Witness, the Supreme Court apparently felt that the free exercise clause was an inadequate ground for their decision. Instead the "relief there afforded was on the basis of free speech, not freedom of religion."⁵⁷⁰ Twenty years after *Barnette* a fast maturing free exercise clause is thought equal to the task in the

Black Muslims' claim to the status of a legitimate religion appears to have been rejected only in the prisons."

556 See generally, Fernandez, *The Free Exercise of Religion*, 36 So. CAL. L. REV. 546 (1963).

557 24 GA. B.J. 519, 520 (1962).

558 35 So. CAL. L. REV. 162, 172-73 (1962).

559 62 COLUM. L. REV. 1488, 1503-04 (1962).

560 This test, of course, makes the circumstances of the speech of determinative importance. Thus, a speech given before hardened criminals is more likely to be found criminal than the same speech delivered before the ladies auxiliary.

561 For an interesting discussion of the possibility of anti-Catholic prejudice in a New York college and of the importance of findings of fact see Application of Lombardo, 240 N.Y.S.2d 119 (App. Div. 1963), reversing 235 N.Y.S.2d 1010 (Sup. Ct. 1962).

562 *Iowa v. Def.-Amish*, Independence Justice of Peace Court, Sept. 1962. Noted at 152.6 of *Civil Liberties Docket* (Nov. 1962).

563 *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1962).

564 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd*, N.Y. (1962).

565 For a discussion of this case in the broader context of the rights and remedies of expelled college students see 38 NOTRE DAME LAW. 174 (1963).

566 *Id.* at 177, 184.

567 221 F. Supp. 766 (D. Ariz. 1963).

568 *Id.* at 775.

569 319 U.S. 624 (1943).

570 Rodas, *The Passing of Nonsectarianism — Some Reflections on the School Prayer Case*, 38 NOTRE DAME LAW. 115, 127 (1963).

Sheldon case. In the past two years the most significant contribution to that maturation process has been the startling decision in *Sherbert v. Verner*—a decision which suggests the growing importance of the free exercise clause in broad areas of American life. Of course it will take time before we can confidently measure in these pages the length of the shadow cast by *Sherbert*.⁵⁷¹ Still, for the present at least, we can enjoy the warm sun of a brave new world visualized by some *Sherbert* commentators⁵⁷² in which the establishment clause no longer clouds the free exercise issue.

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⁵⁷¹ The first application of the *Sherbert* principle of accommodation was made in *In re Jennison*, 375 U.S. 14 (1963).

⁵⁷² Gilbert, Tenth Judicial Circuit Conference, 34 F.R.D. 29, 57 (1964); Moore, *The Supreme Court and the Relationship Between the "Establishment" and "Free Exercise Clauses,"* 42 TEXAS L. REV. 142, 145, 185 (1963).