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Church-State Religious Institutions and Values: A Legal Survey 1960-1962

Joseph P. Albright

Philip B. Byrne

N. Patrick Crooks

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NOTES

CHURCH-STATE RELIGIOUS INSTITUTIONS AND VALUES: A LEGAL SURVEY

1960 - 62

CONTENTS

I. INTRODUCTION

With this Survey Note, the NOTRE DAME LAWYER continues an analysis, first published in 1958,¹ of the problems inherent in the church-state relationship. The second such analysis appeared in the May, 1960, number of the LAWYER.²

This Note is an attempt to examine critically and exhaustively the judicial recognition of this relation over the past two years. That purpose, stated by the editors of the first Survey, remains the same. It is not our objective, in this analysis, to provide a restatement of the legal relations between church and state. The complexity of the problems in this area of the law deny any such hornbook approach. Rather, it is our simple objective herein to present an exhaustive analysis of the legal developments of the church-state relation over the past two years. To the authors of texts much broader in scope and volume we leave the unenviable task of presenting a complete and interrelated analysis of all the legal and political materials dealing with the church-state problem in the United States.

The areas of controversy have remained similar in all three Surveys, but emphasis has been varied. While the 1960 Survey probed the area of church gambling in great detail, that subject has, in this Survey, been relegated to a brief exposition in the concluding section. The section on test oaths is included for the first time simply because the first case in point was handed down in 1961 after a century and a half of obscurity. By introducing this into the Survey, the path was cleared for a report on the problems of individuals in the smaller, or less accepted, religions in the free exercise of their beliefs. In addition, the editors of this Survey have included two other areas pertaining to the church-state relation: 1) state regulation of the religious corporate form, and 2) the status of clerical privilege in the law of evidence.

The conclusions drawn or trends seen in previous Surveys are often referred to throughout. Thus it may be difficult to gain a complete understanding of the present Survey without a reference to the contents of the former. This is particularly true since, in the years covered by this Survey — as was true in the other church-state notes — few cases have been presented for determination on constitutional grounds. However all the topics in one way or another are illuminated by the decisions construing the first amendment in the related fields. The areas now in the glare of adjudication on the constitutional issue are areas such as test oaths, Sunday closing and education. The other topics stand in varying degrees of proximity to a final solution.

All the topics are similar, moreover, in that each field is of practical importance to the religions in the outcome of judicial controversy or the enactment of statutes. These difficulties with which the various churches are confronted today are either concerned with the state as government or with the state as a conglomerate social body. These may be analogized to the established institution-value distinction in the topical organization of this and past Surveys. The problems arising out of the necessary conjunction with the state as government — e.g., education, Sunday closing

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

² *Religious Institutions and Values: A Legal Survey (1958-59)*, 35 NOTRE DAME LAWYER 405 (1960); 35 NOTRE DAME LAWYER 537 (1960).

and obscenity — are those closest to the present consensus of the inclusiveness of the first amendment. The topics considering the individual religion in a neutral, if not hostile, society — e.g., free exercise problems — are to be considered insofar as they are actual or potential grounds for state action in behalf of or contrary to some professed interest of the church, and not the church itself. For the most part, the institution-value distinction is sound, but it is not without problems; for example, the decisions discussed herein concerning public schools in the past two years are concerned primarily with the religious values in public facilities.

It will be noted that those areas dealing with the state as government, but not now viewed as presenting constitutional issues, are dealt with in some cases as non-religious problems. The religious institutions, we shall see, are most usually looked upon by the courts as buildings, charities, or benefits to the state. Thus the benefits to the church are considered benefits to the state, eliminating the possibility of conflict and a constitutional issue.

Why certain aspects of church institutional existence are presently viewed as presenting constitutional problems and why some values of a particular religion have been accepted as consistent with the state's best interests cannot be entirely answered in this Survey. Nevertheless, we may supply certain answers as to the present status of the law and the likelihood of a future solution in terms of a comprehensive theory of church-state relations in the United States.

II. RELIGIOUS INSTITUTIONS

A. CHURCH PROPERTY

1. *Basic Concepts* — Emerging Constitutional Standards

Despite St. Paul's exhortation that they should avoid lawsuits,³ neither Christians nor other American sects have shown much inclination to keep their internal disagreements out of the courts. On the contrary, a survey of the past three years shows a large number of these cases coming before the appellate courts and decisions appear on questions of property ownership, church membership, the tenure of clerics, and occasionally what seem to be purely doctrinal conflicts. The reasoning and decisions of the courts in each of these areas will be examined in turn. Some religious disputes have arisen in the more limited context occasioned by the existence of religious corporation laws in forty-eight of the states. Separate treatment will be given these rather distinctive problems near the end of this section of the Survey.

By far the most common type of religious dispute to reach the courts has been that involving disagreement with respect to the ownership or use of property.

First examined will be the conflicts arising in local churches which are in some way affiliated with a central body; then discussed will be those involving independent congregations.

*Kresnick v. St. Nicholas Cathedral*⁴ is the only case in this area to reach the Supreme Court in the last three years. In disposing of this case with a per curiam opinion, the Court seems to have ended a controversy which began in the 1920's. What is perhaps more important, the Court has made it clear that its decision in an earlier case, that of *Kedroff v. Saint Nicholas Cathedral*,⁵ did in fact place constitutional limits on the actions of courts as well as legislatures in deciding intra-church disputes.

The long controversy culminating in *Kresnick* cannot be described within the limits of this Survey,⁶ but at least one important principle has been established by those decisions, i.e., that the property of hierarchical churches split by schism rests

³ I Corinthians 6:7.

⁴ 363 U.S. 190 (1960).

⁵ 344 U.S. 94 (1952).

⁶ See the extensive discussion of the struggle for possession of Saint Nicholas Cathedral in Duesenberg, *Jurisdiction of Civil Courts over Religious Issues*, 20 OHIO ST. L.J. 508, 516 (1959).

secure in the first established branch of that church. State attempts to award the property to the schismatic faction are prohibited by the fourteenth amendment. That, however, may not be all there is to the *Kedroff-Kresnik* diptych. The Court in both cases relied heavily on *Watson v. Jones*,⁷ a nineteenth century case arising out of a Civil War era schism of the Presbyterian Church. Though it only decided that courts should, on common law grounds, defer to the decisions of the central bodies of associated churches in determining property disputes, the Court in its opinion included a famous three-part classification of religious dispute cases. It divided them as follows:

1. The first of these is when the property which is the subject of controversy has been, the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.
2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.
3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization.⁸

For each of these three divisions the Court prescribed a different mode of judicial action. In the first situation, a court must enforce the trust.⁹ In the second class of cases, where a church is governed by a congregational polity, a court must follow either the majority of the congregation, or, if the congregation itself has a representative government, the officers elected by the majority.¹⁰ The third class of cases is, of course, that actually present in *Watson* and *Kedroff*. With regard to these situations the Court said:

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.¹¹

The extensive presentation of the doctrine of *Watson v. Jones* is given for two purposes. The first is to illustrate that in the years following, only the third *Watson* proposition has been definitely raised to constitutional standing. The second is to present the standard posed by this most noteworthy case, against which the following cases may be judged. One more thing need be said before going on to the state cases; it seems probable, now that *Kresnik* has established beyond doubt that there are fourteenth amendment limitations upon courts in this area, that the constitutional aspects of future cases will receive much more attention than they have in the past. The property disputes occasioned by schismatic factions, similar to that in *Watson*, have not occurred in recent years as frequently as have cases involving suits by central bodies against local congregations to recover local church property.¹² In each of the three such cases noted, the laws of the central church provided that under certain circumstances local congregations could be declared defunct by the central

7 80 U.S. (13 Wall.) 679 (1871).

8 *Id.* at 722-23.

9 *Id.* at 723.

10 *Id.* at 725.

11 *Id.* at 727.

12 *Presbytery of the Everglades v. Morgan*, 125 So. 2d 762 (Fla. App. 1961); *Louisiana District, Church of the Nazarene v. Church of the Nazarene*, 132 So. 2d 667 (La. App. 1961); *Beauchamp v. Trustees of the Miami Conference of the Evangelical United Brethren Church*, 110 Ohio App. 109, 160 N.E.2d 343 (1959).

body, in which case all property would revert to the central body. In a fourth similar case, the court denied recovery to the central body saying that it had "procedural lack of capacity" in having failed to follow its own prescribed procedures in proclaiming the local body extinct.¹³

A recent New Hampshire case involving the right of the central body to the proceeds of a taking by eminent domain presented a more difficult problem.¹⁴ The agreement between the central body and the local church provided that the site would revert to the central body if Baptist services were not held on it for the space of one year. Clearly, services could not be held on *that* site, but the local congregation had applied the proceeds to the building of a new church. The court properly held that the central church retained a trust in the eminent domain proceedings, but that it could not collect until such time as the congregation failed to hold prescribed services on the *new* site.¹⁵ The rights of the central body were also upheld in *Trustees of Transylvania Presbytery, U.S.A. v. Garrard County Board of Education*.¹⁶ There, the court held that the Board of Education had no right to the proceeds from the sale of church property no longer in use because the local congregation had withered away. Neither an apparent condition in the original deed granting the land nor a Kentucky escheat statute¹⁷ were held to apply against the claim asserted by the central body of an affiliated church.¹⁸

The most difficult problem confronting the courts in the property disputes of associated churches arises when the central body itself divides in schism. This was the situation in *First Protestant Reformed Church v. De Wolfe*.¹⁹ When the case first arose, the court had deferred to the judgment of the higher church body, awarded the property to the faction opposed to present plaintiffs on the local level, and enjoined the plaintiff from interfering with the other faction's control. Subsequently, the central church split and a court decided that the faction favoring the plaintiff constituted the true central body. In the present case therefore, the plaintiffs sought to have the judgment against them changed under the device of seeking modification of the injunction.²⁰ The court held that the decree in the first suit was not primarily injunctive and therefore not subject to modification.²¹

This case illustrates one of the difficulties not covered by the *Watson* approach of deference to the central body. Seemingly in a situation such as that in *First Protestant*, where the central body had split, the courts cannot avoid deciding the essentially theological problem of who represents the faction which is the true successor and thus the one which should retain the property.

The principles recognized in allowing the central body of an affiliated church a right of action against a local congregation to enforce church rules are analogous in *Apostolic Faith Mission v. Christian Evangelical Church*.²² In that case it was decided that where a majority of the local congregation sought to withdraw from the central church and brought an action in ejectment to gain possession from the minority loyal to the central church, the loyal minority should prevail.

Located halfway between the conflicts arising in local churches affiliated with a central body, and those involving independent congregations, are problems growing

13 *Annual Mississippi Conference of the Methodist Protestant Church v. First Methodist Protestant Church*, 121 So. 2d 256 (La. App. 1960).

14 *United Baptist Convention of New Hampshire v. East Weare Baptist Church*, 176 A.2d 325 (N.H. 1961).

15 *Id.* at 328.

16 348 S.W.2d 846 (Ky. 1961).

17 KY. REV. STAT. § 273.130 (1955).

18 *Trustees of Transylvania Presbytery, U.S.A. v. Garrard County Board of Education*, 348 S.W.2d 846, 849, 852 (Ky. 1961).

19 358 Mich. 489, 100 N.W.2d 254 (1960).

20 *Id.* at 255.

21 *Id.* at 256.

22 55 Wash.2d 364, 347 P.2d 1059 (1960).

out of the merging of churches. A noted author in this field has said that: "Almost every merger case is also a schism case."²³

The merger of large denominations, coupled with the resistance of individual groups against joining the new combination, provided the conflict in the two cases decided within the last few years. In the first of these cases, a minority of a congregation sought to enjoin the conveyance of title (to its local church) to a new denomination. The new denomination had been formed by the union of the synod, to which the minority had formerly belonged, and other bodies.²⁴ The court found the manner in which the conveyance was attempted improper, but more important, it held that the local church was not automatically affiliated with the new body merely because its parent group had joined.²⁵ In effect, the majority of the congregation is at least temporarily denied its freedom of action necessary to affiliate with the new body. In *Hayman v. Saint Martin's Evangelical Lutheran Church*,²⁶ the opposite situation obtained in the local congregation. In that case the parent body was about to consummate a merger with another denomination. A minority of the local congregation was in favor of the union, and sought to enjoin a proposed withdrawal from the central body. The court decided the question on the basis of the laws of the parent body, which were held to allow withdrawal by vote of the congregation.²⁷ Here again, the local congregation was withdrawn from the merger.

These cases are neither sufficiently numerous nor revealing to show a judicial pattern or policy toward merger, but as this area promises to be an important one, it seems profitable to quote from a seminal study in it:

In the merger cases, as in the schism cases, the law tends to uphold the polity and confession of the original denomination, the law tends to conserve its position against modification, but at the same time fundamental public policy encourages dissidents to constitute themselves as "new" sects or denominations.²⁸

A large percentage of the intrachurch disputes to reach the appellate courts in the past few years have arisen from conflicts within congregations organized as independent democratic polities. All of these cases deal in some way with property rights in the congregation's place of worship. All hinge on a struggle for control of the congregation by two factions thereof.

Most common are the schism cases. In these situations the congregation has split to such a degree that control over the church property itself is hotly disputed. The five cases found here present an interesting contrast. It will be recalled that the Supreme Court said in *Watson v. Jones*, that cases such as these should be decided by simple deference to the decision of the congregation expressed either through its majority or through its officers.²⁹ Three state cases in recent years have shown a significant exception to this rule. In each of these cases the court in effect said that, when confronted with a schism in a congregational church, it will award the property to the majority only if that majority is faithful to the tenets of the congregation as they existed before the schism.³⁰ The language of the court in an earlier hearing of one of these three cases is a good example of this position: "It is settled in this State that where there is a schism in a congregational church, the majority group are entitled to exclusive use of the church property, unless they have departed from the fundamental doctrines of the church as advocated and practiced at the time of its

23 Stringfellow, *Law, Polity and Reunion of the Church: The Emerging Conflict between Law and Theology in America*, 20 OHIO ST. L.J. 412, 434 (1959).

24 American Lutheran Church v. Evangelical Lutheran St. Paul's Church, 343 P.2d 711 (Colo. 1959).

25 *Id.* at 712-13.

26 176 A.2d 772 (Md. 1962).

27 *Id.* at 776.

28 Stringfellow, *supra* note 21, at 434.

29 80 U.S. (13 Wall.) 679, 725 (1871).

30 Sorenson v. Logan, 32 Ill. App. 2d 294, 177 N.E.2d 713 (1961); Rife v. Fleming, 339 S.W.2d 653 (Ky. 1960); Maynard v. Headlem, 334 S.W.2d 930 (Ky. 1960).

organization. . . ."³¹ Other cases have taken different viewpoints. Thus, in a dispute over pulpit affiliations, the Arkansas court held that the majority had a right to an injunction against the minority to restrain it from interfering with church services, saying simply that in a congregational church the majority controls.³² In *Simpson v. Mullineaux*³³ it was held that if the minority withdraws from the congregation, it forfeits all rights to the church property.³⁴ Apparently, in this case it was impossible to determine who professed the true doctrine.³⁵

Two cases arising in Orthodox Jewish congregations provide additional insight into the various judicial approaches to the problem of schism in independent churches. In *Davis v. Scher*,³⁶ a minority member of a synagogue sought an injunction to forbid the practice of mixed or family seating, recently introduced into his congregation. The court issued the injunction after plaintiff had established to its satisfaction that it was a property right which he sought to have protected.³⁷ The court's argument, may be summarized as follows: 1) this is an Orthodox synagogue; 2) Orthodox Jews do not allow mixed seating; 3) therefore, the majority is departing from Orthodox doctrine; 4) the court will not allow this departure if the effect is to deprive plaintiff of a property right.³⁸ Here again, we find a court determining orthodoxy in order to settle the dispute.

A much different approach was taken in *Katz v. Singerman*,³⁹ a Louisiana case. Again the dispute involved mixed seating and again the plaintiff was a minority member of a congregation which had recently adopted the practice by the veto of an overwhelming majority.⁴⁰ This time, however, the theory of the plaintiff was different. He claimed that the majority's action violated the conditions of an express trust set up for the congregation some years before.⁴¹ The trust required that the practices of the congregation always accord with "Orthodox Polish Jewish Ritual."⁴² The trial court in an opinion adopted by the intermediate appellate court found the case to be covered by the express trust principle of *Watson v. Jones*,⁴³ discussed above. After hearing extensive expert testimony as to the meaning of "Orthodox Polish Jewish Ritual," the court found that mixed seating violated the trust, enjoined the practice and was upheld in the first appeal.⁴⁴ The Supreme Court, in reviewing the case also relied on *Watson v. Jones*,⁴⁵ but found it to fit in the second category established in that case. Primarily, the court argued, this was a case involving the kind of decision by a congregation which should not be set aside.⁴⁶ As to the expressed trust, the court said it could be interpreted to admit this practice and that if the maker had wished to prevent mixed seating, he should have expressed that mandate.⁴⁷

These cases involving schisms and doctrinal disputes in congregational churches may be evaluated from several points of view. It seems clear, first of all, that those courts which inquire into the doctrinal controversy and favor the body which most closely adheres to the traditions of the church are favoring stability in doctrine at the expense of development. Judgment as to the wisdom of such policy turns, it is submitted, less on a legal criterion than on a theological viewpoint. Secondly, it

31 *Fleming v. Rife*, 328 S.W.2d 151, 152 (Ky. 1959).

32 *Rush v. Yancey*, 349 S.W.2d 337, 338-39 (Ark. 1961).

33 188 Kan. 139, 360 P.2d 893 (1961).

34 *Id.* at 895.

35 *Id.* at 894.

36 356 Mich. 291, 97 N.W.2d 137 (1959).

37 *Id.* at 140.

38 *Id.* at 141.

39 120 So. 2d 670 (La. App. 1960), *rev'd*, 241 La. 103, 127 So. 2d 515 (1961).

40 *Id.* at 678.

41 *Id.* at 672.

42 *Id.* at 680.

43 80 U.S. (13 Wall.) 679 (1871).

44 *Katz v. Singerman*, 120 So. 2d 670 (La. App. 1960).

45 80 U.S. (13 Wall.) 679 (1871).

46 *Katz v. Singerman*, 241 La. 103, 127 So. 2d 515, 520 (1961).

47 *Id.* at 532-33.

might be argued that, when a church had adopted a congregational polity, the favoring of a minority on doctrinal grounds is an interference with constitutionally protected freedom of religion — the freedom of the majority to govern their church by the form they have chosen. Research has revealed no case in which this point has been raised, but it seems implicit in the final disposition of the *Kedroff* controversy. Finally, an argument might be made from judicial administration. It would seem that in these cases courts have particular difficulty finding the correct doctrine. The simple position that in congregational churches the majority rule is decisive on all issues would greatly reduce both the difficulty of the cases and the number of disputes brought to court.

Though the majority of cases arising from religious disputes involve disagreements over control or use of property as discussed above, other issues arise which must be briefly discussed. Thus, in congregational denominations relief is sometimes sought in the courts because governing bodies have not followed their own rules of decision. Courts seem willing to inquire into this procedural regularity, judge the action of the congregation's government against its own rules and validate or invalidate it depending upon what they find.⁴⁸ Courts recently facing the problem also seem uniformly agreed that they will not review the substantive issues involved in expulsion of church members.⁴⁹ California, however, apparently requires procedural due process.⁵⁰ A few cases have involved the removal of pastors but that topic is believed to be outside the scope of this Survey.

The recent cases discussed above substantially exhaust problems of intrachurch disputes. It remains, however, to discuss the closely related subject of litigation arising from the incorporation of religious bodies. A comparative study of religious corporation laws would of necessity be a book-length work.⁵¹ Such a project will not be attempted here. The history of these laws is of substantial interest, particularly in light of the problem caused by the application of congregationally-oriented statutes to churches organized with the episcopal structure such as the Roman Catholic.⁵² That topic, apparently a dead issue now, is also beyond our scope. What will be attempted is a brief examination of the litigation arising out of these statutes. By way of introduction to that material, it may be well to glance at the status of the unincorporated religious society.

Though the religious society may enjoy certain advantages by incorporating, not otherwise obtainable in a given jurisdiction,⁵³ it is also clear that for some purposes the law treats such bodies as entities. So, for example, in Alabama an unincorporated religious association may bring suit in the name of its church⁵⁴ and in Georgia such a group is subject to foreclosure of a lien on its property.⁵⁵

When religious groups do wish to incorporate, they are permitted to do so in all states except Virginia⁵⁶ and West Virginia.⁵⁷ Most of their problems as corporations are much like those of business corporations. Thus, two cases involved problems of compliance by the religious association with the statutory procedures for incorporat-

48 See *Coates v. Parchman*, 334 S.W.2d 417 (Mo. 1960); *McHague v. Feltmer*, 325 S.W.2d 349 (Ky. 1959); *Willis v. Davis*, 323 S.W.2d 847 (Ky. 1959).

49 *Louison v. Fishman*, 168 N.E.2d 340 (Mass. 1960); *Moorman v. Goodman*, 59 N.J. Super. 181, 157 A.2d 519 (1960); *Bentley v. Shanks*, 348 S.W.2d 900 (Tenn. App. 1960); *Owen v. Board of Directors of Rosicrucian Fellowship*, 173 Cal. App. 2d 112, 342 P.2d 424 (1959).

50 *Owen v. Board of Directors of Rosicrucian Fellowship*, 173 Cal. App. 2d 112, 342 P.2d 424 (1959).

51 See generally, ZOLLMAN, *AMERICAN CHURCH LAW* 102-94 (1933).

52 See generally, DIGNAN, *HISTORY OF THE LEGAL INCORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES* (1935).

53 E.g., in Alabama an unincorporated religious association cannot hold land. *Johnson v. Sweeney's Lane Church of God*, 270 Ala. 260, 116 So. 2d 899 (1959).

54 *Floyd v. East End Baptist Church* 271 Ala. 13, 122 So. 2d 155 (1960).

55 *Rogers v. Lindsey Street Baptist Church*, 104 Ga. App. 487, 121 S.E.2d 926 (1961).

56 VA. CONST. art. IV, § 59.

57 W. VA. CONST. art. VI, § 47.

ing.⁵⁸ Two other cases arose because of claims that the acts of a religious corporation were *ultra vires*.⁵⁹ One court held that only *members* of a religious corporation may complain of *ultra vires* actions;⁶⁰ the other refused even to hear the complaint of a member because no such right had been given him under the charter of his church.⁶¹ Religious corporations, just as business corporations, have been held subject in New York to writs of mandamus requiring them to issue financial statements and adopt by-laws.⁶²

In some states, religious corporations do find themselves in court with problems that would not bother their analogue, the business corporation. In New York where religious corporations must apply to the Supreme Court, rather than to an administrative office, to obtain or amend a corporate charter, they have sometimes had difficulty in obtaining the court's approval.⁶³ Religious corporations in New York must also receive the permission of a court before selling land. Courts have conditioned such permission⁶⁴ and have refused it as not being in the interests of the church.⁶⁵

The cases interpreting religious corporation statutes reveal neither serious problems nor substantial movement in the law. As the above discussion reveals, however, constitutional issues of considerable importance are arising in the area of judicial review of religious disputes. These two topics, taken together, deal with the central core of the law of religious institutions — subsequent sections will deal with particular problems of special controversy.

2. Zoning — In Search of a Standard

The zoning of churches presents problems which are quite distinct from those which the zoning board and courts must decide in more conventional cases. Freedom to use one's property as one wishes is now generally recognized as qualified in most instances by a community interest in orderly development. Such is not the case with the zoning of churches. When objections are raised against exclusion of religious functions from an area, the courts are faced not only by the generalized due process objection but also by the special deference with which they feel compelled, on constitutional or other grounds, to treat churches. The truly paradoxical nature of these cases and the repeated refusal of the Supreme Court to review them has resulted in considerable diversity of approach in state courts. This diversity is amply reflected by the cases decided in the last two years.

Beyond doubt the most important recent church zoning decision is *Lake Drive Baptist Church v. Village of Bayside Board of Trustees*.⁶⁶ The case is important for three reasons: 1) It presents an excellent summary of the various factors considered by the courts in attempting to solve these problems; 2) the opinion of the court sets forth a proposed test of the validity of all zoning of churches; 3) the Wisconsin court in this case takes a unique position, balanced between the majority and minority positions.

58 Bruce v. Hunter 32 Ill. App. 2d 207, 177 N.E.2d 425 (1961); Louisiana District, Church of the Nazarene v. Church of the Nazarene, 132 So. 2d 667 (La. App. 1961).

59 Stone v. Salt Lake City, 11 Utah 2d 196, 356 P.2d 631 (1960); Church of God of the Union Assembly v. Carmical, 214 Ga. 365, 104 S.E.2d 912 (1958).

60 Church of God of the Union Assembly v. Carmical, 214 Ga. 365, 104 S.E.2d 912, 914 (1958).

61 Stone v. Salt Lake City, 11 Utah 2d 196, 356 P.2d 631, 634 (1960).

62 Eisenberg v. Fauer, 25 Misc. 2d 90, 200 N.Y.S.2d 749 (Sup. Ct. 1960).

63 *In re* Jesus Sobre Las Aguas, 21 Misc. 2d 937, 197 N.Y.S.2d 804 (Sup. Ct. 1960); *In re* Application for Approval of Certificate of Incorporation of First Temple of the House of David (Hebrew Catholic Faith), 195 N.Y.S.2d 588 (Sup. Ct. 1959); Application for Amendment of Certificate of Incorporation of Saints of God in Christ Incorporated, 20 Misc. 2d 532, 194 N.Y.S.2d 339 (Sup. Ct. 1959).

64 Application of Congregation Ahavas Achem, 27 Misc. 2d 1097, 213 N.Y.S.2d 770 (Sup. Ct. 1961).

65 Application of Margolin, 16 Misc. 2d 961, 183 N.Y.S.2d 36 (Sup. Ct. 1959).

66 12 Wis.2d 585, 108 N.W.2d 288 (1961).

The facts in *Bayside* are much like those said by a noted authority to be typical of the church zoning area:

The legal problem arises in those cases where there is an attempt to exclude churches, particularly those attended by minority groups within the community, and often where the churches of faiths or denominations attended by the majority of the community are already established in the community as valid non-conforming uses.⁶⁷

The actions of the village of Bayside differed from this usual pattern only in the fact that it first attempted to exclude all churches from the community; then in a later ordinance, the village allowed them only in a restricted area which did not include plaintiff's proposed site. The Lakeside Baptist Church had acquired its site before the passage of either ordinance and had been negotiating with the village for permission to build. Upon final denial of its requests for rezoning and a building permit, the church appealed to the courts.⁶⁸ An adverse result at the circuit level led to an appeal by the church to the Supreme Court of Wisconsin which reversed and enjoined the village from enforcing its ordinance against the church and ordered the village building inspector to issue a building permit.⁶⁹

The court, in the opinion written by Justice Fairchild, first discussed a problem dealing with construction of the state's enabling statute. In deciding that the statute did give local communities some power to zone churches,⁷⁰ it reached a result opposite that of the Missouri Supreme Court in a case decided two years earlier⁷¹ and fully discussed in the last Survey.⁷²

Turning to the question of the constitutionality of the ordinance, the court classified zoning ordinances applied to churches as follows:

With respect to use of land in residence districts for a church, zoning ordinances fall into three types: (1) permitting churches in all; (2) permitting a church only upon special permit, after hearing; (3) excluding churches, often, if not usually from districts where residential use is itself restricted to certain types of dwellings.⁷³

Most zoning ordinances, said the court, fall into one of the first two types.⁷⁴ Many courts, it went on to say, have held the third type invalid, although there are several decisions to the contrary.⁷⁵ The court's next paragraphs well state the existing law:

Most of the decisions on this subject appear to involve denials of a special permit to build a church under the second type of ordinance. In a number, the denial has been set aside, sometimes with an accompanying statement that there is no valid basis for exclusion.

In a few cases, denials under the second type of cases have been upheld.

It is clear enough that a church has some attributes which tend to make it less desirable to its next-door neighbor than a one-family dwelling. It entails substantial gatherings of people, resulting disturbance, and the problem of parking automobiles.⁷⁶

In the last of the quoted paragraphs the court showed its essential realism in facing the problem which confronted it. It refused to take the easy way out by denying that there is a hardship imposed on close neighbors of churches or that these factors should be considered by zoning boards. In this segment of its opinion the Wisconsin court maintained what seems to be a unique position, but it went on to show that realism includes more than concern for material hardship or advantage.

67 I RATHKOPF, ZONING AND PLANNING § 19-1 (1960).

68 State *ex rel.* Lakeside Drive Baptist Church v. Village of Bayside Board of Trustees, 12 Wis.2d 585, 108 N.W.2d 288, 289-92 (1961).

69 *Id.* at 299.

70 *Id.* at 293.

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

72 1958-59 Church-State Survey, *supra* note 2, at 407.

73 State *ex rel.* Lakeside Baptist Church v. Village of Bayside Board of Trustees, 12 Wis.2d 585, 108 N.W.2d 288, 293 (1961).

74 *Ibid.*

75 *Id.* at 294.

76 *Id.* at 295.

A church, however, is not to be viewed merely as the owner of property complaining against a restriction on its use. It may also challenge an ordinance as an unwarranted burden upon, or interference with the freedom of the adherents of the church to worship after the manner of their faith. We are familiar with the constitutional protection of freedom of religion from governmental interference.

An ordinance which excludes a church from a particular district must pass two tests:

(1) Can it reasonably be said that use for a church would have such an effect on the area that exclusion of such use will promote the general welfare, and

(2) Does the exclusion impose a burden upon freedom of worship which is not commensurate with the promotion of general welfare secured?

* * *

The test is whether a regulation is an *undue infringement*. Any restriction upon the opportunity to build a house of worship is at least a potential burden upon the freedom of those who would like to worship there. Whether the burden is slight or substantial will depend upon circumstances. In a community where adequate and accessible building sites are available in all districts, it might be a negligible burden to exclude churches from some of them. There must be many circumstances under which a religious group could demonstrate that an exclusion from a particular area would be a substantial burden.⁷⁷

This case was decided by the court on the basis of the first of its proposed tests. Consequently, there was no need for it to reach the question whether the village had unduly restricted freedom of worship. Yet it is this second part of the court's criterion which marks a real break with the past. Though law review and treatise writers on the subject of church zoning have consistently urged that the first amendment, as applied to states by the fourteenth, was crucial to the decision of cases in the area,⁷⁸ no court previous to *Bayside* appears to have directly adopted such a test.⁷⁹ The court in *Bayside* adopts no absolutes. Its test is presented as applicable to each of the three types of zoning ordinances. The Wisconsin court, in its treatment of the problem, establishes both a valuable precedent and a good example to be followed by other courts.

Several other state courts have considered problems similar to that in *Bayside* during the period of this Survey. Each of the cases illustrates a different approach. *Pelham Jewish Center v. Marsh*,⁸⁰ involved an ordinance excluding places of worship from residential districts. The Appellate Division disposed of the case in a unanimous memorandum decision striking down the ordinance. In doing so, it followed the accepted New York rule on the subject — that there may be no complete exclusion — as expressed in the oft-cited *Diocese of Rochester* case.⁸¹ No new principles were formulated in this jurisdiction.

A 1961 Colorado case⁸² involved the Wisconsin court's second type of ordinance, one in which religious uses were permitted only upon approval of the local zoning board. The plaintiff church had been excluded. The opinion of the court, in striking down the ordinance,⁸³ focused on the property right of the church rather than on freedom of religion. The court apparently ignored any distinction between ordinances which exclude churches and those which leave religious uses to the discretion of the zoning board. A concurring opinion would have upheld the ordinance, but would have reversed the zoning board's refusal to allow the church a conditional use on the ground that the board's action was arbitrary.⁸⁴ It is submitted that the opinion of the court substantially misconstrued the problem. No consideration is taken

77 *Id.* at 295-96 (emphasis by the court).

78 *E.g.*, Note, 70 HARV. L. REV. 1428 (1957).

79 See I. RATHKOFF, ZONING AND PLANNING § 19-4 (1960).

80 197 N.Y.S.2d 258 (App. Div. 1960).

81 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956).

82 *City of Englewood v. Apostolic Christian Church*, 362 P.2d 172 (Colo. 1961).

83 *Id.* at 175.

84 *Id.* at 177.

of facts which might have led to the board's decision and no mention is made of freedom of religion or its limits.

Board of Zoning Appeals of Meridian Hills v. Schulte,⁸⁵ an Indiana case, presented the classic problem of an exclusive suburb seeking to maintain high property values by barring religious uses from areas adjacent to residences.⁸⁶ The religious group involved wished to erect a complete parish "plant" including church, school, rectory and convent. The parties in their briefs had argued the desirability of an alternative site which the village had proposed. The court discussed the matter of maintaining property values and concluded "that the general public interest in moral and intellectual education of the young far outweighs the private interest affected by any depreciation in neighboring property values."⁸⁷ The Indiana court seems to have reached a proper result. It appears that the decisions of the zoning boards of small suburbs in large metropolitan areas excluding churches may be most realistically characterized as serving private rather than public interests.⁸⁸

In most discussions of the problems of church zoning, the California position has been treated as the major exception to the rule that a church may not be excluded by ordinance from an area.⁸⁹ One authority has found the California policy to mean that religious uses are to be treated exactly as other uses and may be excluded if they do not fit the locality's comprehensive plan.⁹⁰ Two recent cases in that state show no retreat from the position attributed to it.⁹¹ Significantly, they are the only two cases discovered within the scope of this Survey in which the party seeking to establish the religious use has lost in the appellate courts.

All of the cases considered thus far have involved challenges by religious groups to rulings of local zoning authorities. It sometimes happens that other landowners in a zoned area will protest a decision of a zoning board allowing a religious use. Two such cases have arisen in the last two years. In *Black v. Town of Montclair*,⁹² neighboring landowners attacked the decision of a zoning board which granted a variance allowing a small Catholic elementary school to remodel. The court laid particular emphasis upon the respect due the decisions of local authorities in such matters.⁹³ Upon full review of the facts the court upheld the decision of the Board.⁹⁴ A 1960 Pennsylvania case also involved an action by landowners to overturn the decision of a zoning board.⁹⁵ Though the decision turned on an issue of retroactive legislation, the opinion of the court, by Justice Musmanno, speaks of the special regard due to the interest of churches.⁹⁶

Two recent New York cases turned on the interpretation rather than the validity

85 172 N.E.2d 39 (Ind. 1961).

86 In its facts, this case very much resembles one of the early leading cases in the area of church zoning. *State ex rel. Synod of Ohio v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515 (1942).

87 *Board of Zoning Appeals of Meridian Hills v. Schulte*, 172 N.E.2d 39, 44 (Ind. 1961).

88 The focus of the court's opinion in this case appears to be on the use of this property for parochial school purposes. In this connection the following statement is worth noting:

We have, then, two grounds upon which public schools are admitted thereto. The first of these grounds is that it is unreasonable to make a distinction between public and parochial schools since they both teach the same curriculum and fulfill the same function. The second ground is that the exclusion of such schools has no relationship to the public safety, health, morals or general welfare, and is therefore arbitrary, capricious and unconstitutional. *I Rathkopf* § 18-20 (1960).

89 See, e.g., 2 YOKLEY, ZONING LAW AND PRACTICE § 222 (2d ed. 1953).

90 I RATHKOPF, THE LAW OF ZONING AND PLANNING § 19-4 (1960).

91 *City of San Marino v. Roman Catholic Bishop of Los Angeles*, 180 Cal App. 2d 657, 4 Cal. Rep. 547 (1960), cert. denied 364 U.S. 909 (1960); *Garden Grove Congregation of Jehovah's Witnesses v. Garden Grove*, 176 Cal. App. 2d 136, 1 Cal. Rep. 65 (1959).

92 34 N.J. 105, 167 A.2d 388 (1961).

93 *Id.* at 392.

94 *Ibid.* This case apparently overrules *Ranney v. Instituto Pontificio Delle Maestre Filippini*, 20 N.J. 189, 119 A.2d 142 (1955).

95 *Yocum v. Power*, 398 Pa. 223, 157 A.2d 369 (1960).

96 *Id.* at 370.

of zoning ordinances. A retreat house was held to be within the spirit of an ordinance which allowed churches, parish schools, rectories and convents.⁹⁷ A similar result was reached as to a center for the distribution of religious literature.⁹⁸

Closely related to the problem of exclusion of religious uses by zoning is that of restriction by private covenants. Two cases were found on enforcement of such covenants against religious groups.⁹⁹ Both were decided on issues unrelated to the religious use and neither court even dealt with the possibility of giving special consideration to such uses.

The cases discussed above include all those decided in the past two years. They provide little basis for prediction. It is expected that the test developed in the *Bayside* case will commend itself to courts deciding future cases and it appears that such a test provides a better basis for decision than others which have been employed. More tentatively, it might be predicted that employment of the *Bayside* test will eventually result in review of this entire problem by the Supreme Court.

3. Taxation — Constitutionality and Controversy

While the battle over the degree of church-state cooperation has raged in past years, until 1961, the right of the state to free the church from the burden of taxation remained uncontested. Controversy over the constitutionality of the tax exemption provisions was confined to a few legal articles.¹⁰⁰ However at the close of the period surveyed here, the Supreme Court of Rhode Island was confronted with an attack on the validity of any religious exemption to state taxes. In *General Finance Corp. v. Archetto*,¹⁰¹ the contention was raised by a taxpayer that the exemption of these religious institutions caused a higher rate of taxation on his property. This, it was argued, was a violation of the state constitution in that it was not a fair distribution of taxes among the entire populace, and because the exemption was in favor of religious institutions, a violation of the first amendment and the comparable section of the Rhode Island Constitution.¹⁰² The first point was dismissed without trouble, but the freedom of religion question posed a more complex problem.

The court, however, in a unanimous opinion ruled that the tax exemption did not contravene either constitutional provision. The major point relied on in relation to the state provision was the existence of exemption for religious institutions at the time of the ratification of the constitution. As to the federal right, the court discussed the three education cases conceding the *Everson* and *McCullum* cases may have shed doubt on the practice by their strict construction of the first amendment, relied on the *Zorach* dicta that "We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen an effective scope of religious influence."¹⁰³ The present court then went on to analyze the decision by writing: "We are persuaded that the court has not gone so far as to hold that clearly and beyond a reasonable doubt the tax exemp-

97 *Diocese of Central New York v. Schwarzer*, 23 Misc.2d 515, 199 N.Y.S.2d 939 (Sup. Ct. 1960), *aff'd mem.*, 217 N.Y.S.2d 567 (App. Div. 1961).

98 *Application of Faith for Today*, 204 N.Y.S.2d 751 (App. Div. 1960), *aff'd mem.*, 9 N.Y.2d 80, 174 N.E.2d 751, 215 N.Y.S.2d 70 (1961).

99 *Smith v. Second Church of Christ Scientist*, 87 Ariz. 400, 351 P.2d 1104 (1960); *Protestant Episcopal Church v. McKinney*, 339 S.W.2d 400 (Tex. Civ. App. 1960).

100 Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROB. 144 (1949); Blake, *Christianity Today*, Aug. 3, 1959, p. 7. For a general discussion of arguments against the exemption, see PFEFFER, CHURCH, STATE & FREEDOM 188-190 (1953); III STOKES, CHURCH AND STATE IN THE UNITED STATES 418 (1950).

101 176 A.2d 73 (R.I. 1961).

102 R.I. CONST. art. I, § 3. The applicable section reads: "[W]e therefore declare that no man shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of his own voluntary contract; nor enforced, restrained, molested, or burdened in his body, or goods."

103 *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

tion statutes here in issue are in contravention of article I of amendments to the federal constitution."¹⁰⁴

The court seemed to partake of the same spirit that had been recognized some years earlier by a legal writer when he had observed "The tax exemption battle has been won by exhaustion."¹⁰⁵ For this feeling of exemption victory in years past appears to underlie the court's theory of an exemption's lawfulness until proven unlawful. The most concrete evidence of this victory is the present existence of the exemption statutes. The form of litigation until the *Archetto* case had been restricted to a formulation of the proper construction to be given the particular statute.

The general rule governing the construction of tax exemption statutes was well stated by Cooley who wrote: "[I]t is a well settled rule that, when a special privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public."¹⁰⁶ Cases in the past two years adequately show that this is not always applied to religious institutions. On the contrary there have always been two general viewpoints in this matter: that favoring an interpretation of the statutes, granting the exemption, which includes almost all the humanitarian and religious activities of the various church organizations, and the other urging strict construction. It would be neither wise nor just to attribute this divergence of interpretation to a particular judicial philosophy of church-state relations or to a conception of the permissible bounds of encouragement for religious activities. What the divergence really signifies is a difference in the legal materials the state courts have at hand in deciding cases.

These materials are basically the state constitution and/or statutes granting an exemption from taxation for religious institutions, e.g., "property used exclusively for religious purposes."¹⁰⁷ In the eastern states, the immunity was originally meant to continue the favors shown by the state to the established church prior to the Revolution.¹⁰⁸ In those states, the exemption evolved simply as a matter of intuitive justice to include all religions.¹⁰⁹ The states which subsequently joined the Union shared in this feeling and included some sort of tax exemption, either in their constitutions or in their early statutes.¹¹⁰ This idea of the church's freedom from taxation

104 *General Finance Corp. v. Archetto*, 176 A.2d 73, 78 (R.I. 1961).

105 Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROB. 144, 152 (1949).

106 II COOLEY, *THE LAW OF TAXATION* § 672 (4th ed. 1924). However, in regard to the religious and charitable exemptions, he writes: "[T]he better rule seems to be that laid down in several states requiring a liberal rather than a strict construction in such cases." *Id.* at § 673.

107 ILL. STAT. ANN. ch. 120, § 500(2) (Smith-Hurd Supp. 1961).

108 Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461, 462 (1959). The fact that some Eastern states did not pass laws in this matter until the middle of the nineteenth century does not affect the much older custom of exemption. See III STOKES, *CHURCH AND STATE IN THE UNITED STATES* 419 (1950).

109 Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461, 462 (1959). For the evolution in one state, Pennsylvania, see Comment, *Taxation of Land Owned by Charitable and Religious Institutions in Pennsylvania*, 3 U. PITT. L. REV. 206 (1937).

110 Fifteen states make mandatory provision for the exemption in their constitutions: ALA. CONST. art. 4, § 91; ARK. CONST. art. 16, § 5; KAN. CONST. art. 11, § 1; KY. CONST. § 170; LA. CONST. art. 10, § 4; MINN. CONST. art. 9, § 1; N.J. CONST. art. 8, § 1; N.M. CONST. art. 8, § 3; N.Y. CONST. art. 16, § 1; N.D. CONST. art. 11, § 176; OKLA. CONST. art. 10, § 6; S.C. CONST. art. 10, § 4; S.D. CONST. art. 11, § 6; UTAH CONST. art. 13, § 2; VA. CONST. art. 13, § 183. However all but four of these states have enacted statutes controlling the exemption: ALA. CODE tit. 51, § 2 (Supp. 1959); ARK. STAT. ANN. § 84-206 (1947); KAN. GEN. STAT. ANN. § 79-201 (1949); MINN. STAT. ANN. § 272.02 (Supp. 1961); N.J. STAT. ANN. § 54:4-3.6 (1960); N.Y. TAX LAW § 4(6A); N.D. CENT. CODE § 57-02-08(7) (1960); OKLA. STAT. tit. 68, § 15.2 (Supp. 1961); S.D. CODE § 57.0311(3) (1939); UTAH CODE ANN. § 59-2-1 (1953); VA. CODE ANN. § 58-12(2) (1950).

by the state is not a peculiar American sensitivity. It has been rooted in most cultures for centuries.¹¹¹

As juristic analysis developed, the courts attempted to find justifying reasons for the long-granted exemption in terms of the public burden the religious organization was itself assuming. For this, it was thought, compensation was owing from the state.¹¹² Another reason advanced was that the humanitarian goals of religious institutions deserved this form of gratitude from the state government.¹¹³ Whether these arguments are correct or not, the statutes have suffered little from constitutional attacks and seem to have been taken as settled doctrine, as exemplified by the court in the *Archetto* case.¹¹⁴

The various statutes may be broken down into three main categories: those exempting "places of worship," those exempting property "used for religious purposes," and a small number exempting property "owned by a religious organization."¹¹⁵ Some states require a combination of these, and a few would seem to demand all three, i.e., "place of worship," "use," and "ownership," to qualify property for the religious exemption.¹¹⁶

The first category, "place of worship," has generally been the most narrowly construed. Two cases have arisen in states with this type of statute. In *Church of God v. Dalton*,¹¹⁷ the Supreme Court of Georgia was required to determine the applicability of its tax exemption statute to four buildings owned by a church but used for income-producing purposes. In regard to three of the buildings, not on the land occupied by the church itself, the court held:

This unambiguous language [of the statute] means that, if the property is used primarily for either profit or purposes other than the operation of the institution it is not exempt. The fact that the property is used to make profit

111 Stokes writes: "The exemption from taxation of churches, and of land immediately about them used for church purposes, is based on a European tradition which goes back to the fourth century when the Emperor Constantine the Great, after his conversion, gave the Church this privilege. III STOKES, CHURCH AND STATE IN THE UNITED STATES 419 (1950). PFEFFER, CHURCH, STATE & FREEDOM 183 (1953) makes allusion to the tax exemption in biblical times, in Egypt, and in Rome.

112 See, e.g., *Young Men's Christian Ass'n v. Douglas County*, 60 Neb. 642, 83 N.W. 924 (1900). Stokes gives a rather extreme example of this theory in stating that "[T]hese Institutions contribute enormously to the moral status of the community, thereby ultimately relieving the state treasury of excessive contributions to reformatory and penal institutions." III STOKES, CHURCH AND STATE IN THE UNITED STATES 422 (1950).

113 "The long and short of it, gentlemen, that the things that make it worthwhile to live in Massachusetts, — to live anywhere in the civilized world, — are precisely the things that are not taxed; the things exempted are the things which are in the highest degree profitable to the community, the colleges, the museums, the churches. . . . They are what makes the common life worth living." Address by Charles W. Eliot, President of Harvard, 1906, in III STOKES, CHURCH AND STATE IN THE UNITED STATES 423 (1950).

114 *General Finance Corp. v. Archetto*, 176 A.2d 73 (R.I. 1961). Previously the Supreme Court had dismissed an appeal for want of a substantial federal question in *Heisey v. County of Alameda*, 352 U.S. 921 (1956). State courts have never agreed with the contention. See *Garrett Biblical Institute v. Elmhurst State Bank*, 331 Ill. 308, 163 N.E. 1 (1928); *City of Hannibal v. Draper*, 15 Mo. 634 (1852).

115 (places of worship) e.g., GA. CODE ANN. § 92-201 (1961): "The following property shall be exempt from taxation, to wit: All public property, places of religious worship or burial. . . ."; (property used for religious purposes) 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. . . ."; (property owned by a religious organization) e.g., N.M. CONST. art. 8, § 3: "All church property. . . ."

116 (combination) e.g., N.Y. TAX LAW § 4(6): "The real property of a corporation or association organized exclusively for the moral or mental improvement of men or women, or for religious . . . purposes . . . and used exclusively for carrying out these purposes . . . by the owning corporation. . . ."; (all three) e.g., CONN. GEN. STAT. ANN. §§ 12-81(13)-(14) (1960): "Houses of religious worship . . . real property and its equipment owned by, or held in trust for, any religious organization. . . ."

117 216 Ga. 659, 119 S.E.2d 11 (1961).

which will in turn be given or used by the church for church purposes in no degree confers tax exemption thereupon.¹¹⁸

As to a restaurant connected with the church itself, the court allowed the exemption, saying: "But the restaurant . . . being a part of the church, and used primarily for church purposes, though secondarily to feed some people for pay, if able, and without charge if unable to pay, comes within the exemption. . . ."¹¹⁹ While this decision is contrary to some of the decisions reported in the previous Survey, it appears logical and necessary in view of the narrow wording of the statute.

In *Radio Bible Hour v. Hurst-Euleless Independent School District*,¹²⁰ an appellate court of Texas agreed with the Georgia court that "place of worship" must be exactly and literally interpreted. Here, the corporation seeking the exemption conducted short religious services on the property in question during the week but not on Saturday or Sunday. Its work, in addition to printing a monthly religious paper, consisted in the "preparation, recording, and dissemination of religious programs and sermons to radio stations in Texas."¹²¹ The court, citing an earlier case that held a building must be owned and exclusively used for religious worship, as distinguished from religious work,¹²² reasoned that the present property did not come within the statutory exemption.

In so doing the court gave assent to a strict construction of tax exemptions. It stated its theory as follows:

The term "actual place of religious worship" as used in the Constitution and the statute heretofore mentioned has a meaning which may be materially different from the meaning to be implied by the use of the same or similar words or phrases in relation to matters other than taxation statutes. In other respects, such words or phrases if susceptible of more than one meaning may be given a more liberal construction. The same is not true where the question is whether property is or is not exempted from the burden of taxation.¹²³

Statutes framed in more general language are not as susceptible to the narrow construction given that in the *Radio Bible Hour* case. Consequently, the statutes which speak in terms of "religious purpose" or "use" exempt property other than the actual church.¹²⁴ *People ex rel. Watchtower Bible and Tract Society v. Haring*,¹²⁵ illustrates the operation of this type of statute. Under the New York statute, property used exclusively for carrying out religious purposes is within the exemption.¹²⁶ In *Watchtower* the plaintiff, the governing body of the Jehovah's Witnesses, owned a farm quite distant from its religious headquarters. The farm supplied the food used by ministers and students residing at the headquarters. The ministers and students were engaged in evangelizing by selling bibles and religious literature in public places and from house to house. Part of the farm's produce was sold to the public when there was a surplus. The Court of Appeals reversed a decision of the Appellate Division refusing the exemption. The sale of a very small part of the farm's production was seen as merely incidental and insubstantial. In regard to the unusual form of evangelizing employed, the court quoted with approval from the United States

118 *Id.* at 13.

119 *Ibid.*

120 341 S.W.2d 467 (Tex. Civ. App. 1960).

121 *Id.* at 468.

122 *City of San Antonio v. Young Men's Christian Ass'n*, 285 S.W. 844 (Tex. Civ. App. 1926).

123 *Radio Bible Hour v. Hurst-Euleless School District*, 341 S.W.2d 467, 469 (Tex. Civ. App. 1960).

124 Many statutes make express provision for other purposes, such as schools, cemeteries, libraries, and parsonages. See, e.g., N.D. CENT. CODE § 57-02-08 (1960):

All land used exclusively for burying grounds or cemeteries; All school-houses, colleges, institutions of learning . . . ; any dwellings belonging to religious organizations intended and ordinarily used for the residence of the bishop, priest. . . .

125 8 N.Y.2d 350, 170 N.E.2d 677, 207 N.Y.S.2d 673 (1960).

126 N.Y. CONST. art. 16, § 1; N.Y. TAX LAW § 4(6).

Supreme Court decision in *Murdock v. Pennsylvania*.¹²⁷ "[T]he mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise."¹²⁸ The New York court concluded that:

It is a new and inadmissible idea that an organization not organized for profit but for religious or educational purposes loses its status as such because out of the sale it makes a first profit which goes into capital or because the distributors of the books make a tiny gain therefrom.¹²⁹

With regard to a contention that the farm was too distant from the religious headquarters to be considered an integral part of the religious activity, Chief Judge Desmond cited an earlier New York case which held that such a construction of the statute would defeat the purposes for which it was enacted. In construing the statute, the court said:

While an exemption statute is to be construed strictly against those arguing for nontaxability . . . the interpretation should not be so narrow and literal as to defeat its settled purpose, which in this instance is that of encouraging, fostering, and protecting religious and educational institutions. . . .

Historically and in reason, the only test is whether the farm operation is reasonably incident to the major purpose of its owner.¹³⁰

This argument for an application of the statute in light of its underlying objectives was accepted by the courts of Ohio in *Holy Trinity Protestant Episcopal Church v. Bowers*.¹³¹ The Ohio statute read in terms of "houses used exclusively for public worship,"¹³² thus seemingly providing a more narrow exemption than the previously cited New York statute.¹³³ The question presented in this case concerned the application of the statute to land purchased for the purpose of building a church at some future time. The Ohio Supreme Court, in allowing this exemption, provided only that the land should not be used for commercial purposes in the meantime. The argument of the court was phrased in this way:

The basis for tax exemption is the public benefit, and the ultimate purpose of tax exemption, whether in relation to public property or non-governmental property, is to insure that property or funds devoted to one public benefit shall not be diminished by diverting such funds by means of taxation to another public benefit. . . .

Many nongovernmental entities such as hospitals and churches are considered to be operated for the public benefit.¹³⁴

In applying this reasoning to the situation before them, the court borrowed from an earlier Ohio opinion which had stated:

It is the purpose and intent of the tax exemption statutes with which we are concerned that the funds be devoted exclusively to the benefit of the public for that particular use, and so to differentiate and deny an exemption to property acquired for such use but not presently so used would defeat the purpose of the exemption statutes.¹³⁵

This seems to be a quite liberal interpretation of the spirit of the exemption statutes. Three members of the court saw it as too liberal, stressing the doctrine of strict construction of all tax exemptions.¹³⁶ It is to be regretted that the court chose to present the issue in terms of the "trust fund" theory now discredited in the area

127 319 U.S. 105 (1942). This case concerned the constitutionality of a Pennsylvania licensing tax imposed on members of the Jehovah's Witnesses conducting house to house sales of their religious tracts.

128 *Id.* at 111.

129 *People ex rel. Watchtower Bible & Tract Society v. Haring*, 8 N.Y.2d 350, 170 N.E.2d 677, 679, 207 N.Y.S.2d 673, 675 (1960).

130 *Id.* at 680, 681.

131 172 Ohio St. 103, 173 N.E.2d 682 (1961).

132 OHIO REV. CODE § 709.07 (Page 1953).

133 N.Y. CONST. art. 16, § 1; N.Y. TAX LAW § 4(6).

134 *Holy Trinity Protestant Episcopal Church v. Bowers*, 172 Ohio St. 103, 173 N.E.2d 682, 683 (1961).

135 *Carney v. Cleveland City School District Public Library*, 169 Ohio St. 65, 157 N.E.2d 311, 314 (1959).

136 *Holy Trinity Protestant Episcopal Church v. Bowers*, 172 Ohio St. 103, 173 N.E.2d 682, 685 (1961).

of tort liability. Nevertheless, it is to be noted that the court did refuse to hide behind concepts of "public burden" or "humanitarian goals." The exemptions were taken for what they were — encouragement of religions by the state. In a very proper sense, this decision is a clear example of the "quid pro quo" rationale of exemptions accepted by the writers of the tax section of the last Survey.¹³⁷

Before leaving state tax exemption, it must be noted that the religious exemption is merely one of several, recognized by all the states. Quite often where the religious exemption is interpreted in a strict sense, the court may classify the activity as a charitable institution. This exemption is broader than some religious exemption statutes.¹³⁸ Of equal importance with state tax exemptions are those made by the federal government. The Internal Revenue Code of 1954 exempts "corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious . . . purposes. . . ."¹³⁹ The United States Court of Claims, in a 1961 case, interpreted this exemption as not applicable to the Scripture Press Foundation, a nonprofit corporation engaged in the publication of religious books for the "betterment of the Protestant Sunday Schools of America."¹⁴⁰ The court accepted the distinction laid down by the Tax Court in *Saint Germain Foundation v. Comm'r.*,¹⁴¹ between "incidental" and other activities which would remove the corporation from the exemption. It laid particular emphasis on the fact that a mere five percent of the accumulated capital and surplus of the business was devoted to expenditures for religious educational programs. The court thus held: "We conclude that the sale of religious literature was the primary concern of plaintiff's activities. We further conclude that the sale of these materials, however religiously inspired, involved the plaintiff directly in the conduct of a trade or business for profit."¹⁴²

Clearly, there must be limitations on the religious purposes included under any statutory exemption. But that the fact situation presented by this case is beyond the protection of the exemption is not as clear as the court's unanimity would lead one to believe. It is to be recalled that the stated purpose of the corporation was religious. The Scripture Press was not a business within the definition embraced by the Ninth Circuit in an earlier decision: "A corporation which in its inception engages in trade, business, or speculation and only has a *vague* charitable design, does not in our opinion come within the terms of the statute."¹⁴³

Section 511 of the Internal Revenue Code of 1954 provides that the exemption accorded to religious institutions does not cover income of such corporations and organizations which is unrelated to their religious purposes, unless the recipient is a "church, a convention or association of churches."¹⁴⁴ The Code of Federal Regulations defines a church as follows: "The term 'church' includes a religious order or a religious organization if such order or organization (a) is an integral part of the church and (b) is engaged in carrying out the functions of the church."¹⁴⁵

A case arose last year as to the application of this exemption to the winery of the De La Salle Institute, a corporation formed by the Christian Brothers Order, to own and operate certain private schools. In *De La Salle Institute v. United States*,¹⁴⁶ a federal district court decided that the winery was not exempt, whether it be regarded as the business of the feeder corporation, established by the Order, or the business of the Christian Brothers Order itself. That the Institute was not a church was evident

137 1958-59 Church State Survey, *supra* note 2, at 420.

138 See, e.g., *In re Estate of Miller*, 171 Ohio St. 202, 168 N.E.2d 743 (1960); *Pittsburgh Bible Institute v. Board of Property Assessors*, 175 A.2d 82 (Pa. 1961).

139 INT. REV. CODE OF 1954, § 501(c)(3).

140 *Scripture Press Foundation v. United States*, 285 F.2d 800, 802 (Ct. Cl. 1961).

141 26 T.C. 648 (1956).

142 *Scripture Press Foundation v. United States*, 285 F.2d 800, 805-06 (Ct. Cl. 1961).

143 *Randall Foundation v. Riddell*, 244 F.2d 803, 808 (9th Cir. 1957). (Emphasis added.)

144 INT. REV. CODE OF 1954, § 511(a)(2)(A).

145 26 C.F.R. § 1.511-2(a)(3)(ii) (1961).

146 195 F.Supp. 891 (N.D. Cal. 1961).

to the court because of its corporate purposes, *i.e.*, education. The contention that the Catholic Church was the true owner of both schools and winery, because of canon law on the matter of real property, was dismissed as irrelevant in a secular court. The three interrelated organizations, the Institute, the Order, and the Church, were viewed as three independent entities at law because of the three distinct legal persons existent. The schools, it was decided, could not rightly be considered churches, even though chapels were found in conjunction with them. The court gave as its reasoning the old maxim: "The tail cannot be permitted to wag the dog."¹⁴⁷

The Institute based its argument that it was a church within the scope of the exemption on the theory espoused in *Swart v. South Burlington School District*,¹⁴⁸ where the Vermont Supreme Court held that parochial schools were an integral part of the Catholic Church. The court answered this in terms of the legislative history of the exemption, which shows an intent to place a restrictive interpretation on the word "church." However, the court also rejected the Vermont motion as a general proposition by writing, "I am not persuaded by the logic of this [Swart] decision."¹⁴⁹

With regard to the taxpayer's contention that the first amendment forbade the government from granting privileges solely to groups constituting churches in the orthodox sense of the term, it was answered that if there were any constitutional questions, they would only concern the question whether Congress could exempt any religious organization from the business tax.¹⁵⁰

The court said that even if the corporate veil of the Institute were pierced so as to find that the real owners of the schools and winery were the Christian Brothers themselves, the holdings would not fall within the exemption. To be classified as a church within the meaning of the statute, an Order must be performing the functions of the church with which it is connected. To be performing "functions," the order must be a "sacerdotal" organization, according to the federal tax regulations.¹⁵¹ The court found these conditions unfulfilled in the instant case: "The functions of the Christian Brothers Order are educational and religious. These functions are not 'church' functions in the sense intended in the statutory language."¹⁵²

Apart from the generalized statement as to the interrelation of education and religion (which would certainly be denied by the Catholic Church), the decision was based on a complete, though perhaps erroneous, study of the legislative purpose in enacting the exemption statutes. Following the liberal approach of the New York Court of Appeals in *Watchtower*,¹⁵³ it would appear that the true intent of the statute might demand a reading of the pertinent section as more than a mere technical conception of an organization's power to conduct worship. It may be doubted that the Order in question is not as much an integral part of the Catholic Church as the Jesuit Fathers with whom the Order was contrasted in the opinion. In rejecting the argument of the taxpayer framed in the terms of canon law, the court is

147 *Id.* at 901.

148 *Swart v. South Burlington School District*, 122 Vt. 177, 167 A.2d 514 (1960).

149 *De La Salle Institute v. United States*, 195 F.Supp. 891, 903 (N.D. Cal. 1961).

150 The plaintiff apparently tried to bring itself within the principle of *Murdock v. Pennsylvania*, 319 U.S. 105 (1942). Thus, it was argued that the tax was discriminatory against the irregular types of religious activity which the Supreme Court had placed on an equal footing with the more usual activities. The clear fallacy of the argument was pointed out by Justice Douglas in *Murdock*,

We do not mean to say that religious groups and the press are free from all burdens of government. . . . It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. *Id.* at 112.

151 26 C.F.R. § 1.511-2(a) (3) (ii):

A religious order or organization shall be considered to be engaged in carrying out the functions of a church if its duties include the ministrations of sacerdotal functions and the conduct of religious worship.

152 195 F.Supp. 891, 905 (N.D. Cal. 1961).

153 *People ex rel. Watchtower Bible & Tract Society v. Haring*, 8 N.Y.2d 350, 170 N.E.2d 677, 207 N.Y.S.2d 673 (1960).

compelled, in order to be consistent with the rest of its opinion, to dismiss as irrelevant the canon law interpretation of the activity. By American standards, based as they are on the pluralism of religious belief, the Order may well be considered as an element of leadership in the Catholic Church, and therefore "sacerdotal" in nature.

The court relied on a revenue regulation which declared that the question of whether the activity is religious worship or the administration of "sacerdotal" functions depends on the tenets and practices of the particular religion.¹⁵⁴ But, it is submitted, the conclusion, based on canon law, that the teaching brothers are considered by the Catholic Church as a mere appendage to its religious purposes, is an entirely new variety of statutory interpretation. It is precisely that conclusion that may spell the mischief of *De La Salle* in the broader context of the relations between church and state.

In the area of tax exemption, the state courts have followed the decisions of the past. No great change can be expected in this judicial treatment; while at the same time the legislatures continue reluctant to adopt changes in the current tax exemption statutes. The constitutional issue here seems dead at present. One writer has reasoned that the Supreme Court of the United States will never take up the question. The basis of this observation is the Court's ruling that a taxpayer has no standing to sue in federal courts. As of now a taxpayer's suit would seem the only way that the question could be presented to the Court.¹⁵⁵

The federal income tax exemptions will, more than likely, be the subject of as little litigation as they have in the past. Of all the fields of church-state relations, taxation is the most static at present.

4. Tort Liability — A Trend under Criticism

As with tax exemption, the immunity granted to religious institutions for torts committed by them or their servants is bound up with the privilege granted to all charitable institutions. In point of fact, the tie-in is yet closer in this area than in taxation for here the privilege is judge-made, thereby escaping the limiting influence of a defining statute.¹⁵⁶ As the previous Survey on tort liability remarked: "[T]he majority of courts have made little, if any, distinction between a religious charitable institution and other types of charitable institutions. . . ."¹⁵⁷ It appears that the fundamental reasons supporting the immunity are applicable equally to institutions of a nonprofit character regardless of religious affiliation. In only one case¹⁵⁸ during the last two years has specific mention been made of a church's status as the basis of a decision. Even here it was not the status of church *qua* church, but the fact that a small institution was completely dependent on the generosity of a small number of people that determined the outcome of the controversy. Perhaps it is correct to conclude that religious institutions' immunity to tort liability, as an independent area of law, is nonexistent.

Yet, the past two years have abounded with cases dealing with the value and

154 C.F.R. § 1.511-2(a)(3)(ii) (1961): "What constitutes the conduct of religious worship or the ministrations of sacerdotal functions depends on the tenets and practices of a particular religious body constituting a church."

155 PREFFER, CHURCH, STATE & FREEDOM 190 (1953): "More likely it [the Supreme Court] would, on the basis of the *Doremus* decision refuse to accept an appeal from a state court, and would, on the ground that the taxpayer has no standing to sue, dismiss a suit in federal court." See also Lawrence, Chicago Daily News, Feb. 10, 1962, p. 8, col. 4.

156 See *Shulte v. Missionaries of La Salle*, 352 S.W.2d 636 (Mo. 1961); *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942); PROSSER, LAW OF TORTS 784 (2d ed. 1955).

157 1958-59 *Church-State Survey*, *supra* note 2, at 422-27. Neither Prosser nor Harper & James in their treatments of the subject note any distinction. See 2 HARPER & JAMES, THE LAW OF TORTS § 29.16 (1956); PROSSER, LAW OF TORTS 784 (2d ed. 1955).

158 *Rosen v. Concordia Evangelical Lutheran Church*, 111 Ohio App. 54, 167 N.E.2d 671 (1960).

limitations of charitable immunity in regard to torts committed by a religious organization. While cases upholding or abrogating the doctrine in regard to other types of charities are controlling also in respect to religious institutions, we shall limit our consideration to decisions involving a religious organization as a party to the suit.

Immunity from tort liability is not a tradition of the common law. Rather it seems to have had its foundations, almost by accident, in Victorian England.¹⁵⁹ English courts soon thereafter overruled both the doctrine and the case from which the doctrine received its life.¹⁶⁰ American courts, however, refused to follow the English retraction.¹⁶¹ Up until the last few years, the majority of states recognized the exemption, although none did so because of a statutory mandate.¹⁶² About twenty years ago, a frontal attack on the privilege commenced with its abolition in the District of Columbia in *President & Directors of Georgetown College v. Hughes*.¹⁶³ When the courts were called upon to abolish the doctrine, they found themselves constrained only by their early reasoning. Accordingly, in an age of "growing social responsibility,"¹⁶⁴ the courts did examine the matter anew and many rejected their past decisions. Two more states, where heretofore immunity had been the rule, have by judicial decision, imposed liability on charitable institutions.¹⁶⁵ The trend toward realism, as the previous Survey discerned, seems to be continuing apace.¹⁶⁶

One of these decisions involved a hospital conducted by the Sisters of Charity. The plaintiff, who suffered injury due to the negligence of a hospital employee, was confronted with the defense of immunity upon bringing suit. This case, *Howard v. Sisters of Charity*,¹⁶⁷ was the first on the subject in the state of Montana. A federal district court, hearing the case on diversity grounds, decided the case squarely on the question of immunity. The court cited modern treatises¹⁶⁸ and recent decisions in other jurisdictions¹⁶⁹ and concluded that immunity could not be established in light of the attitudes expressed therein. The decision specifically imposed liability upon charitable institutions on the grounds of respondeat superior.

Two eastern states, with long-established views on the question, have seemingly reaffirmed their views. The Rhode Island Supreme Court, holding a church liable for the claimant's fall on ice covering the church property, merely reiterated its posi-

159 The doctrine appears to have arisen from dictum in *Feoffees of Heriot's Hospital v. Ross*, 12 Clark & Fin. 507, 8 Eng. Rep. 1508 (1846). The court wrote: "To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose." *Id.* at 1510. This was then applied to charitable corporations for the first and only time in English jurisprudence. *Holliday v. St. Leonard's Shoreditch*, 11 C.B., N.S. 192, 142 Eng. Rep. 769 (1861).

160 *Mersey Docks Trustees v. Gibbs*, L.R. 11 H.L. 686 (1866); *Foreman v. Mayor of Canterbury*, L.R. 6 Q.B. 214 (1871).

161 *McDonald v. Massachusetts General Hospital*, 120 Mass. 432 (1876) was the first American case holding charities immune.

162 N.J. STAT. ANN. § 16:1-48 (Supp. 1958), restored immunity in that state after a judicial overruling of the doctrine a year before. The statute expired by its own terms on June 30, 1959 and has not been replaced.

163 130 F.2d 810 (D.C. Cir. 1942).

164 FRIEDMAN, *Charitable Institutions—A Reexamination of the Doctrine of Immunity from Tort Liability*, 24 GA. B.J. 201, 218 (1961).

165 *Howard v. Sisters of Charity*, 193 F.Supp. 191 (D.Mont. 1961); *Parker v. Port Huron Hospital*, 361 Mich. 1, 105 N.W.2d 1 (1960).

166 1958-59 *Church-State Survey*, *supra* note 2 at ***.

167 *Howard v. Sisters of Charity*, 193 F.Supp. 191 (D.Mont. 1961).

168 RESTATEMENT (SECOND), TRUSTS § 402(2) (1957): "A person against whom a tort is committed in the course of the administration of a charitable trust can reach the trust property and apply it to the satisfaction of his claim." IV SCOTT, *THE LAW OF TRUSTS* p. 2895 (2d ed. 1956): "Such a sweeping exemption from liability of charitable institutions seems to be clearly against public policy. The institutions should be just before they are generous."

169 *Avellone v. St. John's Hospital*, 165 Ohio St. 467, 135 N.E.2d 410 (1956); *Pierce v. Yakima Valley Memorial Hospital*, 43 Wash. 2d 162, 260 P.2d 765 (1953); *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942).

tion on the subject.¹⁷⁰ This view is that charitable institutions are, with no exceptions, liable for their torts. Massachusetts, on the contrary, dismissing a tort claim against a church for negligence in lighting its property, avoided an opportunity to review immunity, holding: "A verdict for the defendant [church] was properly directed on this evidence, even were the doctrine of charitable immunity inapplicable, which we do not intimate, not having reached that point."¹⁷¹ Both states seem quite satisfied with the reasoning of their respective predecessors on the bench.

Although two more states have overruled their past immunity decisions, perhaps the most significant happening during the course of this year's Survey has been the refusal of a number of courts to do so, and the limitation by others of decisions abrogating immunity. In *Schulte v. Missionaries of La Sallette*,¹⁷² the Missouri Supreme Court dealt with a tort claim against a seminary for negligence in the upkeep of its swimming pool. The court, carefully noting the arguments for and against immunity advanced in recent decisions, upheld the defense for a variety of reasons. It stressed the fact that the state legislature had twice refused to pass an act creating liability for charitable institutions.¹⁷³ The immunity rule was adjudged consistent with the Missouri constitutional provision for tax exemption of charitable and religious institutions. The court denied the major premise used by those courts which have abrogated the rule. It stated:

Certainly not all of our charities are big businesses, generously endowed (as some of the opinions indicate), and thus able to absorb substantial losses. Throughout Missouri we have many small charities which certainly have not, and never will, reach the suggested status of affluence, — religious, cultural, educational, medical, and those strictly benevolent in the sense of aiding the poor and needy . . . nor do we agree with the apparent theory of some that private charity is a thing of the past and that all burdens of suffering humanity should be placed in the lap of government, state and federal.¹⁷⁴

One of the cases cited in the opinion supporting the vitality of the immunity policy was *Helton v. Sisters of Mercy*,¹⁷⁵ an Arkansas decision. There, a careless mistake in the operating room left the plaintiff seriously maimed for life. The court refused to abandon the doctrine basing its decision on *stare decisis*. It inclined to view a privilege granted in many past decisions as having become a matter of right with the passage of time. The court stated: "Decisions which become rules of property should never be overruled, whether they are right or wrong."¹⁷⁶ The case is also interesting in that the plaintiff sought recovery on the alternate theory of breach of contract. It was alleged that the proper performance of the operation was consideration for the fees paid by the patient. The court dismissed this cause on curious grounds. Because of the immunity rule, said the court, the institution was not held to due care in its treatment of the patient and the parties could not contract for something which law had ruled they had no right to expect.

The current status of the immunity doctrine in Ohio is illustrative of the caution now employed in abrogating the defense. The *Avellone* decision of 1956 held that charitable institutions engaged in hospital work were no longer immune.¹⁷⁷ The court in a well-reasoned opinion (cited by almost all the courts dealing with the problem recently) was persuaded that the public policy underlying the immunity doctrine has disappeared due to modern conditions. The ease of procuring liability insurance was

170 *De Mello v. St. Thomas the Apostle Church*, 165 A.2d 500, 504 (R.I. 1960): "As to this state's position on the question of immunity of charitable corporations, see *Glavin v. Rhode Island Hospital*, 12 R.I. 411. . . ." This was the first American case rejecting the doctrine.

171 *Holiday v. First Parish Church of Groton*, 339 Mass. 692, 162 N.E.2d 48, 49 (1959).

172 352 S.W.2d 636 (Mo. 1961).

173 Mo. Const. art. 10, § 6: "All property, real and personal, not held for private or corporate profit, and used exclusively for religious worship, for schools and colleges, for purposes purely charitable . . . may be exempted from taxation by general law."

174 *Schulte v. Missionaries of LaSallette*, 352 S.W.2d 636, 643 (Mo. 1961).

175 351 S.W.2d 129 (Ark. 1961).

176 *Id.* at 131, quoting from *Pitcock v. State*, 91 Ark. 527, 121 S.W. 742, 747 (1909).

177 *Avellone v. St. John's Hospital*, 165 Ohio St. 467, 135 N.E.2d 410 (1956).

one of the salient changes the court mentioned. When two lower court opinions later allowed the defense in situations where no insurance was carried by the defendant institutions, it appeared that the presence or absence of insurance was the controlling factor in the immunity decisions in Ohio.¹⁷⁸

Consequently, when a case arose in 1960 concerning the drowning of a boy in a religious corporation's swimming pool and the court of appeals overruled a demurrer on the basis of the *Avellone* decision without regard to insurance,¹⁷⁹ the Supreme Court of Ohio granted certiorari to resolve the question. In *Gibbon v. Young Women's Christian Association*,¹⁸⁰ the court, weighing all the reasons for and against the doctrine, this time agreed with the conclusion of the dissenters in *Avellone*. It stated:

In the *Avellone* case, the court felt that changed modern conditions of nonprofit hospitals required it to reject and abandon the previously declared public policy. Similarly compelling reasons are not established to the satisfaction of the majority in this case, particularly in light of recent legislative developments . . . , showing the conflict of views in the area of charitable immunity or liability. Therefore, we decline to again declare an extension or modification of public policy. We feel that under these circumstances the doctrine of *stare decisis* should be applied and followed in order if for no other reason, to avoid retroactive imposition of liability on a charitable institution which would result from the declaration of a different public policy — and we hold accordingly.¹⁸¹

The legislative development mentioned was the introduction of a bill in the state legislature which would have had the effect of reversing the *Avellone* decision and safeguarding immunity for other charitable institutions. The bill was overwhelmingly passed in 1958 and again in 1961 (a year after the instant case); it was, however, vetoed by the governor on both occasions.

An appellate court in Ohio explained the retreat from total liability more clearly in the case of *Rosen v. Concordia Evangelical Lutheran Church*.¹⁸² There, the suit arose from injuries sustained from the falling of a shutter from a picnic ground pavilion owned by the church. The court, in allowing the applicability of the defense of immunity, distinguished churches from hospitals as follows:

While it might be that the charitable character of hospital service has, in part, changed, the relationship of the church to the community remains as it always has been, supported entirely by gifts of its members and benefiting many who seek its help but do not give to its support.¹⁸³

The court also made what seems to be the correct analysis of the judicial deference to the legislative will in this matter. It concluded that the issue of immunity or liability was sociological, and therefore better left to the legislature which has the facilities for a more detailed study of the effects of abrogating the doctrine.

Yet in still a later decision, the Ohio Supreme Court narrowed even this reasoning somewhat by holding that charitable institutions were immune from tort liability only in respect to torts committed while acting in pursuit of the purpose for which the institution was organized.¹⁸⁴ Here, the injury occurred during a bingo game, a benefit function of the church conducted on church property. Bingo was thought to have removed the church from the sphere protected by the *Gibbon* decision. Adoption of this theory would, it seems, have called for a different result in the *Rosen* case,

178 *Hunsche v. Alter*, 145 N.E.2d 368 (C.P. Ohio 1957); *Tomasello v. Hoban*, 155 N.E.2d 82 (C.P. Ohio 1958). See comment on these cases in 1958-58 *Church-State Survey*, *supra* note 2, at 424.

179 *Gibbon v. Young Women's Christian Association*, 159 N.E.2d 911 (Ohio Ct. App. 1959).

180 170 Ohio St. 280, 164 N.E.2d 563 (1960).

181 *Id.* at 572.

182 111 Ohio App. 54, 167 N.E.2d 671 (1960).

183 *Id.* at 673.

184 *Blankenship v. Alter*, 171 Ohio St. 65, 167 N.E.2d 922 (1960). Another exception in Ohio Law of charitable immunity is illustrated in *Bell v. Salvation Army*, 172 Ohio St. 326, 175 N.E.2d 738 (1961). Liability was imposed on the charity for a paying customer who was injured in a hotel owned by the charity.

since running a picnic ground is certainly no more incidental to purposes of worship. Ohio's position on immunity was unstable at the beginning of this Survey. These cases, while providing some answers for future controversies, have contributed little to the settlement of the law in Ohio.¹⁸⁵

Even where the immunity has not been overruled formally, the introduction of exceptions to the doctrine may have the same practical effect as an outright repudiation. One of the favorite devices for reaching this result has been the allowance of a recovery for lack of care shown to a plaintiff on the invitee theory of tort liability.¹⁸⁶ On these grounds, the Washington Supreme Court granted recovery to a laborer who was working without pay for his church when a scaffold collapsed under him.¹⁸⁷ Other cases have granted invitee status to one woman coming to a church sodality meeting¹⁸⁸ and another attending a church luncheon.¹⁸⁹ The New York courts, on the contrary, although they removed charitable immunity five years ago,¹⁹⁰ have been quite reluctant to grant recovery on the invitee rationale.¹⁹¹

The trend toward greater liability on the part of religious associations for their torts has itself been subjected to examination in the past two years. It is submitted that in this re-examination, stare decisis alone should not be enough to render immunity sacrosanct, as the *Helton* case decided,¹⁹² but neither should a vague sense of social responsibility on the part of charitable institutions be enough to overrule the established doctrine. Nor should a legislature's inaction compel hesitancy on the part of the courts where the reasons given for the immunity are no longer sound.

Dean Prosser's prediction that "the end of another decade will find a majority of American jurisdictions holding that it [immunity] does not exist,"¹⁹³ has already been fulfilled. Yet, unanimity seems an impossibility at the present time. A distinction between charities, insofar as a particular type of charity may be able to afford individual claims, may be as "fair" an answer as possible. A small church or synagogue differs substantially from a medical research center in financial stability. However, it is submitted that it is confusion and not unfairness that is the most pressing concern. Consequently, the overriding consideration the courts should bear in mind in formulating a solution is certainty of application, that is, either complete immunity or, perhaps more justly, complete liability.

B. EDUCATION — *The Interregnum*

With the inauguration of America's first Catholic President, the relatively quiet controversy that has existed for almost one hundred years over the problem of religion in education has broken into a raging public debate. The court decisions of the past two years would give little indication of the change in the American political climate, but the public dialogue may well set the stage for judicial creation of more definitive statements in the near future. It is for this reason that the period covered in this Survey analysis may be termed an interregnum. It is the lull between the imposition of constitutional controls over state action in regard to religion and edu-

185 For an extensive analysis of Ohio's recent changes, see Morris *Recent Developments in Ohio's Charitable Immunity*, 10 CLEV.-MAR. L. REV. 402 (1961). For a report on how each jurisdiction stood in regard to immunity as of three years ago, see Simeone, *The Doctrine of Charitable Immunity*, 5 Sr. Louis U.L.J. 357 (1959).

186 E.g., in *Hintz v. Zion Evangelical United Brethren Church*, 13 Wis. 2d 439, 109 N.W.2d 61 (1961), the defendant church was held liable for violation of Wisconsin's "safe place" statute in failing to keep a stairway to the church in proper repair.

187 *Haugen v. Central Lutheran Church*, 361 P.2d 637 (Wash. 1961).

188 *De Mello v. St. Thomas the Apostle Church*, 165 A.2d 500 (R.I. 1960).

189 *Price v. Central Assembly of God*, 356 P.2d 240 (Colo. 1960). See also *Bader v. United Orthodox Synagogue*, 148 Conn. 449, 172 A.2d 192 (1961).

190 *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

191 *Kiernan v. Roman Catholic Church of St. John the Evangelist*, 205 N.Y.S.2d 706 (App. Div. 1960); *Krieger v. Holy Name Church*, 199 N.Y.S.2d 696 (App. Div. 1960).

192 *Helton v. Sisters of Mercy*, 351 S.W.2d 129 (Ark. 1961).

193 PROSSER, *LAW OF TORTS* 788 (2d ed. 1955).

cation and the new era, seemingly about to dawn, concerning itself with a re-examination of the place of these constitutional safeguards in the present American society.

The debate revolves primarily around a philosophical quarrel over the ideal relationship of church and state. It focuses on one concrete question, the rights of both in education. Is the state to concern itself with the religious education of its citizens, and thus to cooperate with the religious communities grouped within it,¹⁹⁴ or is the government to eschew any and all cooperation no matter how indirect, for fear of hastening an establishment of religion?¹⁹⁵ The two extreme positions may well serve as the guideposts for the decisions considered here. It seems that the Supreme Court, in the "education" cases of *Everson*,¹⁹⁶ *McCullum*,¹⁹⁷ and *Zorach*,¹⁹⁸ first took a view requiring rigorous separation of church and state wherever possible, and then allowed some accommodation in recognition of the historic interplay between the two. The pendulum now seems to have shifted back to a strict separationist theory such as that expressed in the test oath case.¹⁹⁹ The Constitution has been called upon sparingly in the past two years to determine questions of relationship in education. Yet, all the cases mirror in some way the current interpretation of the first amendment. The cases considered have arisen in relation to the two agencies now primarily entrusted with education, the public schools and the church-controlled schools.

1. *Religion in the Public Schools*

One view of the place of religion in the public schools is that of Professor Rosenfield: "The Constitution requires the public school to be more than nonsectarian and impartial or neutral among the various churches. The Constitution directs the public school to be a completely secular agency."²⁰⁰ The last Church-State Survey recognized this as the current status of the law and liable to be extended in the decisions of the future.²⁰¹ The prediction was generally correct. The extension of the "secularism" concept is most evident in the history of *Schempp v. Abington Township School District*.²⁰² In 1959 a three-judge federal district court struck down a Pennsylvania statute requiring bible-reading in the public schools.²⁰³ The previous Survey attributed much weight to the fact that the statute then under attack made no provision for excusing those children unwilling to take part in the reading. While the case was in transit to the Supreme Court, the state legislature sought to cure this supposedly fatal defect by amending the statute to allow unwilling children to be excused.²⁰⁴ The Supreme Court vacated the judgment and remanded the case to the district court in light of the statutory change.²⁰⁵ Again, the practice was adjudged unconstitutional, not as a violation of the free exercise clause, but as an establishment of religion. The bible-reading was ruled to be a sectarian religious program, even though no comment was made by the reader.

194 PARSONS, *THE FIRST FREEDOM* 80-93 (1948).

195 For an example of the latter view, see BUTTS, *THE AMERICAN TRADITION IN RELIGION AND EDUCATION* 150 (1950).

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

197 *McCullum v. Board of Education*, 333 U.S. 203 (1948).

198 *Zorach v. Clauson*, 343 U.S. 306 (1952); the education cases are examined in 1958-59 *Church-State Survey*, *supra* note *Re-cite* at 412-19.

199 "We renew our conviction that we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion." *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961).

200 Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. PITT. L. REV. 561, 570 (1961).

201 1958-59 *Church-State Survey*, *supra* note *Re-cite*, at 418.

202 30 U.S.L. WEEK 1125 (1962).

203 *Schempp v. School District*, 177 F.Supp. 398 (E.D. Pa. 1959).

204 PA. STAT. ANN. tit. 24, § 15-1516 (Supp. 1960), which reads as follows: "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

205 *School District v. Schempp*, 364 U.S. 298 (1960).

In *Brown v. Orange County Board of Public Instruction*,²⁰⁶ the courts of Florida were faced with the identical problem and reached the same conclusion. The bible introduced into the Florida public schools was the King James version distributed by the Gideons. The court saw the distribution and use as a clear violation of the Florida Declaration of Rights, which prohibits the preference of one religion by the state.²⁰⁷ The argument accepted by some courts in the past — that the book was nonsectarian but of universal truth — was not accepted by the present court. It considered the bible as the Christian equivalent of the Koran or Buddhist Scriptures, which, it said, all would agree have no place in the public schools. It is interesting to note that this court did not object to the bible-reading on the separationist theory the *Schempp* court implicitly accepted, but solely on the grounds that the practice was a preference shown to one religious group over all others. The decision leaves open the question of what the Florida court would do with regard to a practice acceptable to all religions.

That question was raised in the courts of New York in *Engel v. Vitale*.²⁰⁸ The New York public schools begin the class day with the so-called "Regents Prayer." The Court of Appeals affirmed the Appellate Division's decision that the practice did not contravene either the first amendment to the Constitution or the equivalent section of the New York constitution.²⁰⁹ While the prayer may correctly be said to be acceptable to anyone believing in a higher being, its use does not differ substantially from the bible-reading struck down in *Schempp*. The New York practice favors theistic religions; the *Schempp* practice favors some theistic sects. The number of people objecting to this prayer will be smaller, but their reasons will be the same as the sects that objected in *Schempp*. The opinion of Chief Judge Desmond makes no attempt to distinguish the practices.

The court based its decision on the assertion that complete exclusion of religion from public affairs was not the objective of the federal and New York constitutions. To support its thesis, the court referred to the many government documents at the beginnings of American history that made express reference to God, the early creation of a day of Thanksgiving, the establishment of military chaplaincies, the invocation of God in our national anthem, and similar indicia of our religious tradition. Following the spirit of Justice Douglas' statement in *Zorach*, that "We are a religious people. . . ."²¹⁰ Desmond wrote:

The "universally accepted tradition" [that ours is a nation founded and nurtured by belief in God] has been maintained without break from the days of the Founding Fathers. . . . It is an indisputable and historically provable fact that belief and trust in a Creator has always been regarded as an integral and inseparable part of the fabric of our fundamental institutions. It is not a matter of majority power or minority protection. Belief in a Supreme Being is as essential and permanent a feature of the American governmental system as is freedom of worship, equality under the law and due process of law. Like them it is an American absolute. . . .²¹¹

A dissenting opinion called the use of the prayer in the public schools a state endorsement of religion (the majority would certainly agree), and said that the constitutional demands were that the state be absolutely neutral to the entire question of religion. Neutrality was thus interpreted to mean not a lack of preference between various religions, but an inability on the part of the state to promote religion or to associate with it in any form.

206 128 So. 2d 181 (Fla. Ct. App. 1960); *cert. denied*, 129 So. 2d 141 (Fla. 1961).

207 FLA. CONST., § 6 provides: "No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

208 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 (1961).

209 N.Y. CONST. art I, § 3: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind. . . ."

210 *Zorach v. Clausen*, 343 U.S. 306, 313 (1952).

211 *Engel v. Vitale*, 10 N.Y.2d 174, 176 N.E.2d 579, 582, 218 N.Y.S.2d 659, 662 (1961).

It is submitted that *Engel* and *Schempp* are fundamentally contradictory applications of the first amendment. The recitation of prayer, regardless of a universal acceptance, is clearly as devotional an act as the reading of the inspired word. The Supreme Court would seem to have taken cognizance of the different underlying theories. Certiorari has been granted in *Engel*²¹² and the School Board has the right of appeal to the Court by statute.²¹³ On the basis of past decisions, most notably the dicta on church-state relations expressed in *Torcaso v. Watkins*,²¹⁴ decided last term, it may be predicted that the Court will reject the cooperation theory expressed in *Engel*. Justice Douglas, upon whom the New York court relied, has in the meantime explained his *Zorach* approval of interplay to mean something much less than a requirement that our government support religion.²¹⁵ The present attitude of the Court seems highly receptive to the strict separationist theory of *Schempp*, and the result of this term will likely be a more secularized public school system.

A trial court in New York was the scene of a rather bizarre suit brought by one Joseph Lewis, a frequent litigant on church-state matters in that state.²¹⁶ The case concerned the use of the amended pledge of allegiance containing the words "one nation under God." The plaintiff contended that the public schools, in using this form of pledge, were disseminating religion under the cloak of patriotism and were compelling the children to recite words against their religious beliefs. The trial court rejected both grounds without difficulty. The children were not required to join in the saying of the pledge and were even permitted to leave the room during its recitation. The dissemination of religion argument was met with the *Zorach* dictum that religion and government were not to be separated in every and all respects.²¹⁷

The courts of New York have adopted in these cases an interpretation of the first amendment that allows for greater cooperation between church and state than the Supreme Court decisions of the past would seem to tolerate. The *Lewis* case cannot be distinguished in essence from *Schempp* except by a use of the "de minimis" doctrine. The application of that doctrine would seem to solve the conflict between *Lewis* and *Engel*, if as is foreseen the *Engel* decision is overturned by the Supreme Court. The one vestige of religion in the classroom seen in *Lewis* seems fairly certain of protection in any court.

The use of released or dismissed time in public schools has once again come up for scrutiny by a state court. The rule as derived from the *McCollum*²¹⁸ and *Zorach*²¹⁹ cases appears to be that dismissed time programs for religious instruction are licit, if no use of the public school facilities is made. But a state constitution could require

212 368 U.S. 924 (1961). See Butler, *Wall of Separation — Judicial Gloss on the First Amendment*, 37 NOTRE DAME LAWYER 288 (1962).

213 28 U.S.C. § 1253 (1958): "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

214 "Neither state nor Federal governments can constitutionally pass laws nor impose requirements which aid all religions against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." 367 U.S. 488, 495 (1961).

215 "The Puritan influence helped shape our constitutional law and our common law. . . . [It] put individual conscience and individual judgment in the first place." *McGowan v. Maryland*, 366 U.S. 420, 563 (1961) (separate opinion).

216 Application of Lewis, 207 N.Y.S.2d 862 (App. Div. 1960).

217 "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. . . . The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State." *Zorach v. Clausen*, 343 U.S. 306, 312 (1952).

218 *McCollum v. Board of Education*, 333 U.S. 203 (1948).

219 "In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedule to a program of outside religious instruction." *Zorach v. Clausen*, 343 U.S. 306, 315 (1952).

a contrary decision. The Supreme Court of Oregon in *Dilger v. School District*²²⁰ examined that state's dismissed time statute last year. The case arose out of a refusal by a defendant board to arrange the school schedule to conform with the use of dismissed time programs. The plaintiff sought an injunction ordering the board to do so in order that his daughter might receive the religious education offered by a nearby church. The school board defended on the grounds that the statute was silent as to who was responsible for carrying out the arrangements, and that the statute was so worded as to give the local board discretion in determining whether the program should be used in the district. In a split decision, the court decided that the proper interpretation of the statute was that on application by the child, the granting of dismissal time for the purpose of religious education was mandatory. The board had discretion to determine only the proper time and place for the dismissal.

The dissenters saw the statute as too vague to be enforced by the court. They contended that the interpretation given by the majority was unconstitutional in that it compelled the state to furnish religious education and that it discriminated against those children whose church had no dismissed time program and those who professed no religion. It is but a short step from this position to the reasons ascribed to the program by Leo Pfeffer:

The refusal of the promoters of the program to accept a dismissed time system under which all children are released indicates quite clearly that they depend on the non-release of the other children as the factor inducing enrollment for released-time religious instruction.²²¹

While the controversy over the released time program is by no means extinct, the use of the system within the bounds set by *Zorach* appears beyond serious doubt. Yet, even this area may be affected by the expected interpretation of the establishment clause in the bible-reading and prayer cases.²²²

2. *Aid to Parochial Schools*

While federal aid to education bills have been introduced into Congress regularly for the last forty years,²²³ the present administration seems to be the first to stake a large part of its entire domestic program on such a measure. The President told Congress at the beginning of its 1962 session: "It is imperative that such a proposal carrying out these objectives [eliminating classroom shortages and raising the quality of instruction] be enacted at this session."²²⁴ The same bill was proposed during the last session with the near-unanimous approval of educational and religious groups, except the Roman Catholic Bishops. At the beginning of debates on the administration bill, the Bishops issued a statement opposing federal aid unless religious schools were also made recipients of at least low-interest loans.²²⁵ The President refused to include such a provision because, he said, there were constitutional issues involved.²²⁶ To support his position, the Department of Health, Education, and Welfare published a memorandum on the subject concluding that across-the-board grants to religious schools, across-the-board loans, and tuition pay-

220 352 P.2d 564 (Ore. 1960).

221 PFEFFER, CHURCH, STATE & FREEDOM 373 (1953).

222 Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. PITT. L. REV. 561, 574 (1961), sees the coercive effects of released time programs of any description as being the basis for a reversal of *Zorach* by the Court within the coming ten years.

223 See PFEFFER, CHURCH, STATE & FREEDOM 483 (1953); II STOKES, CHURCH AND STATE IN THE UNITED STATES 744 (1950); Manning, *Aid to Education — Federal Fashion*, 29 FORDHAM L. REV. 495 (1961); Mitchell, *Religion and Federal Aid to Education*, 14 LAW & CONTEMP. PROB. 113 (1949).

224 Chicago Sun-Times, Feb. 7, 1962, p. 4, col. 1.

225 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 provision for parochial schools." Pfeffer, *Federal Aid to Parochial Schools?* No, 37 NOTRE DAME LAWYER 309 (1962).

226 N.Y. Times, April 22, 1960, p. 16, col. 2.

ments for church school pupils were all unconstitutional.²²⁷ The National Catholic Welfare Conference (NCWC) issued an answer setting forth the Bishops' reasons for believing that a bill providing aid for parochial schools would be constitutional.²²⁸ The appearance of serious constitutional research into the problem highlights the developments of the past two years and gives the surveyor a beginning point in evaluating the trends in this area.

Until the announcement of the Bishops, it seemed that many leaders of the Catholic Church favored merely the inclusion of Catholic school children in the indirect aids of which the public schools are now the sole recipients, e.g., health care, transportation, free textbooks, etc.²²⁹ There is some reason to believe that the position of many Catholics has changed to that of favoring direct aid. The question of direct aid may soon become highly significant in the litigation of educational problems.

*Swart v. South Burlington Town School District*²³⁰ is the first case dealing with the question. There, the school district was using public school funds to pay the tuition of town children in a nearby parochial school. Under the Vermont statute, a town without a high school of its own was obligated to furnish education for the town children by arrangements with neighboring schools.²³¹ The school district in a predominantly Catholic area of the state was fulfilling this obligation by paying the tuition to a Catholic high school. The arrangement was in force for three years when a local taxpayer brought suit to enjoin the practice. The Vermont Supreme Court affirmed the trial court's holding that these expenditures were contrary to the first amendment and to the separation clause of the Vermont constitution; the two were read to have identical meaning. The purpose of the separation doctrine was seen as a safeguard for the state against schisms and a safeguard against establishment for the churches. The court based its entire conclusion on the Supreme Court's holdings in the education cases. It reasoned: "The Church is the source of their [the schools'] control and the principal source of their support. This combination of factors renders the service of the Church and its ministry inseparable from the educational function."²³² Because of the constraint which the education cases have placed on the states, no other decision on the state level seems possible unless there is a reinterpretation of the first amendment more in line with cooperation between church and state. Perhaps the real purpose of this suit was to bring the question of direct or quasi-direct aid to the attention of the Supreme Court, but in this it also failed because of the denial of certiorari.²³³ The NCWC brief viewed this failure of the Court to pass on the matter as leaving the question open,²³⁴ but the

227 DEPT. OF HEALTH, EDUCATION AND WELFARE, MEMORANDUM ON THE IMPACT OF THE FIRST AMENDMENT TO THE CONSTITUTION UPON FEDERAL AID TO EDUCATION (1961), as reprinted in 50 GEO. L.J. 349 (1961).

228 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. 399 (1961).

229 BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION 147 (1950). The author points out that the Catholic Church was then committed to receiving the welfare measures meted out solely to public school children. Cardinal Spellman said recently that: "Passage of the administration's bill to aid public schools alone means the end of our parochial schools." Denver Register, Feb. 18, 1962, p. 1, col. 6.

230 122 Vt. 177, 167 A.2d 514 (1961).

231 VT. STAT. ANN. tit. 16, § 793(a) (1958): "Each town district shall maintain a high school or furnish secondary instruction, as hereinafter provided, for its advanced pupils at a high school or academy, to be selected by the parents or guardian of the pupil, within or without the state."

232 *Swart v. South Burlington*, 122 Vt. 177, 167 A.2d 514, 520 (1961).

233 *Anderson v. Swart*, 366 U.S. 925 (1961).

234 "Undoubtedly the real reason for the decision in *Swart* lay in the fact that the tuition payments, which were made directly to the schools, were not in some manner apportioned to support of the nonreligious instruction given." 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. 399, 420 N. 54 (1961). One of the con-

more realistic impression would appear to be that the court is well satisfied with the education decisions and the Vermont court's interpretation of them in regard to tuition grants.²³⁵

As to the question of the usual forms of indirect aid to religious schools, the Supreme Court cases would seem to allow them where no appreciable aid is given to the religious institution itself. State courts, however, continue to judge the validity of the program in terms of their own state constitutions, which, while usually patterned on the first amendment, are often interpreted to mean something quite different.

The Oregon Supreme Court in the case of *Dickman v. School District*²³⁶ was called upon to balance its separation clause²³⁷ with a statute granting free textbooks to children attending parochial schools.²³⁸ The books were merely loaned to the religious schools with the ownership remaining in the local school board by terms of the statute. While this case concerned what was formerly classified as indirect aid to religious schools, the defenders of the statute mustered all the constitutional arguments NCWC had made in supporting federal aid to religious schools. Aside from the actual decision invalidating the statute, the court's answers to these arguments are of great importance to any prediction on the future of direct, as well as indirect, aid to religious schools.

The child benefit theory, which in the past has been used to sustain the constitutionality of measures similar to the textbook service, was dismissed by the court as follows:

The so-called "child benefit theory" has been applied in other cases in which the expenditure of public funds is made for the purpose of meeting the educational needs of pupils, including those attending parochial schools. The difficulty with this theory is, however, that unless it is qualified in some way it can be used to justify the expenditure of public funds for every educational purpose, because all educational aids are of benefit to the pupil.²³⁹

The decisions accepting this rationale were characterized as either sacrificing "constitutional principles . . . to serve urgent needs of the community"²⁴⁰ or based on a questionable analysis of the problem.

The contention had been made that the religious schools are merely a means of fulfilling the law that requires the children to attend school; therefore, it was argued, the schools have a right to the expenditures necessary to aid in their compliance. But the entire argument was termed specious by the court: "[I]ts application could be urged in the justification of the expenditure of public moneys for all educational

clusions drawn from the memorandum is that: "There exists no constitutional bar to aid to education in church-related schools in a degree proportionate to the value of the public function it performs [that is] . . . the secular function." *Id.* at 437.

235 The Kentucky Court of Appeals sees as well settled the questions of state aid directly to sectarian schools. "However we may properly indulge the presumption that the legislature did not intend to include schools to which the payments could not legally be made. . . . [I]t is equally reasonable to infer that it does not include schools that give sectarian instruction or have any denominational requirements with respect to their teachers or pupils." *Butler v. United Cerebral Palsy*, 352 S.W.2d 203, 209 (Ky. 1961).

At least one constitutional scholar does not agree, however. Professor Kurland writes, "[T]he continuing question [is] whether the national government can contribute financially to parochial education, directly or indirectly. (Anyone suggesting that the answer as a matter of constitutional law, is clear one way or the other is either deluding or deluded.)" Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961).

236 366 P.2d 533 (Ore. 1961).

237 ORE. CONST. art. I, § 5 provides: "No money shall be drawn from the Treasury for the benefit of any religious or theological institution, nor shall any money be appropriated for the payment of any religious services in either house of the Legislative Assembly."

238 ORE. REV. STAT. § 337.150 (1961) provides: (1) each district school board shall . . . provide textbooks, prescribed or authorized by law, for the free and equal use of all pupils residing in its district and enrolled in and actually attending standard elementary schools or grades seven or eight of standard secondary schools."

239 *Dickman v. School District*, 366 P.2d 533, 539-40 (Ore. 1961).

240 *Id.* at 539.

needs of parochial schools."²⁴¹ The court's other reason for rejecting this contention was that, since the state does not compel pupils to attend parochial schools, the cost thereof is not a matter of public concern. Neither of these arguments appear to meet the claim of the proponents of aid that recompense is due religious schools for all educational services they perform for the state.²⁴²

The court seems to see some validity in Justice Frankfurter's view that the Constitution must be read in light of modern circumstances and that the separation clause hinges on the social theory of the present.²⁴³ But the court finds the dangers of a quarrel among the various sects as to the amount of aid, and the threat of state control of religious education, to be valid reasons for keeping the wall "high and impregnable."²⁴⁴

The argument had been made that prohibition of aid to school children solely because of their enrollment in a religious school was in violation of the equal protection clause. It was answered by the terms of the Constitution itself. The court seems to have concluded that while it might be called discrimination, it was legal discrimination because based on another article of the Constitution. The arguments advanced in the *Dickman* decision may be somewhat unsatisfactory, but the basic thrust of the decision, the finding that religious schools are part of the religion, may be the only answer necessary for the prohibition.

Transportation of parochial school children has been the subject of three cases during the duration of this Survey. In *Matthews v. Quinton*,²⁴⁵ the Supreme Court of Alaska was confronted with a statute, authorizing free bus transportation, which was in effect before Alaska received statehood.²⁴⁶ With no local precedents on either side, the court was free to examine the views of other states on the problem. Having noted the opinion in *Everson*, the court disregarded it and found the statute invalid as a direct aid to religious institutions. The child benefit theory, espoused in *Everson*, was rejected on the reasoning that only some parochial school children were benefited by the statute; therefore, said the court, it could not be contended that the legislature had enacted the bill for the children's benefit. The statute limited transportation to those children living near highways used in transporting children to public schools. The court found the real beneficiaries of the transportation to be the religious schools themselves. It relied on Justice Rutledge's dissent in *Everson*:

Finally, transportation, where it is needed, is as essential to education as any other element. Its cost is as much a part of the total expense, except at times in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials; indeed of all other items comprising the total burden. . . . Hardly can it be maintained that transportation is the least essential of these items, or that it does not in fact aid, encourage, sustain, and support just as they do, the very process which is its purpose to accomplish.²⁴⁷

241 *Id.* at 542.

242 "Education in church-related schools is a public function which, by its nature, is deserving of government support." 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. 399, 437 (1961).

243 *McGowan v. Maryland*, 366 U.S. 420, 463 (1961) (separate opinion). "illuminated . . . by our national experience. . . ."

244 *McColum v. Board of Education*, 333 U.S. 203, 212 (1948).

245 362 P.2d 932 (Alaska 1961).

246 ALASKA COMP. LAWS ANN. § 37-11-5 (Supp. 1958):

In those places in Alaska where transportation is provided . . . for children attending public schools, transportation shall likewise be provided for children who, in compliance with the compulsory education laws of Alaska, attend non-public schools . . . where such children, in order to reach such non-public schools, must travel distances comparable with, and over routes the same as, the distances and routes over which the children attending public schools are transported.

247 *Everson v. Board of Education*, 330 U.S. 1, 47-48 (1947) (separate opinion).

The argument that providing transportation was a valid exercise of the police power by the state was also rejected on this rationale. The police power, said the court, cannot extend to a practice otherwise found unconstitutional.

A long dissent was entered by one of the three justices. His argument relied mainly on the legislative proceedings that led up to the passage of the constitutional article prohibiting "direct" aid to religious organizations. The line of cases which the majority followed was distinguished by reason of the fact that the word "direct" was included in the Alaska constitution, while the other states invalidating transportation statutes had done so under provisions prohibiting aid in general.²⁴⁸ The actual reasons for the majority's decision were laid to practical grounds in the dissent. It stated:

Those who would deny transportation for children attending non-public schools are not concerned with transportation as such. Nor are they truly solicitous about the relatively minor expense to the state which will result from the operation of Chapter 39 (the statute authorizing the free transportation). Their real anxiety, and the real issue in this case, has to do with the very existence of the sectarian or religious educational institutions, and the belief of some persons in the supremacy of public education administered and controlled by the state.²⁴⁹

It is submitted that this remark portrays the true conflict in the field of aid to religious schools. Something more than the mere relationship of church and state enters into the controversy. Establishment in the historic sense does not appear to be a consideration in this field. Rather, the opponents of aid in any form seem committed to the view that, while private schools must be tolerated by virtue of *Pierce v. Society of Sisters*,²⁵⁰ no encouragement to increasing their vitality may be forthcoming. The courts of Oregon permit the transportation of parochial school students but forbid the giving of free textbooks; the Alaska Court, more logically, would prevent even transportation, a function divorced from the basic operation of the school.²⁵¹ The Connecticut Supreme Court, in *Snyder v. Town of Newton*,²⁵² upheld the power of the state government to authorize transportation for parochial school children. The state statute, although struck down for other reasons, was upheld as to transportation on the theory that complete separation was never the attitude of the state. In this connection, the court referred to the historic practice of tax exemption for religious institutions. The court accepted the child benefit theory, saying:

The reasoning in these cases [the state cases allowing transportation services] is substantially the same advanced in *Everson v. Board of Education*, that is, that public transportation to private schools aids the parents, who are under the compulsion of law to send their children to school; that it is a measure to promote the safety of the children; and that therefore it helps the parents and the children and not the school.²⁵³

The court went on to quote, with approval, the following statement from *Chance v. Mississippi State Board*: "The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe from him the benefits common to all."²⁵⁴ The court in the instant case seems on the verge, not

248 *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 Atl. 835 (1934); *Sherrard v. Jefferson County Board of Education*, 294 Ky. 469, 171 S.W.2d 963 (1942).

249 *Matthews v. Quinton*, 362 P.2d 932, 957 (Alaska 1961).

250 268 U.S. 510, 535 (1925). "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."

251 "Like the dissenters in the bus fare case, I am not now able to distinguish between minor payments there involved and payments for educational costs. I believe, therefore, that none of such nondiscriminatory uses of tax funds are forbidden by the First Amendment." *Katz, Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 428 (1953).

252 147 Conn. 374, 161 A.2d 770 (1960), cert. denied, 365 U.S. 299 ((1961).

253 *Id.* at 777.

254 190 Miss. 467, 200 So. 706, 710 (1941).

only of approving the furnishing of such indirect aid, but of demanding that it be administered so as to allow the parent his full right to educate the child in any school he sees fit.

A third case arose in New York over the legality of allowing transportation to religious schools in adjoining areas. In *Application of Silver*,²⁵⁵ the distance covered by such transportation was some thirty-five miles. The court held that this was a reasonable trip under the circumstances, once more affirming the right of the state to furnish transportation for parochial school children. It is interesting to note that while New York has one of the most liberal transportation statutes, the states that have struck down bus transportation have relied quite heavily on the New York case which invalidated an earlier New York statute.²⁵⁶ The remedy in New York was a constitutional amendment. Perhaps that would be the surest way for proponents of indirect aid to proceed in all states.

In summary it can be said that the cases in the last two years have done little to illuminate the present position of American law in regard to the education problem. Religion in the public schools has been further de-emphasized as a result of the *Schempp* case and the guiding principle may soon be that freedom of religion is really a freedom from religion. That "We are a religious people"²⁵⁷ seems to be true only outside the public schools. Even if the Supreme Court adopts a broad prohibition of religious influences in public schools, the matter would not be closed. Rather, the controversy might shift into the political forum, much as has the religious school problem. While such a prohibition would delineate the constitutional essence of the public school, would the definition be the correct one? It has been argued that the studied absence of religion in the classroom has the psychological effect of establishing a religion of irreligion. It must be admitted, however, that no other solution has as yet gained popular acceptance.

Religious schools stand in a completely different light today. The man believing in their usefulness is not encouraged by the recent decisions, but then neither is the man arguing for a complete excision of public support. There seems to be no clear trend satisfactory to either. The resolution of the problem awaits the public debate still in its formative stages. The role of the state in religious education may be temporarily delineated by more detailed pronouncements by the courts in the coming few years, but a lasting answer awaits the formulation of an interpretation of the establishment clause that is capable of general application. Thus, the only prediction as to the future of our educational problems is their continued existence.

III. RELIGIOUS VALUES

A. SUNDAY CLOSING — *A Definitive Rationale*

Sunday closing legislation has given rise to considerable litigation in both state and federal courts. However, no decision nor series of decisions has been more definitive in this area than those which were handed down on May 29, 1961, by the United States Supreme Court.

In *McGowan v. Maryland*,²⁵⁸ and *Two Guys v. McGinley*,²⁵⁹ the Court upheld the constitutionality of the Sunday laws of Maryland and Pennsylvania. The cases

²⁵⁵ 205 N.Y.S.2d 650 (App. Div. 1960).

²⁵⁶ *Judd v. Board of Education*, 278 N.Y. 200, 16 N.E.2d 576 (1938). Before concluding the survey of the transportation area, it is interesting to note the Wisconsin Legislature's attempt to frame a law that would provide transportation for religious school children and yet not stand in danger of violating the separation clause of that state's constitution. The statute was amended to read: "[T]he 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 nonpublic schools, residing in the district, on regular routes approved for the public school bus. . . . Ch. 648, Laws of 1961, amending Wis. STAT. ANN. § 40.53 (1957).

²⁵⁷ *Zorach v. Clausen*, 343 U.S. 306, 313 (1952).

²⁵⁸ 366 U.S. 420 (1961).

²⁵⁹ 366 U.S. 582 (1961).

of *Braunfeld v. Brown*²⁶⁰ and *Gallagher v. Crown Kosher Market*,²⁶¹ were concerned with the constitutionality of the Sunday closing laws of Pennsylvania and Massachusetts, as applied to members of the Orthodox Jewish Faith. These laws were found to be valid by the Court, although no exemption was made for such Sabbatarians — those who celebrate the Sabbath on Saturday.

The Supreme Court had considered the constitutional validity of Sunday legislation prior to 1961.²⁶² However, none of the decisions were reached on the precise issues decided in 1961.²⁶³ The decisions in *Song King v. Crowley*,²⁶⁴ *Hennington v. Georgia*,²⁶⁵ and *Petit v. New York*,²⁶⁶ were recorded before the first amendment was held to be applicable to the states in regard to the establishment of religion²⁶⁷ or the free exercise thereof;²⁶⁸ thus, these cases decided only that the laws in question were not violative of the equal protection clause of the fourteenth amendment. The cases on Sunday laws that had been previously presented to the Court during this century had all been dismissed for want of a substantial federal question.²⁶⁹

The 1961 decisions for the first time focused on the objections that these laws were violative of the establishment and free exercise clauses of the first amendment. In *McGowan v. Maryland*,²⁷⁰ the Court, in an opinion rendered by Mr. Chief Justice Warren, held that the Sunday laws of Maryland were neither violative of the establishment clause, nor offensive to the equal protection or due process clauses of the fourteenth amendment. It was also decided that, since the appellants did not allege an infringement of their own religious freedoms, they had no standing to question whether the laws prohibited the free exercise of religion.²⁷¹

The Maryland appellants, employees of a large department store, maintained that the commodities exempted from the Sunday sales prohibition rendered those statutes violative of due process. They contended that the distinctions therein were unreasonable. Certain merchants, such as operators of bathing beaches and amusement parks, were allowed to sell their products on Sundays. The appellants argued that, because they were prohibited from selling the same type of merchandise on that day, they were denied the equal protection of the law. In rejecting these arguments, the Court stated:

Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently from others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievements of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . .

It would seem that a legislature could reasonably find that the Sunday

260 366 U.S. 599 (1961).

261 366 U.S. 617 (1961).

262 See *Song King v. Crowley*, 113 U.S. 703 (1885); *Hennington v. Georgia*, 163 U.S. 299 (1896); *Petit v. Minnesota*, 177 U.S. 164 (1900); *Friedman v. New York*, 341 U.S. 907 (1951); *McGee v. North Carolina*, 346 U.S. 802 (1953); *Gundaker Central Motors v. Gassert*, 354 U.S. 933 (1957); *Grochowiak v. Pennsylvania*, 358 U.S. 47 (1958); *Ullner v. Ohio*, 358 U.S. 131 (1958); *Kidd v. Ohio*, 358 U.S. 132 (1958).

263 *McGowan v. Maryland*, 366 U.S. 420, 436 (1961).

264 113 U.S. 703 (1885).

265 163 U.S. 299 (1896).

266 177 U.S. 164 (1900).

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

268 *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

269 *Friedman v. New York*, 341 U.S. 907 (1951); *McGee v. North Carolina*, 346 U.S. 802 (1953); *Gundaker Central Motors v. Gassert*, 354 U.S. 933 (1957); *Grochowiak v. Pennsylvania*, 358 U.S. 47 (1958); *Ullner v. Ohio*, 358 U.S. 131 (1958); *Kidd v. Ohio*, 358 U.S. 132 (1958).

270 366 U.S. 420 (1961).

271 *Id.* at 429.

sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day. . . .

The record is barren of any indication that this apparently reasonable basis does not exist, that the statutory distinctions are invidious, that local tradition and custom might not rationally call for this legislative treatment. . . . Likewise, the fact that these exemptions exist and deny some vendors and operators the day of rest and recreation contemplated by the legislature does not render the statutes violative of equal protection since there would appear to be many valid reasons for these exemptions, as stated above, and no evidence to dispel them.²⁷²

The appellants next contended that the Maryland statutes violated the constitutional prohibition of the first amendment respecting an establishment of religion. They argued that, since Sunday is the Sabbath of the predominant Christian sects, the purpose of the enforced cessation of labor on that day is to facilitate and encourage church attendance by Christians, and to recruit new members from people without religious beliefs or with marginal beliefs. In order to substantiate this "establishment" argument, the appellants relied on the phrasing of the present Maryland statutes, as well as earlier versions of Sunday laws and pronouncements of the highest court of Maryland.²⁷³

In order to decide the questions raised by these contentions, the Court felt it necessary to examine the historical background and development of Sunday closing laws in America. It discovered that although the original Sunday laws were motivated by religious forces, "beginning before the eighteenth century, nonreligious arguments for Sunday closing began to be heard more distinctly and statutes began to lose some of their totally religious flavor."²⁷⁴

Before reaching a decision, the Court turned its attention, as it had in the famous *Everson v. Board of Education* case,²⁷⁵ which also involved the establishment clause, to the historical context surrounding the enactment of the first amendment. Therein, it discovered that James Madison, who proposed the first amendment in Congress, had previously co-authored Virginia's Declaration of Rights which included a "free exercise of religion" clause, and had also sponsored an "act for establishing religious freedom" in Virginia. In the same year, 1785, that this act passed the Virginia Assembly, Madison presented to the Virginia legislators a bill concerning the punishment of those who labored on Sunday. This bill became law the next year, 1786. In 1799, the Virginia legislature repealed all subsequently enacted legislation deemed inconsistent with that establishing religious freedom. Virginia's statute banning labor on Sunday stood.²⁷⁶ Thus, it can be seen that neither James Madison, who introduced the first amendment into Congress, nor the members of the Virginia legislature, who were also vitally concerned with religious liberty, felt that Sunday laws were an infringement of freedom of religion.

Before specifically reviewing the Maryland statutes in question, the Court reached the conclusion that Sunday closing laws, *per se*, did not offend the establishment clause of the first amendment. It stated:

In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States. . . .

. . . The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot pre-

272 *Id.* at 425-27.

273 *Id.* at 430-31.

274 *Id.* at 433-34.

275 330 U.S. 1 (1947).

276 *McGowan v. Maryland*, 366 U.S. 420, 437-39 (1961).

scribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.²⁷⁷

The Court, after closely scrutinizing the relevant Maryland statutes, held that their purpose was to set aside a day of rest and recreation, not to aid religion, and that thus these Sunday laws were not in conflict with the "establishment" prohibition of the first amendment. It was emphasized, however, that this decision was not to be taken as *carte blanche* approval of all state Sunday closing laws. The Court declared:

We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose — evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect — is to use the State's coercive power to aid religion.²⁷⁸

In a companion case, *Two Guys v. McGinley*,²⁷⁹ the Court applied the rationale of *McGowan* to its consideration of the constitutionality of the Sunday laws of Pennsylvania, and concluded that the purpose of these statutes was to set aside a day of rest and recreation, not to aid religion.²⁸⁰ In an opinion penned by Mr. Chief Justice Warren, it also concluded that the distinctions and exemptions contained in the statutes were not violative of equal protection.²⁸¹ The decision, as in *McGowan*, was by an eight to one margin, with Mr. Justice Douglas dissenting.

In *Braunfeld v. Brown*,²⁸² and a companion case, *Gallagher v. Crown Kasher Market*,²⁸³ the Court found that the Sunday laws of Pennsylvania and Massachusetts were neither violative of the equal protection clause of the fourteenth amendment nor of the establishment clause of the first amendment, nor in contravention of the free exercise provision of that amendment. This decision was reached, even though the applicable statutes did not exempt Orthodox Jews and other Sabbatarians from the force of the cessation-of-labor-on-Sunday provisions. Members of the Orthodox Jewish Faith, as Sabbatarians, are required, by their Faith, to close their businesses and abstain from all manner of work from nightfall on Friday to nightfall on Saturday each week. Thus, the combined effect of holding this belief and being subject to the Sunday closing laws would be a cessation of all business activities for such persons from Friday at nightfall until Monday morning. Since the appellants in these two cases alleged an infringement of their own religious freedoms, they had standing to question whether or not such laws, providing no exemptions, interfered with the free exercise of their religion.

In the *Braunfeld* case,²⁸⁴ appellants, who were clothing and furniture merchants, alleged that the Sunday closing laws would result in an impairment of their ability to earn a living. Braunfeld further contended that he would be forced to discontinue his business unless the state provided an exemption for Sabbatarians who closed on another day in accord with the dictates of their conscience; the alternative, he argued, would be to force them to abandon their religious beliefs.

The Supreme Court disposed of both of these contentions by pointing out that the Sunday laws do nothing more than regulate a secular activity; they do not make any religious practice itself unlawful. Admitting that such laws operate so as to make the practice of some beliefs more expensive, the Court felt that to strike down

277 *Id.* at 444-45.

278 *Id.* at 453.

279 366 U.S. 582 (1961).

280 *Id.* at 598.

281 *Id.* at 591-92.

282 366 U.S. 599 (1961). For an excellent discussion of Sunday closing laws as applied to Sabbatarians see Mann and Garfinkel, *The Sunday Closing Laws Decisions — A Critique*, 36 NOTRE DAME LAWYER 323 (1962). Mann argued appellants' position before the Supreme Court and Garfinkel assisted him on the brief.

283 366 U.S. 617 (1961).

284 *Braunfeld v. Brown*, 366 U.S. 599 (1961).

such legislation — "legislation which imposes only an indirect burden on the exercise of religion"²⁸⁵ would radically limit the operating latitude of a legislature. The Court, after noting that a number of states provide an exemption for Sabbatarians,²⁸⁶ went on to state that while this may be a wise course, it was not concerned with the wisdom of the legislation, but rather with its constitutionality. It was also pointed out that to permit such an exemption might undermine the state's objective of providing a day of rest, *i.e.*, the elimination of as much commercial noise and activity on that day as possible. The Court concluded that the Pennsylvania laws did not interfere with the free exercise of appellants' religion.

In *Gallagher v. Crown Kosher Market*,²⁸⁷ the Court applying the reasoning of the *McGowan* and *Braunfeld* decisions, evaluated and upheld the Sunday laws of Massachusetts.

Justices Brennan, Douglas, and Stewart dissented in both Sabbatarian cases. Mr. Justice Brennan forcefully argued against the majority opinion when he declared:

[T]he issue in this case — and we do not understand either appellees or the Court to contend otherwise — is whether a State may put an individual to a choice between his business and his religion. The Court today holds that it may. But I dissent, believing that such a law prohibits the free exercise of religion.

... For in this case the Court seems to say, without so much as a deferential nod towards that high place which we have accorded religious freedom in the past, that any substantial state interest will justify encroachments on religious practice, at least if those encroachments are cloaked in the guise of some nonreligious public purpose.

... [T]heir effect is that appellants may not simultaneously practice their religion and their trade, without being hampered by a substantial competitive disadvantage. Their effect is that no one may at one and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen. This clog upon the exercise of religion, this state-imposed burden on Orthodox Judaism, has exactly the same economic effect as a tax levied upon the sale of religious literature. And yet, such a tax, when applied in the form of an excise or license fee, was held invalid in *Follett v. Town of McCormick*, *supra*.²⁸⁸

Brennan next proceeded to question whether the interest of the state in having everyone rest on the same day is so compelling that it entitles the state to impede appellants' freedom of worship. In order to reach a determination as to this issue, he considered the infringements allowed upon the free exercise of religion in *Reynolds v. United States*,²⁸⁹ where the Court upheld polygamy conviction of a member of the Mormon faith despite the fact that it was an accepted doctrine that male members had a duty to practice polygamy. In *Prince v. Massachusetts*,²⁹⁰ the Court upheld a statute making it a crime for a female under eighteen years of age to sell printed matter or other merchandise in public places, despite the fact that one of the tenets of the Jehovah's Witnesses prescribes that a child should distribute religious literature in public — that a child should "lead" them. Bren-

285 *Id.* at 606.

286 CONN. GEN. STAT. REV. § 53-303 (1958); FLA. LAWS ch. 59-1650, § 2 (1959); IND. ANN. STAT. § 10-4301 (1956); KAN. GEN. STAT. ANN. § 21-953 (1949); KY. REV. STAT. § 436.160(2) (1959); ME. REV. STAT. ch. 134, § 44 (1954); MASS. GEN. LAWS ANN. ch. 136, § 6 (1961) (exemption only as to selling of kosher meat until 10:00 a.m. on Sunday); MICH. STAT. ANN. REV. § 18.855, 18.122, 9.2702 (1957); MO. REV. STAT. § 563.700 (1959); NEB. REV. STAT. § 28-940 (1956); N.J. STAT. ANN. § 2A: 171-4 (1953); N.Y. PEN. LAW § 2144; N.D. REV. CODE § 12-21-17 (1960); OKLA. STAT. ANN. tit. 21, § 909 (1958); R.I. GEN. LAWS § 11-40-4 (1956); S.D. CODE § 13.1710 (1939); TEX. PEN. CODE ANN. art. 284 (1952); VA. CODE § 18.1-359 (1950); WASH. REV. CODE § 9.76.020 (1951); W.VA. CODE ANN. ch. 61, § 6073 (1961); WIS. STAT. ANN. § 301.33 (1958). (It should be noted that Wisconsin does not have comprehensive Sunday regulations.)

287 366 U.S. 617 (1961).

288 *Braunfeld v. Brown*, 366 U.S. 599, 611-13 (1961).

289 98 U.S. 145 (1878).

290 321 U.S. 158 (1944).

nan distinguished these cases by arguing that the interest of the state in stamping out polygamy, "a practice deeply abhorred by society,"²⁹¹ and in protecting children provides a much stronger justification for an infringement upon religious beliefs, than does the state's interest in having everyone rest on the same day.

The objection has been raised that if an exemption were to be allowed for Sabbatarians, then all their employees, including Christians, would have to labor on Sunday. This may be answered by pointing out that the Sunday laws forbid the labor of *all persons* (with certain limited exceptions) on Sunday, and that an exemption granted to Sabbatarians need not apply to their non-Sabbatarian employees.²⁹²

Mr. Chief Justice Warren, in his opinion in the *Braunfeld* case, raised the point that, because of this fact, an exempted employer might hire employees on the basis of whether or not their own religious beliefs qualified them for the exemption, and that such a practice might violate state antidiscrimination policy in regard to hiring.²⁹³ Brennan answered this problem when he stated:

Finally, I find the Court's mention of a problem under state antidiscrimination statutes almost chimerical. Most such statutes provide that hiring may be made on a religious basis if religion is a bona fide occupational qualification. It happens, moreover, that Pennsylvania's statute has such a provision.²⁹⁴

The recent Supreme Court decisions could do much to correct current inconsistencies²⁹⁵ in state evaluations of Sunday closing laws in the light of state and federal constitutional provisions. In its disposition of the four cases²⁹⁶ involving Sunday closing legislation, the Court developed a rationale which outlines the basic requirements of due process, equal protection, and freedom of religion. All of these standards could, and should, prove invaluable in achieving some sort of uniformity of state decisions in this area. For examples of the current chaos, one need merely look at a sampling of the decisions handed down by state courts since the last Survey.

In *Moore v. Thompson*,²⁹⁷ the Supreme Court of Florida held that an act which prohibited the sale or exchange of new or used motor vehicles on Sunday by car dealers was unconstitutional. It felt that the distinctions and exemptions of the statute were arbitrary, and consequently were not a reasonable basis for validly exercising the state police power. The court pointed out that it was fully cognizant of the fact that decisions of other states were in conflict with its own determination.

A New Jersey superior court, relying on pronouncements of the New Jersey Supreme Court, held in *State v. Monteleone*,²⁹⁸ that the classification of articles as saleable and nonsaleable on Sunday was not discriminatory, and that the Sunday closing law was thus constitutional.

The Supreme Court of South Carolina considered the constitutionality of a statute prohibiting the showing of motion pictures on Sunday, and found, in *Carolina Amusement Co. v. Martin*,²⁹⁹ that it was not violative of constitutional provisions, either state or federal, respecting equal protection, due process, free speech, and freedom of religion. It might be noted that the South Carolina Sunday law permitted Sunday motion pictures in certain areas of the state under specified condi-

291 *Braunfeld v. Brown*, 366 U.S. 599, 614 (1961).

292 *E.g.*, IND. ANN. STAT. § 10-4301 (1956).

293 *Braunfeld v. Brown*, 366 U.S. 599, 609 (1961).

294 *Id.* at 615.

295 1955-57 *Church-State Survey*, *supra* note 1, at 432-36; 1958-59 *Church-State Survey*, *supra* note 2, at 427-32; 35 NOTRE DAME LAWYER 569 (1960).

296 *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).

297 126 So. 2d 543 (Fla. 1960).

298 63 N.J. Super. 596, 165 A.2d 39 (1960).

299 236 S.C. 558, 115 S.E.2d 273 (1960).

tions. While not directly deciding the point, the court indicated that it did not consider such distinctions violative of equal protection.

Two recent Ohio cases demonstrate that inconsistent applications, interpretations, and evaluations of Sunday laws occur even within the same state. In *State v. Woodville Appliance, Inc.*,³⁰⁰ an Ohio county court held the Ohio Sunday laws unconstitutional in that, in addition to containing unreasonable classifications, they were arbitrary, capricious, and vague, and were contrary to the constitutional provisions and the Bill of Rights of Ohio. The court ignored precedents of the Ohio Supreme Court, such as *State v. Kidd*,³⁰¹ which was decided in 1958, in reaching its decision. It justified this oversight on the grounds that the Ohio Sunday laws had recently been revised, and that the Ohio Supreme Court had not passed on their constitutionality since revision.

About three months after this decision, the Supreme Court of Ohio cited the new Sunday laws with apparent approval in reaching the determination that a city ordinance, requiring a junk yard in a residential district to close on Sunday, did not conflict with an exemption for Sabbatarians, contained in the state Sunday closing laws.³⁰²

In a very recent decision,³⁰³ the Illinois Supreme Court ruled that the state law banning car sales on Sunday was unconstitutional. The Illinois court considered and applied the rationale of the United States Supreme Court's decisions³⁰⁴ in reaching its determination. The court accepted the proposition that the basic purpose of Sunday closing laws is to provide a general day of rest for all citizens, but it felt that when a statute "singles out only one activity or occupation to which this day of rest shall apply,"³⁰⁵ that it is then a special law and thus forbidden by the Illinois constitution. The same conclusion could probably be reached by application of the equal protection clause of the fourteenth amendment of the Constitution.

It would seem that the Supreme Court reached the right result in holding that Sunday closing legislation is a justifiable exercise of the state's police power when public welfare, rather than religious belief, is made the rational basis. It should be noted that Russia, scarcely considered at this time in history to be a Christian nation, has decreed that Sunday is to be the general rest day in a seven-day week.³⁰⁶ This suggests that the Supreme Court's rationale has a substantial foundation in reality — that it does, indeed, reach the core of the question.³⁰⁷ However, the correctness of the Court's ruling that nothing in the Constitution requires an exemption from Sunday closing legislation for Sabbatarians might be questioned. The right to freely exercise one's religion should not be infringed upon without a compelling justification.

B. OBSCENITY — *A Comparison of State and Church Positions*

1. *Problem of Definition*

Essentially, obscenity poses a problem of balance — of weighing the constitutional guarantee of freedom of expression against the upholding of basic moral

300 171 N.E.2d 565 (Ohio 1960).

301 167 Ohio St. 521, 150 N.E.2d 413 (1958).

302 *City of Akron v. Klein*, 171 Ohio St. 207, 168 N.E.2d 564 (1960). An Ohio court of appeals has recently held that the state's new Sunday laws were constitutional in *City of Euclid v. MacGillis*, 179 N.E.2d 131 (Ohio 1962). For a similar case in Missouri, see *State v. Katz Drug Co.*, 352 S.W.2d 678 (Mo. 1962).

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

304 *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 Koshher Market*, 366 U.S. 617 (1961).

305 *Courtesy Motor Sales v. Ward*, 179 N.E.2d 692, 695 (Ill. 1962).

306 *BATES, RELIGIOUS LIBERTY: AN INQUIRY* 6 (1945).

307 *But see* JOHNSON & YOST, *SEPARATION OF CHURCH AND STATE IN THE UNITED STATES* 255 (1948).

standards. It is the purpose of this section of the Survey to analyze the law of obscenity³⁰⁸ in order to ascertain what balance has been struck between the demand of society that freedom of speech and press be safeguarded and its desire to prevent the corruption of public morals. An analysis of this type requires a comparison of the respective positions of state and church with regard to the definition of obscenity.

It was determined in *Roth v. United States*³⁰⁹ that "[O]bscenity is not within the area of constitutionally protected free speech or press." The Supreme Court outlined the legal test for obscenity: "[W]hether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to prurient interest."³¹⁰ The Court endorsed the American Law Institute's definition of prurient interest.³¹¹ Therein, it is defined as, "a shameful or morbid interest in nudity, sex, or excretion . . . if it goes, substantially beyond customary limits of candor in description or representation of such matters. . . ."³¹²

The element of scienter must be alleged and proved in order to sustain the conviction of a violator of the obscenity laws. The Supreme Court so held in *Smith v. California*,³¹³ however, the Court left any determination of the extent of the scienter requirement for future consideration.³¹⁴

Recent cases in the area of obscenity have exemplified judicial application of the principles to be derived from the two leading cases discussed above. A federal district court in Illinois applied the *Roth* definition in a decision involving a literary review entitled "Big Table." In determining that by this standard, the material contained therein was neither obscene nor filthy and therefore mailable, the court stated:

Obscene material, as stated above, is "material which deals with sex in a manner appealing to prurient interest." The Kerouac article does not deal with sex any more than it does with anything else. And, surely, the meaning of "manner" in that approved definition implies a method of presentation which is something more than simply using unaccepted words.

In comparison, the other article . . . while not exactly the wild prose picnic in the style of Kerouac, is, taken as a whole, similarly unappealing to the prurient interest. The exacerbated, morbid, and perverted sex related by the author could not arouse a corresponding interest in the average reader, as the Hearing Examiner in the case agreed. The dominant theme or effect is of shocking the contemporary society, in order to better point out its flaws and weaknesses, but that clinical appeal is not akin to lustful thoughts.³¹⁵

The court also discussed the charge that the contents of the magazine were "filthy," which is a separate classification of nonmailable matter. It decided that the standard governing this classification could not be of a lesser degree than that announced in the *Roth* decision, and thus should be considered as substantially the same as that standard, or as requiring a somewhat more positive reaction.³¹⁶

The "Rule of Thumb" set up by the superintendent of police of New Orleans and his deputy, that a publication was obscene if it contained a picture showing "bare breasts or bare buttocks," was held to be an infringement on constitutionally

308 For discussions of the historical development of the law of obscenity see 1955-57 *Church-State Survey*, *supra* note 1, at 436-52. 1958-59 *Church-State Survey*, *supra* note 2, at 537-46.

309 354 U.S. 476, 485 (1957).

310 *Id.* at 489.

311 *Id.* at 487 n.20.

312 MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957).

313 361 U.S. 147 (1959).

314 *Id.* at 154. The Court stated: "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock."

315 *Big Table, Inc. v. Schroeder*, 186 F.Supp. 254, 261 (N.D. Ill. 1960).

316 *Id.* at 262.

protected rights.³¹⁷ The court insisted upon application of the standards established in *Roth*.

In *State v. Jackson*,³¹⁸ the Supreme Court of Oregon also accepted the American Law Institute's test³¹⁹ for obscenity in its application and interpretation of the Oregon statutory provisions in this area.

The Ninth Circuit decided in *Ackerman v. United States*,³²⁰ that the *Roth* test of obscenity is applicable to private letters. It held that the scienter requirement set down in the *Smith* decision³²¹ was met by the defendant's knowledge, as the writer of the letters, that they were obscene within the statute prohibiting the mailing of obscene matter.³²²

In *City of Cincinnati v. King*,³²³ the municipal court of Cincinnati concluded that a bookseller must have had some knowledge of the book or books alleged to be obscene if a conviction was to be sustained. In discussing the scienter requirement imposed by the *Smith* case,³²⁴ wherein the extent of that requirement was not defined, the court said:

So far as we are concerned here, the *Smith* case stands for the legal proposition that a bookseller, such as the defendant in the Cincinnati case, must have *some* notice of the books he sells: must have *some* knowledge of the contents of the book or books alleged to be obscene. . . . All that the United States Supreme Court is requiring in such prosecution is that the prosecuting authority prove that the bookseller had a general knowledge of the general, ordinary, and usual contents of the books in his store. We do not believe that the United States Supreme Court ever intended to establish a rule of law allowing a bookseller with impunity to shut his eyes to something which he could readily see, nor shut his mind to something which he should and easily could know. . . .³²⁵

The Supreme Court of Florida held in *Cohen v. State*³²⁶ that the requirement of scienter was impliedly included in the state obscenity law, and that the state must therefore prove that the accused had knowledge of the obscene character of the material involved.³²⁷

However, it has been held that it is not necessary to establish that a bookseller actually read the book in question, in order to convict him of violating a statute proscribing sale of obscene books. The necessary element of knowledge may be established by circumstantial evidence.³²⁸

In order to ascertain what balance has been struck between the demands of society for freedom of speech and press and its desire to prevent the corruption of public morals, it is necessary to focus attention on the views of some of the moralists and theologians as to the meaning of obscenity.

It appears that it is acceptable to many moralists to define the "obscene" in terms of its tendency to arouse venereal pleasure.³²⁹ This definition differs little in essence from the Supreme Court's definition in *Roth v. United States*,³³⁰ especially when it is remembered that "prurient" conveys the idea of a tendency to excite lustful thoughts.³³¹ The *Roth* rule requires consideration of the book or film as a

317 *In re Louisiana News Company*, 187 F.Supp. 241 (E.D. La. 1960).

318 224 Ore. 337, 356 P.2d 495 (1960).

319 See *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957).

320 293 F.2d 449 (9th Cir. 1961).

321 *Smith v. California*, 361 U.S. 147 (1959).

322 *Ackerman v. United States*, 293 F.2d 449 (9th Cir. 1961).

323 168 N.E.2d 633 (Ohio 1960).

324 *Smith v. California*, 361 U.S. 147 (1959).

325 *City of Cincinnati v. King*, 168 N.E.2d 633, 636 (Ohio 1960).

326 185 So. 2d 560 (Fla. 1960).

327 *Id.* at 563.

328 *People v. Skenkman*, 20 Misc. 2d 1093, 195 N.Y.S.2d 570 (Sup. Ct. 1960).

329 THEISEN, A MORAL EVALUATION OF THE AMERICAN LAW REGARDING LITERARY OBSCENITY 97 (1957). See Gardiner, *Moral Principles Toward a Definition of the Obscene*, 20 LAW & CONTEMP. PROB. 569 (1955).

330 354 U.S. 476 (1957).

331 *Id.* at 487 n.20.

whole,³³² which is in conformity with canon law, requiring that the subject be considered in its entirety.³³³ However, many moralists and theologians might argue that the natural law, being broader than canon law, would declare a publication obscene where it contained a single obscene passage.

The "average person" standard enunciated in *Roth*³³⁴ meets no serious moral objection as long as provision is made for the protection of the young and the immature.³³⁵ "[W]here adoption of the Federal Rule has removed the protection of the law from children, some statutory provision should be made to prohibit such literature as tends to the corruption of the morals of youth."³³⁶

In *Butler v. Michigan*,³³⁷ the Supreme Court held that a statute, which makes it a misdemeanor to sell or make available to the general public material detrimental to the morals of youth, violates the due process clause of the fourteenth amendment. The Court stated: "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause. . . ."³³⁸ The Court did, however, cite with apparent approval another Michigan statute making it a crime to furnish a minor material tending to corrupt his morals.³³⁹

There appears to be no legal objection to a tightly-drawn statute which would be protective of minors as long as "what is fit for children" is not the standard by which publications available only to adults are judged. The Roman Catholic Church's position is that such legislation is necessary, but state legislatures and Congress have not seen fit to follow the proposal. However, in a recent comparison of the law of obscenity and pertinent moral principles, it was reasoned that:

In American law, as in Catholic philosophy, freedom of the press is regarded as a natural right, just as that of self-preservation. . . . In evaluating the American law against obscene literature, however, we must approach with a certain tolerance. . . . Should the Constitutional guarantees of a free press prevent the obscenity laws from being developed to perfection, we must remember that according to Catholic moral principles some imperfection in the law may be tolerated in order to secure a greater good. The Constitutional guarantees of a free press, which often handicap the legislator when he draws up a law against obscene literature, are a safeguard against tyranny. The greater good involved, the safeguarding, namely, of essential rights, justifies a certain tolerance of imperfection in the law against obscene literature.³⁴⁰

2. Prior Restraint

The question of prior restraint is one of the most troublesome questions raised by obscenity laws. The hallmark case in this area is *Near v. Minnesota*,³⁴¹ where the Supreme Court stated: "In determining the extent of the constitutional protec-

³³² *Id.* at 489.

³³³ Theisen, *supra* note 22, at 61, 66, 101. See Gardiner, *Moral Principles For Discerning the Obscene*, PROCEEDINGS OF THE CATHOLIC THEOLOGICAL SOCIETY OF AMERICA 128 (1954).

³³⁴ *Roth v. United States*, 354 U.S. 476, 489 (1957).

³³⁵ Theisen, *supra* note 22 at 105.

³³⁶ *Id.* at 108.

³³⁷ 352 U.S. 380 (1957).

³³⁸ *Id.* at 383-84. See *Police Com'r of Baltimore v. Seigel Enterprises*, 223 Md. 110, 162 A.2d 727 (1960). The court held that the section of the state statute, which prohibited display, upon the public streets or highways or other places within the view of children, of publications obscene for a child, was unconstitutional; it prohibited adults from viewing books which it is their right to buy and read, the court held.

³³⁹ *Butler v. Michigan*, 352 U.S. 380, 383 (1957). See *State v. Jackson*, 224 Ore. 337, 356 P.2d 495 (1960), where, in dictum, the court approved the idea of a tightly-drawn statute for the protection of children; *In re Louisiana News*, 187 F. Supp. 241 (E.D. La. 1960). (The court, in dictum, stated that there is no objection to an effective state policy of safeguarding minors against publications thought to have a corrupting influence on the morals of youth.)

³⁴⁰ Theisen, *supra* note 22 at 95, 96.

³⁴¹ 283 U.S. 697 (1931).

tion, it has been generally, if not universally, considered that it is the chief purpose of the guaranty of free speech to prevent previous restraints upon publication."³⁴² The Court proceeded to explain that there may be exceptions even to so sacrosanct a principle as this.

[T]he protection even as to previous restraints is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. . . . No one would question but that a government might prevent actual obstruction of its recruiting service or the publication of sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications.³⁴³

In 1952, in *Joseph Burstyn, Inc. v. Wilson*,³⁴⁴ the Court reached the conclusion that under the first and fourteenth amendments, a state may not place a prior restraint upon the showing of a motion picture on the basis of the censor's conclusion that it is sacrilegious. However, it refused to consider whether the prohibition also applied to the showing of obscene films.³⁴⁵

Mr. Justice Frankfurter delivered the opinion of the Supreme Court in the 1957 case of *Kingsley Books, Inc. v. Brown*,³⁴⁶ which upheld a New York statute which permitted the state courts to enjoin the further distribution of books displayed for sale or intended to be sold or distributed, if the books were found to be obscene after due trial. The Court distinguished the *Near* case, which involved matters deemed to be derogatory of a public officer. "Unlike *Near*, [the statute is concerned solely with obscenity and, as authoritatively construed, it studiously withholds restraint upon matters not already published and not yet found to be offensive."³⁴⁷

Until 1961, the Supreme Court, despite the language in the *Near* decision, had never decided the precise question of whether obscenity was a permissible exception to the principle forbidding prior restraint. That question was raised in *Times Film Corp. v. Chicago*.³⁴⁸ The Court upheld a municipal ordinance requiring submission of films to the office of the commissioner of police for examination or censorship prior to public exhibition, and forbidding their exhibition without a permit obtained from that office by meeting certain standards.

Admittedly, the challenged section of the ordinance imposes a previous restraint, and the broad justiciable issue is therefore present as to whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. It is that question alone that we decide. We have concluded that [the section] of Chicago's ordinance requiring the submission of films prior to their public exhibition is not, on the grounds set forth, void on its face.³⁴⁹

The petitioner's attack upon the ordinance did not include any challenge to the validity of the standards set out therein, as prior movie censorship cases before the Court had. Mr. Justice Clark, writing for the majority, noted that distinction and said: "Obviously, whether a particular statute is 'clearly drawn,' or 'vague,' or 'indefinite,' or whether a clear standard is in fact met by a film are *different questions* involving other constitutional challenges to be tested by considerations *not here involved*."³⁵⁰

The Court reviewed *Near v. Minnesota*,³⁵¹ and subsequent decisions in the area of prior restraint, in order to support its conclusion. It found these cases to hold that the first amendment guarantees are not absolute, that all previous

342 *Id.* at 713.

343 *Id.* at 716.

344 343 U.S. 495 (1952).

345 *Id.* at 505, 506.

346 354 U.S. 436 (1957).

347 *Id.* at 445.

348 365 U.S. 43 (1961).

349 *Id.* at 46.

350 365 U.S. at 43. (Emphasis added.)

351 283 U.S. 697 (1931).

restraints are not invalid, that motion pictures are within the protection of the first and fourteenth amendments, but that obscenity is not so protected.³⁵²

Based on a claim of absolute privilege against prior restraint, the petitioners contended that the state's sole remedy was the invocation of criminal process under the Illinois pornography statute, and that only after a transgression. Rejecting that argument, the Court stated: "To illustrate its fallacy, we need only point to one of the 'exceptional cases' which Chief Justice Hughes enumerated in *Near v. Minnesota* . . . namely, 'the primary requirements of decency [that] may be enforced against obscene publications.'"³⁵³

Four members of the Court — Justices Black, Brennan, Douglas, and Warren — dissented. Warren and Douglas wrote opinions expressing their disapproval. They viewed the Court's decision in *Times* as having a much wider application than that stated by Justice Clark in the majority opinion. Warren contended that the Court was approving of prior restraint not just in regard to *obscene* films, but rather was sanctioning it for *all* films. He stated:

Let it be completely clear what the Court's decision does. It gives official license to the censor, approving a grant of power to city officials to prevent the showing of any motion picture these officials deem unworthy of a license. It thus gives formal sanction to censorship in its purest and most far-reaching form, to a classical plan of licensing that, in our own country, most closely approaches the English licensing laws of the seventeenth century which were commonly used to suppress dissent in the mother country and in the colonies.³⁵⁴

Warren also noted that Chicago had chosen this procedure without any apparent attempt to discover other, more suitable, means to achieve its ends.

Douglas, relying on quotations from Plato, Thomas Hobbes, John Milton and John Courtney Murray, caustically reminded the majority that "Regimes of censorship are common in the world today. Every dictator has one; every communist regime finds it indispensable."³⁵⁵ He argued that when the government must wait until after publication, rather than imposing a prior restraint, then the protections of the Bill of Rights remain to shield the accused. The Douglas opinion stated that:

The presumption of innocence, the right to jury trial, proof of guilt beyond a reasonable doubt — these become barriers in the path of officials who want to impose their standard of morality on the author or producer. The advantage a censor enjoys while working as a supreme bureaucracy disappears. The public trial to which a person is entitled who violates the law gives a hearing on the merits, airs the grievance, and brings the community judgment to bear upon it.³⁵⁶

Implicit in the Douglas dissent seems to be a fear that the *Times* decision holds the seeds for future application of the principle of prior restraint to other media of communication; if prior restraint is appropriate for motion pictures, there seems to be no constitutional objection to its applicability to books, newspapers, magazines and the like in a drive to eliminate the obscene.

Since the majority opinion is couched in rather general, abstract terms, it is difficult to determine the ultimate effect of *Times*. In *City of Portland v. Welch*,³⁵⁷ a case decided eight months after *Times*, the complaint alleged that the defendant exhibited a motion picture without deleting certain scenes as required by the censors, as a condition to the issuance of a license to show the picture. The Supreme Court of Oregon held that it failed to charge the defendant with a crime. The court noted that nothing in the complaint advised the defendant how the movie fell

³⁵² *Times Film Corp. v. Chicago*, 365 U.S. 43, 47-48 (1961). See 36 NOTRE DAME LAWYER 406, 407 (1961).

³⁵³ *Times Film Corp. v. Chicago*, 365 U.S. 43, 49 (1961).

³⁵⁴ *Id.* at 55-56.

³⁵⁵ *Id.* at 79.

³⁵⁶ *Id.* at 83.

³⁵⁷ 364 P.2d 1009 (Ore. 1961).

short of the standards set by the city, or why the scenes had been ordered deleted.³⁵⁸ The court distinguished its case from *Times* by pointing out that the defendant here had not been accused of failing to submit the film for inspection by the censors.

In *Zenith International Film Corp. v. City of Chicago*,³⁵⁹ the Seventh Circuit, which met reversal in *Times*, held that the administration of Chicago's prior restraint ordinance, as applied to the film involved, deprived the owner of its right to a full and fair hearing.

Zenith had no opportunity to present evidence of contemporary community standards; the responsible city officials failed to view the film as a whole and thus could under no circumstances apply the proper standard of obscenity; there was no *de novo* hearing before the mayor; the sole group that saw the film was a Film Review Board whose procedure does not allow for a hearing; there are no standards for selection of such Board and no safeguards to preclude an entirely arbitrary judgment on its part; and finally, there was no indication given to Zenith why the city found the film to be "obscene and immoral."

The fundamental procedural elements of notice and hearing have been denied Zenith where they should have been provided — before the licensing body itself. . . .

The recent *Times* Film decision does not provide *carte blanche* authorization for *ad hoc*, unfair, abortive municipal licensing procedures. We re-emphasize that it does hold a city has the power to impose a system of prior restraints on movie distribution, if it does so properly. Chicago's procedure, as followed in the case at bar, is lacking in the requisite elements of procedural due process.³⁶⁰

The *City of Portland*³⁶¹ case and the *Zenith*³⁶² decision may well be strongly indicative of the manner in which the courts will look upon the now permissible principle of prior restraint, where motion pictures are involved. Both of these decisions, but especially *Zenith*, emphasize the fact that while prior restraint is now permitted, the essential requirements of procedural due process — *notice* and *fair hearing* — remain unaltered. If courts were steadfastly to maintain that these requirements must always be met when there is an attempt, at any level of government, to censor, then it is not inconceivable that a fair and efficient administrative process would develop. This, at any rate, could be the net effect of the position taken by the Seventh Circuit in *Zenith*. It will not satisfy the minority in *Times*, but it may well provide some safeguards against the dangers they saw inherent in the *Times* holding.

It may be predicted that the Supreme Court will be very reluctant to extend permission for prior restraint to other communications media. Four Justices vehemently dissented in *Times*, and it could not be said that the majority revealed a reckless abandonment of *Near*, given the carefully narrowed basis for the *Times* holding.

As with the law, there is no unanimity in the religious approach to prior restraint. For example, Justice Douglas, dissenting in *Times*, quoted from John Courtney Murray, S.J., as follows:

The freedom toward which the American people are fundamentally oriented is a freedom under God, a freedom that knows itself to be bound by the imperatives of the moral law. Antecedently it is presumed that a man will make morally and socially responsible use of freedom of expression; hence there is to be no prior restraint on it. However, if his use of freedom is irresponsible, he is summoned after the fact to responsibility before the judgment of the law. There are indeed other reasons why prior restraint on communications is outlawed; but none are more fundamental than this.³⁶³

From their teachings and writings, it is not difficult to discern that there are

358 *Id.* at 1012.

359 291 F.2d 785 (7th Cir. 1961).

360 *Id.* at 790.

361 *City of Portland v. Welch*, 364 P.2d 1009 (Ore. 1961).

362 *Zenith International Film Corp. v. City of Chicago*, 291 F.2d 785 (7th Cir. 1961).

363 MURRAY, WE HOLD THESE TRUTHS 164-65 (1960).

many moralists, in direct conflict with Murray, who would be delighted with the exercise of the principle of prior restraint as to communications — in any form — thought to be obscene. It is precisely because there is this judicial and moral divergence of opinion that the subtle questions of church-state relations in the area of obscenity laws defy a simple, or even clear solution. Undeniably, an absolute constitutional principle of freedom of expression is irreconcilable with prior restraint, whatever the reason. But, as is evident from the holding in *Times*, the prevailing view is that there can be no absolute principles of constitutional law which will prevail against legal and moral opposition to what is admittedly a serious problem affecting the very foundations of society — gross and unrestrained obscenity.

The great conflict in this area is not over what is or is not obscene. The church and the state appear to have reached essential agreement on the meaning of the term. The great value judgments appear to have been made — the general meaning of the term has been established by *Roth* and it is clear from *Times* that some prior restraints may be imposed. But it is the application of those judgments that will provide a fertile field for debate and litigation as society tries to reconcile constitutional principles with those that are essentially moral and religious. The past few years have shed more light on the problem, but much obscurity still prevails.

C. DOMESTIC RELATIONS

In dealing with the institutional problems of church-state relations, *e.g.*, education, taxation, and tort liability, the delicate balance between demands of the church and demands of the state is measured in the courts by pitting constitutional values and institutional values in direct conflict.

There is another more subtle conflict between church and state, which has largely remained unmeasured by the courts, simply because the problems have not yet been cast in terms of the first amendment. It is to be doubted whether some of the problems herein will ever be adjudicated in those terms, because there are adequate existing bases of decision, *e.g.*, in divorce and child custody. In other areas, such as artificial insemination, the basic issue has not even reached the stage of formulation in terms of a social consensus, and therefore is not embodied in any positive legislation. The role to be played by religion and the churches, then, in the field of "family law" is a variable, perhaps best determined by the exigencies of each particular problem.

1. *Separation and Divorce Problems* — Legal Imbalance

(a) Divorce

The problem of church-state conflict is seen in the law of divorce and separation only in the rare cases in which the parties directly urge a religious ground as the basis for dissolution of the matrimonial bond. Two recent New York cases³⁶⁴ amply illustrate the approach followed by the courts when confronted with religious conflict. In *Diemer v. Diemer*,³⁶⁵ a Protestant husband asked for a decree of separation, alleging cruel and inhuman treatment. Mrs. Diemer, having contracted an invalid marriage in the eyes of her faith, Roman Catholicism, had three years later repudiated that marriage and refused sexual relations to her husband unless he would submit to a remarriage in the Catholic Church. The court held that the husband was entitled to the decree on the ground of abandonment, making it clear that "deep-felt and conscientious religious convictions" were insufficient motives in law to justify the abandonment of marital obligations. The court further said that it was immaterial to the issue of abandonment that religious beliefs were involved, and that in this situation, base and illegitimate reasons would be indistinguishable

³⁶⁴ *Di Croce v. Di Croce*, 27 Misc. 2d 1035, 209 N.Y.S.2d 624 (Sup. Ct. 1961); *Diemer v. Diemer*, 8 N.Y.2d 206, 168 N.E.2d 654, 203 N.Y.S.2d 829 (1960).

³⁶⁵ 8 N.Y.2d 206, 168 N.E.2d 654, 203 N.Y.S.2d 829 (1960).

from sincere motives. The second case, *Di Croce v. Di Croce*,³⁶⁶ is one in which the wife changed her religion after marriage from Roman Catholicism to membership in the Pentecostal Church. Friction in the family grew as the wife and her brothers attempted to proselytize the husband and five children. A separation decree was granted to the husband based on "cruel and inhuman treatment." The court explicitly stated that change of faith and religious differences would not, of themselves, be enough to justify the separation. But where fanaticism results in cruelty to the husband, even though inspired by religious fervor, there is ample justification.

These cases show the general attitude of the courts in dealing with religious factors influencing marital discord. Religious values are not independently considered, except insofar as they can be dealt with as legal concepts, such as abandonment or cruelty.

(b) Child Custody

In adoption proceedings and in determination of custody after divorce or separation, the law remains much the same as described in the preceding Church-State Surveys.³⁶⁷ Matching the religion of the child and the adoptive parents remains a relatively strong policy, whereas in the allocation of children following a divorce or separation, religious belief is a relatively minor factor. The consideration of greatest weight in determining which parent shall have custody of a child, or who will be fit adoptive parents, is as always the best interests and welfare of the child.³⁶⁸ For example, in *In re Stone*,³⁶⁹ a mother who had abandoned her child was contesting an adoption proceeding. The court remanded the case because the chancellor had neglected to make findings on the "two most important aspects" of the matter: 1) whether the best interests of the child would be promoted by adoption, and 2) whether the fact that the natural mother was Protestant should preclude an adoption by Jewish parents on the basis of statutory policy. The statute in question requires that: "Whenever possible, the petitioners shall be of the same religious faith as the natural parents of the child to be adopted."³⁷⁰ *Commonwealth v. White*³⁷¹ also supports the proposition that, in adoption cases, religion is an important factor, outweighed only by superior interests of the child's welfare. In that case a Catholic mother, deserted by her husband, also a Catholic, placed their eight-month-old child with a minister of the Assembly of God Church and his wife. The father, in contesting the adoption proceeding, raised the religious issue and demanded custody. The court voiced the most widely accepted position:

As a general rule, courts should endeavor to place the custody of a child with persons of the same religious faith, but, bearing in mind the paramount importance of the general welfare of the child, the courts may, in the exercise of a sound discretion, place a child in the custody of persons of a different religious faith if the child's welfare demands. A proper religious atmosphere is an attribute of a good home and it contributes significantly to the ultimate welfare of a child.³⁷²

The court then affirmed the decree for the adoptive parents on the basis of the father's misconduct and poor character, indicating that the best interests of the child would be ill-served if the father were to have custody.

Where custody of children is an issue after a divorce, and the natural parents are the antagonists, the religious factor is not as important. In *Wood v. Wood*,³⁷³ a father sought to gain custody from his ex-wife on the ground that she was not

³⁶⁶ 27 Misc. 2d 1035, 209 N.Y.S.2d 624 (Sup. Ct. 1961).

³⁶⁷ 1958-59 *Church-State Survey*, *supra* note 2, at 432-39; 1955-57 *Church-State Survey*, *supra* note 1, at 453-62.

³⁶⁸ *Commonwealth v. Reitz*, 193 Pa. Super. 125, 163 A.2d 908 (1960).

³⁶⁹ 398 Pa. 190, 156 A.2d 808 (1959).

³⁷⁰ PA. STAT. ANN. tit. 1, § 1 (Supp. 1960).

³⁷¹ 403 Pa. 55, 169 A.2d 69 (1961).

³⁷² *Id.* at 73.

³⁷³ 168 A.2d 102 (Del. Ch. 1961).

rearing the children in the Catholic faith as they had agreed before marriage. The court dismissed this contention with a few well-chosen words:

In pure custody matters the welfare of the child must be the court's overriding consideration, and the responsibility for religious training of a child must largely fall into the hands of the parent selected by a court as the custodian.³⁷⁴

A rather extreme case³⁷⁵ shows the extent to which a court's judgment as to the material welfare of a child will outweigh all other factors, including those of a religious nature. The facts in *Frank v. Frank*³⁷⁶ showed that a mother married her paramour, by whom she was pregnant before divorce from her first husband. She then successfully sought custody of a child of the first marriage, because she was able to provide more care than the father. Even though the natural father had been raising the child as a Catholic, the court was content to say: "We can not say that the chancellor abused his discretion in not giving the question of religion greater weight in this case."³⁷⁷ In these cases the prime touchstone on which decisions turn is that of the child's best welfare. An important constituent of "welfare" here is religion, but the courts cannot and do not choose between particular religions as contributing more, or less, to that welfare.

(c) Agreements Concerning Religious Training

The so-called "pre-nuptial" agreement — a contract between engaged persons relating to religious training of the children of the marriage — has generally been considered unenforceable by civil courts.³⁷⁸ To turn again to the *Wood* case,³⁷⁹ the father sued either for custody of his child, or for specific enforcement of the wife's agreement to raise the child as a Catholic. The court declined to enforce it, saying that agreements of that kind, made under the auspices of church authorities, are not matters with which a civil court should concern itself. It based its decision on two points: 1) that such agreements are impossible to enforce in the face of the probability that mere lip service would be paid to any enforcing order, and 2) that American governmental agencies traditionally remain aloof from ecclesiastical matters in deference to specific constitutional prohibition.

In recent years, however, such agreements have often been incorporated in separation and divorce decrees, with the result that they are governed by the state's rules on obedience to, and modification of, court orders. Again, of course, the best interest of the child is the chief guidepost. Two Illinois cases,³⁸⁰ however, have shown a tendency toward rigidity; they assumed that a divorce decree was itself controlling, because the welfare of the child was paramount in its original formulation. In *Taylor v. Taylor*,³⁸¹ a Catholic mother had been given the right to determine the religious training of the children, and the Protestant father was given the right to determine their educational training. The chancellor modified this decree by eliminating the father's prerogative, saying that due to the fine line between religion and education, such a decree would prove troublesome and impractical. The Supreme Court of Illinois reversed, saying that the only question was whether or not circumstances had so changed as to justify the modification. Moreover, the court indicated that there was no real religious issue in the case, dismissing it in summary fashion:

The implication of plaintiff's argument that secular education cannot be isolated from religious teaching is contrary to the basic tenets of our public

³⁷⁴ *Id.* at 104.

³⁷⁵ *Frank v. Frank*, 26 Ill. App. 2d 16, 167 N.E.2d 577 (1960).

³⁷⁶ 26 Ill. App. 2d 16, 167 N.E.2d 577 (1960).

³⁷⁷ *Id.* at 580.

³⁷⁸ Pfeffer, *Religion in Upbringing of Children*, 35 B.U.L. REV. 333, 360 (1955).

³⁷⁹ *Wood v. Wood*, 168 A.2d 102 (Del. Ch. 1961).

³⁸⁰ *Taylor v. Taylor*, 32 Ill. App. 2d 45, 176 N.E.2d 640 (1961); *Gottlieb v. Gottlieb*, 31 Ill. App. 2d 120, 175 N.E.2d 619 (1961).

³⁸¹ 32 Ill. App. 2d 45, 176 N.E.2d 640 (1961).

school system and it is a well known fact that millions of American Catholics send their children to public schools without any apparent violation of their religious precepts.³⁸²

In the other Illinois decision, *Gottlieb v. Gottlieb*,³⁸³ a similar situation was presented. The Catholic mother, bound by the decree to raise the children as Jews, persistently violated its provisions by rearing them in the Catholic religion. The decree was upheld against the argument that to enforce it would harm the children in the light of their training up to that time.

[I]n the absence of clearly established circumstances indicating that the best interests of the child would be served by modification we do not feel that solemn agreements incorporated in a decree and sanctioned by the court should be so lightly cast aside. . . .³⁸⁴

In New York, a substantially different approach has been taken. In *Hehman v. Hehman*,³⁸⁵ and in *Martin v. Martin*,³⁸⁶ children were allowed to choose which religion they would prefer, notwithstanding that the decrees contained provisions regulating their education and religious training. In those cases, the child's best welfare was not considered as established by the divorce decree, in contrast to *Taylor* and *Gottlieb*, but rather that their welfare depended upon their own choice. Justice Friend, in the *Gottlieb*³⁸⁷ case, disagreed with the result in New York on the ground that a child of tender years has not a mature and intelligent opinion on the subject of religion, and there is no impartial way to determine the child's preference. In sharp contrast is the opinion of Justice Shapiro in the *Hehman* case,³⁸⁸ where he says of the child: "[W]ith the heart of a child he may speed directly to what is the truth for him more quickly and accurately than we adults whose lives and actions, like Hamlet, are 'sicklied o'er with the pale cast of thought'."³⁸⁹ The tendency of the courts to handle religious problems in terms of existing legal concepts, where readily available, is reflected again in this area. Prenuptial agreements are unenforceable standing alone; they may be enforceable when embedded in a judicial decree.

(d) A New Approach

Divorce law ought not be an embodiment of morality but it should reflect the teachings of religion on the importance of a stable family unit as far as is socially desirable. Criticism of the existing marriage laws and family codes has been widespread in the past years. It is too soon to predict whether state legislatures will begin now to tighten up their domestic relations laws, but at least one state, Wisconsin, has taken significant steps in attempting to regulate the social institution of marriage in an effective manner. Their new Family Code³⁹⁰ expresses a visionary attitude in dealing with that relation. It recognizes and expressly states the policy to be followed in working with its provisions.

It is the intent of [the statute] to promote the stability and best interests of marriage and the family. Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. The seriousness of marriage makes adequate premarital counseling and education for family living highly desirable and courses thereon are urged upon all persons con-

382 *Id.* at 643.

383 31 Ill. App. 2d 120, 175 N.E.2d 619 (1961).

384 *Id.* at 621.

385 13 Misc. 2d 318, 178 N.Y.S.2d 328 (Sup. Ct. 1958).

386 127 N.Y.S.2d 851 (App. Div. 1954), *aff'd per curiam*, 308 N.Y. 136, 123 N.E.2d 812 (1954). *Contra*, *Shearer v. Shearer*, 73 N.Y.S.2d 337 (Sup. Ct. 1947); *Ramon v. Ramon*, 34 N.Y.S.2d 100 (Dom. Rel. Ct. 1942).

387 *Gottlieb v. Gottlieb*, 31 Ill. App. 2d 120, 175 N.E.2d 619 (1961).

388 *Hehman v. Hehman*, 13 Misc. 2d 318, 178 N.Y.S.2d 328 (Sup. Ct. 1958).

389 *Id.* at 331.

390 WIS. STAT. ANN. §§ 245-48 (Supp. 1961).

templating marriage. The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned.³⁹¹

Particularly exemplifying this new attitude are the following provisions. The Code redefines marriage, not only as a civil contract, but as the legal status of husband and wife.³⁹² Permission of a judge is required for issuance of a marriage license in all cases where there are minor children of a previous marriage, in order to insure that obligations to such children will be met before new responsibilities are undertaken.³⁹³ Justices of the peace may no longer perform marriage ceremonies.³⁹⁴ And possibly most important is the section that provides that where a person conscientiously objects to divorce, he may insist on legal separation, which merely removes some of the obligations of marriage, rather than severing the marriage bond.³⁹⁵

2. *Antimiscegenation*. — A Forgotten Value

In recent years there has been an increased awareness of legislative and judicial responsibility in questions concerning civil rights. As a result, developments may occur in cases deciding the constitutionality of antimiscegenation statutes, which prevent marriage between persons of different races. As a practical matter, the general thrust of these statutes is the prohibition of marriages between whites and Negroes. About one-half of the states have enacted such legislation.³⁹⁶ In addition, a few state constitutions have provisions embodying the same policy.³⁹⁷ Arguments favoring these laws are usually based upon grounds of protection of civil harmony, racial peace, and desire to keep the races pure and unmixed (on the basis of a "scientifically proven" biological inferiority of colored races, especially Negroes). There can be no reason why these statutes are allowed any semblance of validity at this time. Only one state has held its antimiscegenation statute unconstitutional,³⁹⁸ the rest have upheld them.³⁹⁹ The California decision in *Perez v. Lippold*⁴⁰⁰ is interesting, not only as the one case holding for invalidity, but as a lengthy exposition of what seems so obvious. Petitioners sought a writ of mandamus to compel issuance of a marriage license to them against the prohibition of the existing law. They contended that the statute prohibited the free exercise of their religion, specifically, the right to partake of the Roman Catholic sacrament of Matrimony. The court preferred not to decide the case on that ground, saying that if the law were reasonably directed to a social evil, it must stand. To that end, they relied on

391 WIS. STAT. ANN. § 245.001 (Supp. 1961).

392 WIS. STAT. ANN. § 245.01 (Supp. 1961).

393 WIS. STAT. ANN. § 245.10 (Supp. 1961).

394 WIS. STAT. ANN. § 245.16 (Supp. 1961).

395 WIS. STAT. ANN. §§ 247.085(4), 247.09 (Supp. 1961). It must be noted, however, that after five years a divorce may be had by either party, WIS. STAT. ANN. § 247.07(7) (Supp. 1961).

396 ALA. CODE tit. 14, § 360 (1958); ARIZ. REV. STAT. ANN. § 25-101 (1956); ARK. STAT. ANN. § 55-104 (1947); COLO. REV. STAT. ANN. § 90-1-2 (1953); DEL. CODE ANN. tit. 13, § 101(a)(2) (1953); FLA. STAT. ANN. § 741.11 (1941); FLA. CONST. art. 16 § 24; GA. CODE ANN. § 53-106 (1961); IND. ANN. STAT. § 44-104 (1952); KY. REV. STAT. § 402.020 (1955); LA. CIV. CODE ANN. art. 94 (West 1952); MD. ANN. CODE art. 27, § 398 (1957); MISS. CODE ANN. § 459 (1942); MISS. CONST. art. 14, § 263; MO. REV. STAT. § 451.020 (1949); NEB. REV. STAT. § 42-103 (1960); NEV. REV. STAT. § 122.180 (1957); N.C. GEN. STAT. § 51-3 (Supp. 1961); N.C. CONST. art. 14, § 8; OKLA. STAT. ANN. tit. 43, § 12 (1951); S.C. CODE § 20-7 (1952); S.C. CONST. art. 3, § 33; TENN. CODE ANN. § 36-402 (1956); TENN. CONST. art. 11, § 14; TEX. PEN. CODE ANN. arts. 492-94 (1952); UTAH CODE ANN. § 30-1-2 (1953); VA. CODE ANN. §§ 20-50 to-60 (1950); W.VA. CODE ANN. § 4701 (1961); WYO. COMP. STAT. ANN. 20-18 (1957).

397 See constitutions cited note 33 *supra*.

398 *Perez v. Lippold*, 32 Cal. 2d 711, 198 P.2d 17 (1948).

399 *E.g.*, *State v. Pass*, 59 Ariz. 16, 121 P.2d 882 (1942); and *State v. Gibson*, 36 Ind. 389 (1871).

400 32 Cal. 2d 711, 198 P.2d 17 (1948).

Reynolds v. United States,⁴⁰¹ to wit, that some indirect and socially reasonable religious infringements are necessary and valid. Instead they based their decision on two grounds. First, they said that the right to marriage is fundamental, and implicit in that right is free choice of partners. The state, by restricting the right of free choice in marriage on the basis of race alone, is thereby violating the equal protection clause of the fourteenth amendment. Second, they held that the statute was too vague, as a penal law, to be constitutionally enforceable. It made no provision for mixed ancestry, and did not specify what proportions of mixed blood were necessary to classify persons as mulattoes.

The Supreme Court of the United States has never ruled on the question, but has had two opportunities to do so. In *Naim v. Naim*,⁴⁰² a white woman sought to have her marriage to a Chinese annulled, claiming that the Virginia statute was sufficient ground for nullity. The Virginia court held that the decree was properly granted, notwithstanding the fact that the parties had married in North Carolina to evade the Virginia statute. (It should be noted that the statute is applicable to marriages contracted outside the state, where the persons return thereafter to reside in Virginia.) The Supreme Court of the United States remanded the case on the ground that the record failed to disclose facts sufficient to draw the constitutionality of the statute in question, specifically because there was no exposition or finding as to the relationship of the parties to the State of Virginia when they contracted the marriage in North Carolina.⁴⁰³ After the Virginia court refused to send the case back to the lower state court on procedural grounds,⁴⁰⁴ the Supreme Court dismissed the second appeal for want of a properly presented federal question.⁴⁰⁵ In *Jackson v. Alabama*,⁴⁰⁶ the conviction of a Negro woman for marrying a white man was upheld, and the Supreme Court, in 1954, denied certiorari.⁴⁰⁷

There has been no substantial religious attack on antimiscegenation statutes, and very likely there will not be, until the day when interracial marriages no longer carry with them the drastic social consequences present today.

3. Control of Birth — Social and Moral Agitation

(a) Artificial Insemination

Another sector of family law that may prove to be a source of future development is that dealing with the artificial insemination of human beings. There is little case law or legislation treating this subject as yet, but what there is condemns artificial insemination by a third party donor as adulterous, and opposed to public morals and welfare.⁴⁰⁸ Perhaps the leading case at this time is *Orford v. Orford*,⁴⁰⁹ an action for alimony by a wife who alleged she had given birth to a child conceived by a third party donor. The husband defended by declaring that this was adultery. The wife's argument was that adultery demanded normal sexual inter-

401 98 U.S. 145 (1878).

402 197 Va. 80, 87 S.E.2d 749 (1955).

403 *Naim v. Naim*, 350 U.S. 891 (1955).

404 *Naim v. Naim*, 197 Va. 734, 90 S.E.2d 849 (1956).

405 *Naim v. Naim*, 350 U.S. 985 (1956).

406 37 Ala. App. 519, 72 So. 2d 114 (1954).

407 *Jackson v. Alabama*, 348 U.S. 888 (1954).

408 In *Doornbos v. Doornbos*, No. 54-S-14981, Super. Ct. Cook Cty., 1954, *appeal dismissed*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956), it was held that heterologous artificial insemination with or without the husband's consent is contrary to public policy and good morals, and is adultery on the part of the mother. This was an unpublished opinion noted in 36 *CHI.-KENT L. REV.* 1, 23-24 (1959). In *Strnad v. Strnad*, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948), it was held that a child conceived by artificial insemination with the father's consent, was legitimate on the theory that the father had "adopted" him. It should be noted that bills on the subject have been proposed in Indiana, Minnesota, Ohio, Virginia, and Wisconsin, but have not been acted upon. See also N.Y., *SANITARY CODE* § 112 (1947), which implicitly recognizes heterologous artificial insemination as acceptable.

409 49 Ont. L.R. 15, 58 D.L.R. 251 (1921).

course outside marriage, and that a distinction must be drawn between the act of adultery, *i.e.*, sexual intercourse, and conception and pregnancy, which is merely the result of an impregnation. The court's holding was that the wife had committed adultery in the usual way, but the judge went on to comment at length on the wife's argument.

[T]he essence of the offense of adultery consists not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of these powers to the service or enjoyment of any person other than the husband or wife comes within the definition of adultery. . . . Sexual intercourse is adulterous because in the case of the woman, it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would, therefore, be adulterous. That such a thing could be accomplished in any other than the natural manner probably never entered the heads of those who considered the question before. . . . If it were necessary to do so, I would hold that that in itself was "sexual intercourse."⁴¹⁰

This area presents a bewildering complexity of legal problems: 1) the question of the child's legitimacy, 2) the question of inheritance rights, 3) the question of adultery, 4) the question of a physician's liability for falsification of records and for improperly performed inseminations, and 5) the question of the liability and responsibility of the donor, to name a few. Because the existing law is scanty, no prediction is possible as to the course to be taken. It seems rather more likely that the issues will be fought in the political arena, and therefore the existing social and religious attitudes about artificial insemination take on increased importance.

Generally, the proponents of artificial insemination say that the practice fulfills the need of healthy young couples who for some reason are unable to have children in the normal way.⁴¹¹ Opponents of the practice say that, in light of the principle that the end never justifies the means, it is opposed to the natural and moral law.⁴¹² The Roman Catholic Church and the Anglican Church maintain that the practice is immoral, and recommend the passage of legislation designed to make it a criminal offense. The Protestant position has never been authoritatively stated, and the Jewish position varies with the particular groups; orthodox, conservative, and liberal. To what extent religious teachings will dictate the shape the law will take in this area is difficult of ascertainment for the reason that there is no categorical moral solution acceptable for application to all the people of our society. From a strictly legal standpoint, the wisest course 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.

(b) Contraception

Anthony Comstock, a fanatically zealous crusader against pornography, inspired the passage of congressional laws appropriately known as the "Comstock laws" just before the turn of the last century.⁴¹³ In the years immediately following, the states,

410 *Id.* at 258.

411 Levisohn, *Dilemma in Parenthood: Socio-Legal Aspects of Human Artificial Insemination*, 36 CHI.-KENT L. REV. (1959).

412 LoGatto, *Artificial Insemination: Legal Aspects, and Artificial Insemination: Ethical and Sociological Aspects*, 1 CATHOLIC LAW. 172, 267 (1955).

413 Every article . . . designed . . . or intended for preventing conception or producing abortion . . . is declared to be nonmailable matter. . . . 72 Stat. 962, 18 U.S.C. § 1461 (1958). [See § 2 of the original bill, 17 Stat. 598 (1873).]

All persons are prohibited from importing into the United States from any foreign country . . . any drug or medicine or any article whatever for the prevention of conception or for causing unlawful abortion. . . . 62 Stat. 862 (1948), 19 U.S.C. § 1305(a) (1958). [See § 3 of the original bill, 17 Stat. 598 (1873).]

See also the McKinley Tariff Law, 62 Stat. 718 (1948), 18 U.S.C. § 552 (1950).

with the single exception of New Mexico, followed the example of Congress. At this time, some 33 states have statutes forbidding sale, distribution, advertisement, or advice on the use of contraceptive devices.⁴¹⁴ Connecticut has forbidden the use of contraceptives as well.⁴¹⁵ Connecticut is also unusual in that its courts, as opposed to the position maintained by other state and federal courts,⁴¹⁶ have refused to exempt physicians from the reach of the statutes when they advise and counsel on the use of artificial birth control measures.⁴¹⁷

The case of *United States v. One Package*, decided by the Second Circuit in 1936, definitely established that a doctor may import drugs or devices for preventing conception when the health of his patients demands.⁴¹⁸ This decision was in large part based on the result in *Bours v. United States*,⁴¹⁹ which held that the abortion provisions of the federal "Comstock law" were not applicable to situations in which the abortion was to be done by a physician in order to save the woman's life.

Youngs Rubber Corp. v. C.I. Lee & Co.,⁴²⁰ and *Davis v. United States*,⁴²¹ were the intermediate steps in the progression from *Bours* to *One Package*. In the *Youngs* case, contraceptives not intended for illegal use entitled the manufacturer to protection from trade mark infringement; and similarly, in the *Davis* case, the intent to use the forbidden items for an illegal purpose was held to be necessary for a conviction under 18 U.S.C.A. § 1461 (which prohibits the transmission of contraceptives through the United States mails). This requirement is apparently well entrenched in the law, as was seen recently in *United States v. H. L. Blake Co.*,⁴²² where good faith sale of prophylactics to doctors, druggists, and jobbers (distributing to such trade) for medical purposes, was beyond the reach of § 1461 in the absence of proof of an intent to use the articles for the purpose of preventing conception.⁴²³

The states have accomplished the exemption of physicians prescribing contraceptives for medical purposes both by statute⁴²⁴ and by decision.⁴²⁵ In *People v. Sanger*,⁴²⁶ the New York court applied the statutory exception to good faith advice by a physician to cure or prevent disease, and included druggists acting on the

414 ARIZ. REV. STAT. ANN. §§ 13-211 to -213 (1956); ARK. STAT. ANN. §§ 82-944 to -954 (1960); CAL. BUS. & PROF. CODE § 601, § 4301-25; COLO. REV. STAT. ANN. § 40-9-17, §§ 66-10-3 to -10-12 (1953); CONN. GEN. STAT. ANN. § 53-32 (1958); DEL. CODE ANN. tit. 16, §§ 2501-04 (1953); HAWAII REV. LAWS § 155-73, §§ 302A-1 to -3 (1955); IDAHO CODE ANN. § 18-603 (1947) and §§ 39-801 to -810 (1961); IND. ANN. STAT. § 9-601, §§ 10-2803 to -2804 (Supp. 1961); IOWA CODE ANN. 725.5-10 (1950); KAN. GEN. STAT. ANN. § 21-1101 (1949); KY. REV. STAT. §§ 214.190-270 (1953); LA. REV. STAT. § 14:88 (1951); ME. REV. STAT. ANN. ch. 134, § 11, ch. 25, § 114 (1954); MD. ANN. CODE art. 27, § 41 (1957); MASS. GEN. LAWS ANN. ch. 272, §§ 20-21 (1956); MICH. STAT. ANN. § 28.229 (1938); MINN. STAT. ANN. §§ 617.25-27 (1947); MISS. CODE ANN. § 2289 (1957); MO. REV. STAT. § 563.300 (1949); MONT. REV. CODES ANN. § 94-3609, §§ 94-3616 to -3619 (1947); NEB. REV. STAT. § 28-423 (1956) and §§ 71-1104 to -1114 (1958); NEV. REV. STAT. § 202.190, §§ 202.210 -230 (1960); N.Y. PEN. LAW §§ 1142-45; N.C. GEN. STAT. § 14-194 (1951); OHIO REV. CODE ANN. §§ 2905.32 -37 (Page 1953); ORE. REV. STAT. §§ 435.010 -130, § 435.990 (1953); PA. STAT. ANN. tit. 18, § 4525 (1945); S.D. CODE § 13.1726 (1960); UTAH CODE ANN. § 58-19-1(f), §§ 58-19-2 to -19-11 (1953); WASH. REV. CODE § 9.68.030, §§ 18.81.010 -080 (1957); WIS. STAT. ANN. § 151.15 (1957).

415 CONN. GEN. STAT. ANN. § 53-32 (1958).

416 *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936); *Davis v. United States*, 62 F.2d 473 (6th Cir. 1933); *Youngs Rubber Corp. v. C. I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930); *McConnell v. City of Knoxville*, 172 Tenn. 190, 110 S.W.2d 478 (1937); *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918).

417 *Buxton v. Ullman*, 147 Conn. 48, 156 A.2d 508 (1959).

418 *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936).

419 229 Fed. 960 (7th Cir. 1915).

420 45 F.2d 103 (2d Cir. 1930).

421 62 F.2d 473 (6th Cir. 1933).

422 189 F.Supp. 930 (W.D. Ark. 1960).

423 A legal purpose is the prevention of disease. *E.g.*, *Youngs Rubber Corp. v. C. I. Lee & Co.*, 45 F.2d 103, 108 (2d Cir. 1930).

424 N.Y. PENAL LAW §§ 1142-45.

425 *Commonwealth v. Corbett*, 307 Mass. 7, 29 N.E.2d 151 (1940).

426 222 N.Y. 192, 118 N.E. 637 (1918).

physician's orders. In *McConnell v. City of Knoxville*,⁴²⁷ a city ordinance allowing the exception for physicians was held constitutional. The Massachusetts decision in *Commonwealth v. Corbett*⁴²⁸ is similar to *Davis*⁴²⁹ in that it demanded *knowledge* by the seller that the articles were to be used for the prevention of conception in order to convict him under the Massachusetts statute.⁴³⁰ Informational literature concerning the prevention of conception has been allowed under the physician's exception.⁴³¹

The most recent state activity in this field has taken place in New Jersey and Connecticut. The New Jersey statute⁴³² was held to be unconstitutionally vague in *State v. Kinnel Building Drug Stores*.⁴³³ The whole attack on the statute there was leveled on one phrase — "without just cause." Two cases decided prior to *Kinney* in New Jersey had not entertained doubts concerning that phrase, and the basis for the latest decision seems unfortunate. The New Jersey legislature may well have difficulty in passing an acceptable statute in the face of the attitude of the court, in spite of the statement: "There is no question but that the State can control the sale of contraceptive material."⁴³⁴

The *Kinney* decision, however, has not received the national attention that certain Connecticut cases have. After *Tileston v. Ullman* was dismissed by the Supreme Court of the United States on jurisdictional grounds,⁴³⁵ five cases were instituted in Connecticut that were believed to have "plugged the jurisdictional hole."⁴³⁶

In *Buxton v. Ullman*, a doctor alleged he could not prescribe contraceptives, without criminal prosecution and the loss of his license, for a woman patient with a serious heart condition. This woman also brought her own suit as *Jane Doe*. In *Hoe v. Ullman*, the medical problem demanding contraception was an RH-negative and RH-positive blood factor of husband and wife, a problem in genetics which had caused the birth of three abnormal children, and it was contended that there would be psychological damage to the mother from another such birth. And in *Trubek v. Ullman*, a young couple, both law students, wished to complete their studies before having children. The result of the *Buxton*⁴³⁷ decision in Con-

427 172 Tenn. 190, 110 S.W.2d 478 (1937).

428 307 Mass. 7, 29 N.E.2d 151 (1940).

429 *Davis v. United States*, 62 F.2d 473 (6th Cir. 1933).

430 MASS. GEN. LAWS ANN. ch. 272, §§ 20-21 (1956).

431 *Consumers Union of the United States v. Walker*, 145 F.2d 33 (D.C. Cir. 1944), held that 18 U.S.C.A. § 1461 did not apply to a special report issued by the plaintiff to its members (restricted to those married and using prophylactics on doctor's orders), because this report supplied information vital to life and health. See also *United States v. Nicholas*, 97 F.2d 510 (2d Cir. 1938); *United States v. One Book Entitled "Contraception,"* 51 F.2d 525 (S.D.N.Y. 1931); *United States v. One Obscene Book Entitled "Married Love,"* 48 F.2d 821 (S.D.N.Y. 1931).

432 Any person who, *without just cause*, utters . . . or possesses with intent . . . to sell . . . any [thing] . . . for the prevention of conception or the procuring of abortion . . . is a disorderly person. N.J. STAT. ANN. § 2A:170-76 (1953). (Emphasis added.)

433 56 N.J. Super. 37, 151 A.2d 430 (1959).

434 *Id.* at 432.

435 318 U.S. 44 (1943), *dismissing appeal from* 129 Conn. 84, 26 A.2d 582 (1942). The Court said that, in bringing a suit on behalf of his patients, the doctor had no standing to sue.

436 *Buxton v. Ullman*, *Doe v. Ullman*, *Hoe v. Ullman*, *Poe v. Ullman*, 147 Conn. 48, 156 A.2d 508 (1959). *Roe v. Ullman*, No. 87984, New Haven County Court, was withdrawn in lieu of *Trubek v. Ullman*, then No. 90417, New Haven County Court. Subsequently, when *Trubek* reached the Connecticut Supreme Court of Errors, it was held that the rights of the parties were previously determined by the decision in *Buxton*, 147 Conn. 633, 165 A.2d 158 (1960). Three other cases were also brought at that time in the New Haven County Court, based on the infringement of the religious freedom of Protestant clergymen who wished to counsel parishioners on marital responsibilities. *Willard v. Ullman*, No. 90317; *Livingston v. Ullman*, No. 90316; *Teague v. Ullman*, No. 90315.

437 147 Conn. 48, 156 A.2d 508 (1959). The decision was based on the cases of *Tileston v. Ullman*, 129 Conn. 84, 26 A.2d 582 (1942), and *State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (1940). In the latter case, an indictment of two doctors and a nurse for violations of the statute was upheld, over demurrer.

necticut was as expected. The statute was upheld, and an appeal was taken to the United States Supreme Court. The appeal was prosecuted on the *Poe* and *Buxton* cases, and it was held that the controversy was not sufficiently ripe to require a decision on the merits.⁴³⁸ The reasoning of Mr. Justice Frankfurter was that Connecticut had not chosen to enforce the statute, and thus the controversy was deprived of the "immediacy" necessary for constitutional adjudication. The Court demanded that there be a real danger of sustaining some direct injury as the result of enforcement of the statute. Mr. Justice Douglas dissented on the dual grounds that: 1) in restricting the right of the doctor to advise his patients, the statute was an unconstitutional infringement of his freedom of expression, and 2) in prohibiting the use of contraceptives by married couples, the statute deprived them of their liberty without due process of law, within the meaning of the fourteenth amendment.

(c) Abortion

The original federal "Comstock law" also prohibited the passage of abortifacients through the mails,⁴³⁹ in interstate commerce,⁴⁴⁰ and from foreign countries.⁴⁴¹ But as was noted above, the decision in *Bours v. United States*⁴⁴² exempted physicians from the scope of its coverage. However, the law on sale, carriage, and advertisement of abortifacients has created few problems in relation to those raised by penal laws prohibiting the performance of an abortion — particularly those abortions designated as "therapeutic."

Every state makes abortion a criminal offense,⁴⁴³ and all exempt a therapeutic abortion when *necessary* to save the mother's life.⁴⁴⁴ Only six allow the same excep-

438 *Poe v. Ullman*, 367 U.S. 497 (1961). It is said that the decision here is difficult to reconcile with that of *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). A possible ground for explanation is that the Connecticut statute had been "enforced" but once in its history (*State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (1940)), while the Hatch Political Activity Act, 53 Stat. 1148 (1939), as amended, 5 U.S.C. § 118(i) (1950), had not admitted of the same laxity of enforcement.

439 72 Stat. 962, 18 U.S.C. § 1461 (1958).

440 72 Stat. 962, 18 U.S.C. § 1462 (1958).

441 62 Stat. 862, 19 U.S.C. § 1305(a) (1958).

442 229 Fed. 960 (7th Cir. 1915).

443 ALA. CODE tit. 14, § 9 (1958); ALASKA COMP. LAWS ANN. § 65-4-6 (1949); ARIZ. REV. STAT. ANN. §§ 13-211 to -213 (1956); ARK. STAT. ANN. §§ 41-301 to -302, §§ 41-2223 to -2224 (1947); CAL. PEN. CODE §§ 274-275; COLO. REV. STAT. ANN. § 40-2-23, §§ 66-3-65 to -3-67 (1953); CONN. GEN. STAT. ANN. §§ 53-29 to -32 (1958); DEL. CODE ANN. tit. 11, §§ 301-302 (1953); GUAM PEN. CODE §§ 274-275 (1953); FLA. STAT. ANN. §§ 797.01-02 (1941); GA. CODE ANN. §§ 26-1101 to -1104 (1953); HAWAII REV. LAWS §§ 309-3 to -5 (1955); IDAHO CODE ANN. §§ 18-601 to -603 (1947); ILL. ANN. STAT. tit. 38, 23-1 to -3 (Smith-Hurd 1961); IOWA CODE ANN. § 701.1 (1946); IND. ANN. STAT. §§ 10-105 to -106 (1956); KAN. GEN. STAT. ANN. §§ 21-409 to -410, § 21-437 (1949); KY. REV. STAT. § 435.040, § 436.020 (1955); LA. REV. STAT. §§ 14:87-88 (1950); ME. REV. STAT. ANN. ch. 134, §§ 9-11 (1954); MD. ANN. CODE art. 27, § 3 (1957); MASS. GEN. LAWS ANN. ch. 272, §§ 19-21 (1956); MICH. STAT. ANN. §§ 28.554-555 (1954); MINN. STAT. ANN. §§ 617.18-.21 (1945); MISS. CODE ANN. §§ 2222-2223 (1956); MO. REV. STAT. §§ 559.090-100 (1949); MONT. REV. CODES ANN. §§ 94-401 to -402 (1947); NEB. REV. STAT. §§ 28-404 to -405 (1956); NEV. REV. STAT. §§ 201.120-140 (1957); N.H. REV. STAT. ANN. §§ 585:12-.14 (1955); N.J. STAT. ANN. § 2A:87-1 (1953); N.M. STAT. ANN. §§ 40-3-1 to -3-3 (1953); N.Y. PEN. LAW §§ 80-82; N.C. GEN. STAT. §§ 14-44 to -46 (1953); N.D. REV. CODE §§ 12-25-01 to -25-07 (1960); OHIO REV. CODE ANN. §§ 2901.16-.17 (Page 1953); OKLA. STAT. ANN. tit. 21, §§ 861-862 (1951); ORE. REV. STAT. § 163.060 (1961); R.I. GEN. LAWS ANN. §§ 11-3-1 to -3-4 (1956); PA. STAT. ANN. tit. 18, §§ 4718-4719 (1945); TENN. CODE ANN. §§ 39-301 to -302 (1956); S.D. CODE §§ 13.3101-3103 (1939); UTAH CODE ANN. §§ 76-21- to -2-2 (1953); TEX. PEN. CODE ANN. arts. 1191-1196 (1961); VT. STAT. ANN. tit. 13, §§ 101-104 (1958); VA. CODE ANN. §§ 18.1-62 to -63 (1950); WASH. REV. CODE §§ 9.02.010-9.02.040 (1952); W. VA. CODE ANN. § 5923 (1961); WIS. STAT. ANN. § 940.04 (1958); WYO. COMP. STAT. ANN. §§ 6-77 to -78 (1957).

444 Except Louisiana, LA. REV. STAT. §§ 14:87-88 (1950).

tion where the abortion is necessary to preserve the mother's health.⁴⁴⁵ In construing the requirement of "necessity," most states say that there must be actual necessity.⁴⁴⁶

What of the mother who aborts herself, or consents to the abortion? Generally she is not held accountable. In *the Matter of Vince*,⁴⁴⁷ takes the usual approach in these situations; it was said there that the mother's offense is wholly a common law crime (not statutory),⁴⁴⁸ and therefore that it must be proved that the foetus was "quick," i.e., alive, at the time of the abortion.

The only real controversy raging in legal circles concerning abortion is that raised by section 207.11 of the Model Penal Code.⁴⁴⁹ This section would constitute, if adopted, a significant relaxation of the existing state law.

Section 207.11. Abortion and Related Offenses.

(1) *Unjustified Abortion.* A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) *Justifiable Abortion.* A licensed physician is justified in terminating pregnancy if:

(a) he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defects, or the pregnancy resulted from rape by force or its equivalent . . . or from incest . . . and

(b) two physicians, one of whom may be the person performing the abortion, have certified in writing their belief in the justifying circumstances and have filed such certificate prior to the abortion in the licensed hospital where it was to be performed, or in such other place as may be designated by law.

Justification of abortion is an affirmative defense.

Other sections make self-abortion unlawful if past the twenty-sixth week of the pregnancy,⁴⁵⁰ and distribution of abortifacients unlawful unless to physicians and others involved in the chain of distribution.⁴⁵¹ Prevention of conception is expressly exempted from the section.⁴⁵²

The formulation of this Model Code section by the draftsmen of the American Law Institute has been vigorously attacked on objections to its language,⁴⁵³ to its necessity on medical grounds,⁴⁵⁴ and to the moral view it reflects.⁴⁵⁵ There are irreconcilable and basic differences which have generated a great deal of bitterness⁴⁵⁶

445 ALA. CODE tit. 14, § 9 (1958); COLO. REV. STAT. ANN. § 40-2-23, §§ 66-3-65 to -3-67 (1953); D.C. CODE ANN. § 22-210 (1961); MD. ANN. CODE art. 27, § 3 (1957); N.M. STAT. ANN. §§ 40-3-1 to -3-3 (1953); ORE. REV. STAT. § 163.060 (1961). The exception may apply to mental health as well. See *The King v. Bourne*, [1939] 1 K.B. 687, 3 All E.R. 615.)

446 *Adams v. State*, 200 Md. 133, 88 A.2d 556 (1952); *State v. Rudman*, 126 Me. 177, 136 Atl. 817 (1927); *Hatchard v. State*, 79 Wis. 357, 48 N.W. 380 (1891). *Contra*, *State v. Dunkelbarger*, 206 Iowa 971, 221 N.W. 592 (1928). (May a physician remove a dead foetus from the womb and escape prosecution therefor? *Commonwealth v. Wood*, 77 Mass. (11 Gray) 85, 92 (1858), said yes; *Anderson v. Commonwealth*, 190 Va. 665, 58 S.E.2d 72 (1950), said no, on the ground that abortion is a crime against both mother and foetus.)

447 2 N.J. 443, 67 A.2d 141 (1949). See also *People v. Buffum*, 40 Cal. 2d 709, 256 P.2d 317 (1953), which discusses the guilt of a mother cooperating with an abortionist.

448 Only Rhode Island and Vermont expressly exclude her, though. See statutes cited note 31 *supra*.

449 MODEL PENAL CODE § 207.11, (Tent. Draft No. 9, 1959).

450 § 207.11(3).

451 § 207.11(6).

452 § 207.11(7).

453 Quay, *Justifiable Abortion — Medical and Legal Foundations*, 49 Gzo. L.J. 173-80 (1960). The specific complaint was vagueness and ambiguity.

454 *Id.* at 180-256.

455 Tinnelly, *Abortion and Penal Law*, 5 CATHOLIC LAW, 187 (1959).

456 See e.g., Alvah W. Sulloway, *The Legal and Political Aspects of Population Control in the United States*, 25 LAW & CONTEMP. PROB. 593, 604-613 (1960). On population control generally, see Norman St. John-Stevias, *A Roman Catholic View of Population Control*, *Id.* at 445; and Richard M. Fagley, *A Protestant View of Population Control*, *Id.* at 470. (These articles were part of an extensive symposium, which effectively dealt with the problem of population control.)

— a situation that will continue because one of the antagonists, the Roman Catholic Church, is committed irrevocably to its position.

Totally apart from the moral differences are problems involving such considerations on the practical level as: (1) the psychological and physical results of abortions; (2) the untold harms wrought upon women by quacks — the truly criminal abortion mills; (3) the deleterious effects of unenforceability and nullification of existing laws in cases where reputable physicians (in the public eye) are involved; and, (4) the danger in declaring as criminal, behavior demanded in good conscience by at least a substantial minority of the American people and (5) the danger of weakening in an immediate and practical way the moral fiber of the nation.⁴⁵⁷

These considerations are also relevant in any planned reform of the contraception laws. Some reforms seem to be necessary in the abortion and contraception laws in order to remedy the evil of back room abortionists and the evil of unenforceable prohibitions of birth control. Possibly, the only good effect of the existing law is the complete restriction of public display, advertising, and the possibility of indiscriminate access by young people to abortifacients and contraceptive devices.

IV. FREE EXERCISE

A. TEST OATHS — *An Anachronism Removed*

Those who record the progress of religious liberty in this country have always regarded at least one battle as irrevocably won. Religious tests for public office, we were assured, had disappeared long ago. The Supreme Court has consistently referred to this particular method of eliciting religious unanimity as barred.⁴⁵⁸ A statement of Justice Rutledge illustrates this attitude:

Compulsory attendance upon religious exercises went out early in the process of separating church and state, together with forced observance of religious forms and ceremonies. Test oaths and religious qualifications for office followed later. These things none devoted to our great tradition of religious liberty would think of bringing back.⁴⁵⁹

But the unmourned tests were not fully buried. Eight states have retained in their constitutions the requirement of a declaration of belief in a Supreme Being as a prerequisite for public office.⁴⁶⁰ Typical of such provisions is that found in the Mississippi constitution: "No person who denies the existence of a Supreme Being shall hold any office in this state."⁴⁶¹ Though it is impossible to discover whether these clauses have been rigidly enforced, it is certain that their conformity with the federal constitution had never been considered by the Supreme Court until the closing days of the 1960 term.⁴⁶² The story of that first (and probably final) treatment will receive the primary emphasis in this section of the survey.

The American experience in this area is closely related to the English religious tests which arose from the struggles of various sects for supremacy during the seventeenth century. The establishment and gradual decline of these tests in England has been well summarized elsewhere.⁴⁶³ It is sufficient to note that though the English

457 See Packer & Gampbell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417 (1959), on the attitude of hospitals and medical men to the necessity and desirability of therapeutic abortion. This article indicates that strict statutory standards are not, in practice, complied with.

458 *Everson v. Board of Education*, 330 U.S. 1, 44 (1947) (separate opinion); *Girouard v. United States*, 328 U.S. 61, 69 (1946); *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 663 (1942) (separate opinion).

459 330 U.S. 1, 44 (1947) (separate opinion).

460 ARK. CONST. art. 19, § 1; MD. DECLARATION OF RIGHTS art. 37; MISS. CONST. art. 14, § 265; N.C. CONST. art. VI, § 8; PA. CONST. art. I, § 4; S.C. CONST. art. XVII, § 4; TENN. CONST. art. IX, § 2; TEX. CONST. art. I, § 4.

461 MISS. CONST. art. 14, § 265.

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

463 PFEFFER, CHURCH, STATE AND FREEDOM 25 (1953).

tests were instrumental in forcing the colonists to come here, many of them felt no compunction against imposing similar restrictions within the colonies.⁴⁶⁴ Opposition to these religious requirements led to the insertion in the federal constitution of the article VI provision forbidding such qualifications for federal office: "(N)o religious Test shall ever be required as a Qualification to an Office or Trust under the United States."⁴⁶⁵ Some of the discussions during the period of ratification concerning this clause are illuminating. Luther Martin, a delegate to the Convention, said in addressing the Maryland legislature on November 29, 1787:

The part of the system which provides, that *no religious test* shall ever be required as a qualification to any office or public trust under the United States, was adopted by a great majority of the convention, and without much debate; however, there were some members so unfashionable as to think, that a *belief in the existence of a Deity*, and of a *state of future rewards and punishments* would be some security for the good conduct of our rulers, and that, in a Christian country it would be *at least decent* to hold some distinction between the professors of Christianity and downright infidelity or paganism.⁴⁶⁶

The opposite, and prevailing, attitude was expressed by Theophilus Parsons in the Massachusetts ratifying convention:

It has been objected, that the Constitution provides no religious test by oath, and we may have in power unprincipled men, atheists and pagans. No man can wish more ardently than I do, that all our public offices may be filled by men who fear God and hate wickedness; but it must remain with the electors to give the government this security — an oath will not do it: Will an unprincipled man be entangled by an oath? Will an atheist or a pagan dread the vengeance of the Christian's God, a being in his opinion the creature of fancy and credulity? It is a solecism in expression.⁴⁶⁷

Before turning to the specific Maryland test it is necessary to recall the common law disqualification of nontheists as witnesses and jurors. The rationale of this exclusion, the notion that the law, as an assurance of their credibility, must require that participants in trials believe in a personal avenging God, is an obvious analogue to the religious tests for public office.⁴⁶⁸ The withering of this disability, now almost complete,⁴⁶⁹ indicates that honesty and reliability are no longer thought to be confined solely to theists.

The history of the English test oaths, the American constitutional provisions, and the common law disabilities all combine to aid us in understanding the decision which invalidated the Maryland religious test.

Roy R. Torcaso, having been appointed by the governor to the office of notary public, went to the county clerk's office to obtain his commission. The clerk asked him to sign the prescribed oath and affirmation of the existence of God.⁴⁷⁰ Torcaso refused and the clerk declined to issue the commission. Torcaso thereupon sought a writ of mandamus ordering the commission issued. He lost in the circuit court and appealed to the Court of Appeals of Maryland.⁴⁷¹

In affirming the decision of the lower court, the Court of Appeals reviewed

464 Discussion of these colonial establishments may be found in *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961) and scattered throughout I STOKES, *CHURCH AND STATE IN THE UNITED STATES* (1950).

465 U.S. CONST. art. VI.

466 I ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* 385-86 (1836).

467 II ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* 119 (1836).

468 See *Thurston v. Whitney*, 56 Mass. (2 Cush.) 104 (1848); *Blocker v. Burness*, 2 Ala. 354 (1841); *Brock v. Milligan*, 10 Ohio 121 (1840); *Atwood v. Welton*, 7 Conn. 66 (1828).

469 See 3 JONES, *EVIDENCE* § 752 (5th ed. 1959).

470 This affirmation was required on the basis of Article 37 of the Maryland Declaration of Rights which reads as follows: "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office other than the oath prescribed by this Constitution."

471 *Torcaso v. Watkins*, 223 Md. 49, 162 A.2d 438, 439, 440 (1960).

the history of religious tests in Maryland.⁴⁷² It settled all problems of construction in favor of enforcing the provision against the appellant.⁴⁷³

More important than the problems of interpreting the Maryland constitution is the question of the validity of that provision under the federal constitution. The appellant contended that the test violated his freedom of religion and discriminated against him.⁴⁷⁴ The Court of Appeals readily conceded that the fourteenth amendment is supreme over state constitutions and that the freedom of religion provisions of the first amendment applied to the states through the fourteenth.⁴⁷⁵ The court, however, refused to find that the fourteenth amendment was violated by the religious test in its constitution. It argued that Torcaso was not being *compelled* to believe anything but was merely required to affirm belief in God in order to take a state office.⁴⁷⁶ The state's power to set reasonable qualifications for its offices was clearly established, said the court.⁴⁷⁷ This requirement was viewed by it as reasonable, particularly because it saw a paradox in having solemn oaths administered by persons who did not believe in their sanctity.⁴⁷⁸

The court neither faced squarely nor answered satisfactorily the problem of whether Torcaso's freedom of religion was infringed. It did refer extensively to other provisions of the Maryland Declaration of Rights limiting the privileges of nontheists.⁴⁷⁹ In that connection the court said: "The historical record makes it clear that religious toleration, in which this State has taken pride, was never thought to encompass the ungodly."⁴⁸⁰ Anticipating review by the Supreme Court, the Court of Appeals predicted that its religious test would be upheld,⁴⁸¹ citing Mr. Justice Douglas' statement in *Zorach v. Clauson*: "We are a religious people whose institutions presuppose a Supreme Being."⁴⁸² In the same paragraph the court referred to the common law disability of atheistic witnesses.⁴⁸³

Almost a year after its decision in *Torcaso* the Court of Appeals was proven wrong in its prediction as the Supreme Court unanimously struck down Article 37, the religious test provision.⁴⁸⁴ The opinion of the Court, in which all the Justices except Mr. Justice Frankfurter and Mr. Justice Harlan joined, is a forceful indictment of all religious tests. Mr. Justice Black based his opinion on the free exercise clause.⁴⁸⁵ He began by stating that this was clearly a *religious* test.⁴⁸⁶ He then examined the history of such tests in England and Colonial America.⁴⁸⁷ Article VI of the Constitution, according to the Justice, is proof behind the Court's observation in *Girouard v. United States* that the "test oath is abhorrent to our tradition."⁴⁸⁸

Turning to the first amendment, the Court stated that it was clearly designed to go beyond article VI.⁴⁸⁹ Saying that the history, rationale and scope of the first amendment have been thoroughly explored previously, Mr. Justice Black referred in a footnote to seven cases interpreting the amendment.⁴⁹⁰ Then, however, the

472 *Id.* at 441.

473 *Id.* at 441-42.

474 *Id.* at 440.

475 *Id.* at 442.

476 *Ibid.*

477 *Ibid.*

478 *Id.* at 443-44.

479 *Id.* at 443.

480 *Ibid.*

481 *Ibid.*

482 343 U.S. 306, 313 (1952).

483 *Torcaso v. Watkins*, 223 Md. 49, 162 A.2d 438, 443 (1960).

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

485 *Id.* at 496.

486 *Id.* at 489-90.

487 *Id.* at 490-91.

488 328 U.S. 61, 69 (1946).

489 *Torcaso v. Watkins*, 367 U.S. 488, 492 (1961).

490 *Ibid.*

Justice cited two cases, *Cantwell v. Connecticut*,⁴⁹¹ the first case applying the free exercise clause to the states, and *Everson v. Board of Education*,⁴⁹² the first discussion of the applicability to the states of the establishment clause, and quoted from them.⁴⁹³ The Court next examined the famous statement of Mr. Justice Douglas relied on by the Maryland Court of Appeals and quoted above.⁴⁹⁴ "Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept."⁴⁹⁵

The next paragraph appears to be the core of the Court's opinion:

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.⁴⁹⁶

Finally, the Court considered the statement of the Court of Appeals that Article 37 was constitutional since no one is compelled to seek public office.⁴⁹⁷ "The fact, however," Mr. Justice Black answered, "that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution."⁴⁹⁸ *Weiman v. Updegraff*⁴⁹⁹ is cited in support of this holding. In summary the Court said, "This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him."⁵⁰⁰

The effects of the decision in *Torcaso* are not difficult to evaluate. The language of the Court was clearly broad enough to outlaw all religious tests for public office. If the case should arise, it is also fairly certain that any disabilities of witnesses based on religious belief would also fall. Leo Pfeffer, counsel for *Torcaso*, is of the opinion that the decision should, but will not, result in the amendment of state and federal statutes prescribing oaths so as to remove the phrase "so help me God."⁵⁰¹

It is difficult to tell whether Mr. Justice Black is of the opinion that nonreligious persons are protected in their lack of belief by the "free exercise" clause. The Court's statement that, "Neither [the federal nor state government] can constitutionally pass laws which aid all religions against non-believers"⁵⁰² is remarkably like an earlier statement in *Everson* repeated in *Torcaso*. In that case, interpreting the "establishment of religion" clause, the Justice said that it meant at least that, "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."⁵⁰³ The sentence in *Torcaso*, when compared with the sentence in *Everson*, seems to refer to *establishment* and probably reflects the prevailing interpretation of that clause. But *Torcaso* is purportedly decided upon the "free exercise" clause. It is the appellant's freedom of religion which is said to be violated. Lower courts have specifically stated that the fourteenth amendment does *not* protect freedom from

491 310 U.S. 296 (1940).

492 330 U.S. 1 (1947).

493 *Torcaso v. Watkins*, 367 U.S. 488, 492-93 (1961).

494 *Id.* at 494.

495 *Ibid.*

496 *Id.* at 495.

497 *Id.* at 495-96.

498 *Ibid.*

499 344 U.S. 183 (1952).

500 *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961).

501 Pfeffer, *Some Current Issues in Church and State*, 13 W. RES. L. REV. 33 (1961).

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

503 *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

religion.⁵⁰⁴ Taken in total, this case apparently does extend the protection of the free exercise clause to nonbelievers, but just how it does so is not clear. We are the people of the Text and Gloss but, it is submitted, state laws should not be struck down by Gloss unless clear reference is made to the provision of the Text which is being employed.

One final effect of *Torcaso* should be mentioned. Two distinguished scholars, debating the constitutionality of federal aid to education, have found in the *Torcaso* opinion evidence of the Court's attitude on that question.⁵⁰⁵ This case, then, is in a curious position: it eliminates an anachronistic remnant of an earlier era, and by its language casts a long shadow on other, future controversies.

B. CLERICAL PRIVILEGE — Noticeable Activity

Though the subject is a narrow one, there has been much legislation dealing with the role of ministers of the church in courts of the state. It was the rule at common law that a minister did not have a legal privilege to refuse to reveal that which was communicated to him in his role as confessor or spiritual advisor.⁵⁰⁶

Dissatisfaction with this view has led to the enactment of statutes granting such a privilege to all clergymen, regardless of denomination, where the elements of penitential confession or spiritual counsel and advice, according to the usual course of their practice or discipline, are present. Forty-one states now have such legislation;⁵⁰⁷ in the last three years, seven states — Florida,⁵⁰⁸ Illinois,⁵⁰⁹ North

504 See *Zorach v. Clausen*, 198 Misc. 631, 199 N.Y. S.2d 339, 344 (Sup. Ct. 1950); *Gordon v. Board of Education*, 78 Cal. App. 464, 178 P.2d 488, 495 (1947) (separate opinion). *Contra*, *Ex parte Jentzsch*, 112 Cal. 468, 471, 44 Pac. 803, 803-04 (1896).

505 Scanlan, *Legal Aspects of Federal Aid to Parochial Schools*, 37 NOTRE DAME LAWYER 288, 305 (1962); Pfeffer, *Some Current Issues in Church and State*, 13 W. RES. L. REV. 14 (1961).

506 See 5 CATHOLIC LAW. 339 (1959); 8 WIGMORE, EVIDENCE § 2394 (McNaughton rev. 1961); TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 302 (1948); Russell v. Jackson, 9 Hare 387, 391, 68 Eng. Rep. 558, 560 (Ch. 1851) (Privilege denied in dictum); Wilson v. Rastall, 4 Term R. 753, 759-60, 100 Eng. Rep. 1283, 1287 (K.B. 1792) (the privilege was confined to cases of counsel, solicitor, and attorney only); The King v. Sparkes (K.B.), cited by Garrow, for the plaintiff in *Dubarré v. Livette*, Peake N.P. 108, 109-10, 170 Eng. Rep. 96, 97 (K.B. 1791) (the prisoner-papist's confession to a Protestant clergyman was admitted in evidence); Anonymous, Skin. 404, 90 Eng. Rep. 179, 180 (K.B. 1693) (communications with an attorney or scrivener were privileged; not so as to those with a "gentleman, parson, etc.").

507 ALASKA COMP. LAWS ANN. § 58-6-5 (1949); ARIZ. REV. STAT. ANN. § 12-2233 (1956); ARK. STAT. ANN. § 28-606 (1947); CAL. CIV. PROC. CODE ANN. § 1881 (3); COLO. REV. STAT. ANN. § 153-1-7(3) (1953); FLA. STAT. ANN. § 90.241 (1960); GA. CODE ANN. § 38-419.1 (1954); HAWAII REV. LAWS: § 222-20 (1955); IDAHO CODE ANN. § 9-203 (1948); ILL. ANN. STAT. ch. 51, § 48.1 (Smith-Hurd Supp. 1961); IND. ANN. STAT. § 2-1714 (1946); IOWA CODE ANN. § 622.10 (1950); KAN. GEN. STAT. ANN. § 60-2805 (1949); KY. REV. STAT. ANN. § 421.210(4) (1959); LA. REV. STAT. § 15:477, :478 (1950); MD. ANN. CODE art. 35, § 13 (1957); MICH. COMP. LAWS § 617.61 (1948); MINN. STAT. ANN. § 595.02(3) (1947); MO. ANN. STAT. § 491.060 (1952); MONT. REV. CODES ANN. § 93-701-4(3) (1947); NEB. REV. STAT. § 25-1201—1206 (1956); NEV. REV. STAT. § 48.070 (1957); N.J. STAT. ANN. § 2A:84A-23 (Supp. 1960); N.M. STAT. ANN. § 20-1-12 (C) (1953); N.Y. CIVIL PRACTICE ACT ANN. § 351 (Cahill-Parsons 1955); N.C. GEN. STAT. § 8-53.1 (Supp. 1961); N.D. REV. CODE § 31-01-06 (1960); OHIO REV. CODE ANN. § 2317.02 (Page 1953); OKLA. STAT. ANN. tit. 12, § 385(5) (Supp. 1958); ORE. REV. STAT. § 44.040 (1957); PA. STAT. ANN. tit. 28, § 331 (Supp. 1960); R.I. GEN. LAWS ANN. § 9-17-23 (Supp. 1961); S.C. CODE § 56-861 (Supp. 1960); S.D. CODE § 36.0101 (1939); TENN. CODE ANN. § 24-109 to -111 (Supp. 1961); UTAH CODE ANN. § 78-24-8(3) (1953); VT. STAT. ANN. tit. 12, § 1607 (1959); WASH. REV. CODE § 5.60.060(3) (1956); W.VA. CODE ANN. § 4992(d) (1961); WIS. STAT. ANN. § 325.20 (1958); WYO. STAT. ANN. § 1-139(2) (1957).

508 FLA. STAT. ANN. § 90.241 (1960).

509 ILL. ANN. STAT. ch. 51, § 48.1 (Smith-Hurd Supp. 1961).

Carolina,⁵¹⁰ Pennsylvania,⁵¹¹ Rhode Island,⁵¹² South Carolina,⁵¹³ and Tennessee⁵¹⁴ — have classified communications of this type as privileged.

There is no federal law on the subject, although the Supreme Court has recognized the privilege in dicta,⁵¹⁵ and the District of Columbia Circuit has determined that recognition should be accorded to it.⁵¹⁶ The Court of Appeals based its decision on what was termed a "proper application" of Rule 26 of the Federal Rules of Criminal Procedure.⁵¹⁷

Dean Wigmore, in his treatise on evidence, has proposed four fundamental conditions for the establishment of a privilege against disclosure of such communications:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.⁵¹⁸

The conditions laid down by Wigmore are satisfied by clergyman-penitent communications, and the reasons for according recognition to the privilege seem compelling. It appears that this problem of the relations between church and state is coming to a near-unanimous and amicable solution.

C. INDIVIDUAL FREEDOM — *A Need for Sensitive Balancing*

1. *The Fundamental Conflict*

The "free exercise clause" of the first amendment and similar provisions of various state constitutions have repeatedly been subjected to limitation.⁵¹⁹ Although

510 N.C. GEN. STAT. § 8-53.1 (1960).

511 PA. STAT. ANN. tit. 28, § 331 (Supp. 1960).

512 R.I. GEN. LAWS ANN. § 9-17-23 (Supp. 1961).

513 S.C. CODE § 56-861 (Supp. 1960).

514 TENN. CODE ANN. §§ 24-109 to -111 (Supp. 1961).

515 Totten v. United States, 92 U.S. 105, 107 (1875).

516 Mullen v. United States, 263 F.2d 275, 280 (D.C. Cir. 1959).

517 *Id.* at 278-80. Judge Fahy stated:

The resolution of the problem today for federal courts is to be found in a proper application of Rule 26, Fed. R. Crim. P., adopted in 1948 under the authority of Congress. This Rule provides: "... The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an Act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

... Sound policy — reason and experience — concedes to religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secrets of a penitent's confidential confession to him, at least absent the penitent's consent. ... The benefit of preserving these confidences inviolate overbalances the possible benefit of permitting litigation to prosper at the expense of the tranquility of the home, the integrity of the professional relationship, and the spiritual rehabilitation of a penitent. The rules of evidence have always been concerned not only with truth but with the matter of its ascertainment.

It should be noted that under Rule 43(a) of the Federal Rules of Civil Procedure, the determination of whether to respect the clergyman-penitent privilege would be controlled by state statutes or decisions, since there are no contrary federal statutes or rules of court. In the absence of a state statute or decision on the subject, the court would be free to exercise its discretion.

518 8 WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961). Both the Model Code of Evidence, rule 219 (1942) and the Uniform Rules of Evidence, rule 29, endorse the clergyman-penitent privilege.

519 Antieau, *The Limitations of Religious Liberty*, 18 FORDHAM L. REV. 221 (1949), for a treatment of these limitations and the reasons upon which they are based; TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA (1948).

the ramifications of that clause are many and varied, the scope of this section will be limited to a consideration of the cases — reported in 1959, 1960 and 1961 — that affect the individual's free exercise of religion. Primarily, these cases apply principles developed by the Supreme Court through judicial construction of the free exercise clause. These principles have generally established that the practice of one's religion cannot be used as an excuse for the violation of state law promulgated for the health, safety, and welfare of its citizens. Religious beliefs, on the other hand, are ordinarily regarded as sacrosanct; the advocacy of such beliefs is subject only to the restrictions applied to any other form of expression.

The first of the notable cases defining the limits of free exercise sustained the state interest in prohibiting polygamy regardless of its religious significance for Mormons.⁵²⁰ In that case, *Reynolds v. United States*, the Court wrote into the first amendment a societal structure which in effect excluded large groups of the world's religious population from the protection of its freedoms. Nevertheless, the legitimate interest of the state is undeniable. In a later case,⁵²¹ the Court, in a questionable⁵²² extension of *Reynolds*, affirmed the conviction of a Mormon for conspiracy to obstruct the laws of the territory of Idaho. Defendants were there indicted under a statute requiring an oath of all voters that they were not members of any "order, organization or association which teaches, advises, counsels or encourages"⁵²³ polygamy. The only evidence was the fact that the defendants were members of the Mormon Church when they took the oath; thus, adherence to a religious belief, without more, was punished.⁵²⁴

Another inroad on the sanctity of belief is seen in *United States v. Ballard*.⁵²⁵ The defendant, charged with mail fraud, claimed he was disseminating religious literature. His conviction was upheld by the Supreme Court on the ground that no error was found in the trial court's instructions to the jury. Those instructions prevented the jury from considering the correctness of the defendant's beliefs, but allowed them to probe the sincerity of those views in determining whether or not fraud had been committed.

In *West Virginia Board of Education v. Barnette*,⁵²⁶ the compulsory recitation of the Pledge of Allegiance was held unconstitutional as applied to a Jehovah's Witness. The Court reasoned that this symbolic utterance did not so materially advance the state's interests that it might require the taking of such a pledge. Individual freedom prevailed, although the decision did not turn on the religious nature of the objection.

A clear statement of the problem in measuring state regulation of religious interests against the demands of the first amendment is found in *Cantwell v. Connecticut*.⁵²⁷ There, Jehovah's Witnesses had been convicted for violating a state statute which was held by the state court to require solicitors of religious literature to get a permit. The Supreme Court reversed the convictions and held that the regulations could not apply to petitioners. The Court went on to say:

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. . . . Thus the Amendment embraces two concepts — freedom to believe and freedom

520 *Reynolds v. United States*, 98 U.S. 145 (1878).

521 *Davis v. Beason*, 133 U.S. 133 (1890).

522 Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 8-10 (1961).

523 133 U.S. 333, 334 (1890).

524 Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 8-10 (1961).

525 322 U.S. 78 (1944).

526 319 U.S. 624 (1943).

527 310 U.S. 296 (1940).

to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. . . . In every case the power to regulate must be so exercised as not, in attaining the permissible end, unduly to infringe the protected freedom.⁵²⁸

The principle, so-called, of accommodation is demonstrated in *Pierce v. Society of Sisters*,⁵²⁹ which established the freedom of children to attend religious schools provided instruction in secular subjects meets reasonable minimum requirements of the state. Such exemptions are generally placed on the basis, inter alia, that as a God-fearing but tolerant people, our governments should accommodate the religious needs of its people wherever possible. Another facet of the principle of accommodation was demonstrated in *Everson v. Board of Education*.⁵³⁰

2. Compulsory Education

The power of states to establish minimum standards for nonpublic schools has proved a fertile source of controversy. Its alleged exercise has collided with the religious interests of parents in recent cases.

The Mennonite-Amish objection to more than minimal education for children brought equitable and criminal actions in Ohio. In *State ex rel. Chalfin v. Glick*,⁵³¹ local officials complained that Amish schools which apparently did not meet Ohio's minimum standards were nuisances, and sought to have their operation abated. The injunction was refused, the court basing its decision on the ground that no statute forbade the existence of schools not meeting the state standards and that no evidence proved them injurious to the public welfare.

The court rejected, on grounds not relevant here, the contention that the parents had engaged in a conspiracy. In turn, this permitted the court to avoid deciding whether the deliberate violation of laws on religious grounds amounted to teaching the youths "active disregard and disrespect for the laws of the state,"⁵³² and whether any penalty would attach if it did. Thus it avoided what was perhaps the most serious aspect of the case.

In the other Ohio case, *State v. Hershberger*,⁵³³ five Amish children had been committed by the trial court to the custody of the county welfare board because their parents refused to send them to accredited schools. The parents sat silently by while two children submitted and a third refused to go with welfare officials. The other two could not be found. The latter children remaining absent, contempt charges were lodged against the parents. At trial, the father alleged that his religion would not permit him to give up the children. Defendants were convicted for their failure to permit the welfare board to have custody of the child. Although the conviction was later reversed on technical grounds, the lower court's opinion is interesting. In a lengthy obiter dictum, it discussed the constitutional questions, already conceded by defendant, in order to answer newspaper critics.

Close and repeated reading of *Hershberger* and *Chalfin* reveals that such cases get to court because of emotions rather than zealous law enforcement. Although, as the court noted, since the remedy in Ohio for violating the school attendance law is fine or imprisonment, there is natural reluctance to invoke such penalties against sincere religious objection. The simplicity of our written protections of freedom and the layman's concept of their extent collide with the limitations imposed by the courts, leading to hot emotion. The obvious attraction of such cases to the press inflames the passions latent in the dispute and forces each side to extreme positions.

528 *Id.* at 303-04.

529 268 U.S. 510 (1925).

530 330 U.S. 1 (1947).

531 113 Ohio App. 23, 177 N.E.2d 293 (1960).

532 *Id.* at 295. The court did find, however, that the record did not prove that "the children were being taught active disregard or disrespect for the laws of the state." *Id.* at 298.

533 150 N.E.2d 671 (Ohio Juv. Ct. 1958), *rev'd per curiam*, 168 N.E.2d 12 (Ohio App. 1959).

On the other hand, alternate remedies frequently delay the securing of the welfare of the child and permit the courts to evade the real problems.

A device sometimes used to avoid the religious problem is that of home education, as in *State ex rel. Shoreline School Dist. v. Superior Court*.⁵³⁴ Here, the child had been withdrawn from the public schools because of parental objections on religious grounds to her exposure to meat, fish, dancing and music. She was made a ward of the court, but was left in the physical custody of her parents, provided she was given adequate schooling. The decision appealed from held that since the legislature provided no standards for private schools, the home instruction was a permissible private substitute to public instruction. Moreover, the lower court held that the home instruction was comparable in quality to public schooling. The Supreme Court of Washington reversed, relying in part on a 1912 case⁵³⁵ which had held that home instruction is not equal to private schooling, regardless of the quality of the instruction or the instructor. The court then proceeded to set forth the standards prescribed for nonpublic schools, which had, except for the prior decision cited, been unknown. The religious contention was dismissed with a brief discussion.

The dissent pointed out that the court failed to reach the ultimate issue — the best interests of the child. Moreover, the dissent pointed to the escape route left unmentioned by the majority, i.e., the legislature provided in addition to normal excuses an exemption "for any other sufficient reason."⁵³⁶ The necessity for curtailing the practice of these parents' unorthodox views should, perhaps, have been re-examined in light of the object of the state's educational interests. So reviewed, it might appear that, as to these parents, the court's minimum standards for schools exceed the limitations implied by *Pierce v. Society of Sisters*.⁵³⁷

A religious freedom problem has also arisen concerning religious practices in the public schools. These cases are, however, fully treated elsewhere in this and past Surveys.

3. Public Health

The interest of the state in the health and safety of a child is sometimes put in conflict with the religious convictions of the parent or custodian. Four cases have been recently reported. In *Hoener v. Bertinato*,⁵³⁸ a juvenile court was petitioned to grant custody of an unborn child to the county welfare department. It was shown that the parents, both Jehovah's Witnesses, had opposing RH blood factors, and that blood transfusions would be required upon the birth of the child. The petition was granted in accordance with the principle that the practice of religious beliefs inconsistent with the state interest in general health and welfare should be limited.⁵³⁹

Another Maryland case, *Craig v. State*,⁵⁴⁰ involved the manslaughter conviction of parents who had failed to give proper medical care to their daughter. The court reversed on the insufficiency of the evidence, but went on to lay down principles for the guidance of the trial court. It is the implications of those principles that present the disturbing element in *Craig*. First, the court used the peace and safety limitation to establish that the interest of the state should prevail over the parents' religious objections. Second, the court rejected the contention that, because Christian Science practitioners were allowed (to function) in Maryland, these defendants,

534 55 Wash.2d 177, 346 P.2d 999 (1959), cert. denied, 363 U.S. 814 (1960). Justices Warren, Brennan and Douglas disagreed with the denial.

535 *State v. Connort*, 69 Wash. 361, 124 Pac. 910 (1912).

536 346 P.2d 999, 1006 (1959).

537 268 U.S. 510 (1925).

538 67 N.J. Super. 517, 171 A.2d 140 (1961).

539 It is submitted that where the life of the child is involved, as here, freedom of religion is also served by the vindication of the state interest. The child will be returned to its parents to be raised under their tutelage; he may later adopt the beliefs of his parents and even practice those beliefs by refusing medical aid proffered to him.

540 220 Md. 590, 155 A.2d 684 (1959).

members of the Church of God, were denied equal protection of the laws. It was said that ministrations by a Christian Science practitioner failed to fulfill the duty of parents to "provide medical care for their children."⁵⁴¹ Finally, the court dismissed the contention that due process had been denied because the offense charged was not adequately defined by statute.

A third common situation is the case involving a parent's refusal to permit vaccination of his children. A recent New Jersey case, *Board of Education of Mountain Lakes v. Maas*,⁵⁴² was also decided in favor of the state interest in health. The case was initiated by the school board to have the defendant stop leaving the unimmunized children at school. Although the statute allowed the school board to exempt pupils whose "parent or guardian . . . objects . . . upon the ground that the proposed immunization interferes with the free exercise of his religious principles,"⁵⁴³ the court decided that the board was not required to grant exemptions, and acquiesced in the board's uniform custom of denying relief under that clause. It would seem that the judiciary would subject the local exercise of discretion to closer scrutiny in view of the legislature's evident interest in preserving freedom of conscience. It is noted that the school board's action assured neither the children's immunization nor their attendance at school.

An injunction sought on religious grounds against the fluoridation of the city water was refused in *Baer v. City of Bend*.⁵⁴⁴ The report contains a review of cases restricting religious practices.

4. Conscientious Objection

Religious objection to war and military establishments raises substantial legal difficulties. Again, the state's concern for its own protection is the prime policy consideration, although it is true that some concession has been made to sincere religious scruple. In *Hanauer v. Elkins*,⁵⁴⁵ the court refused to order the University of Maryland to admit two students who declined to take the basic course required in military training. In its opinion the Court noted that the draft substitute is permitted as a matter of federal legislative grace, that the privileges and immunities clause of the fourteenth amendment does not require recognition of such privileges by the state land-grant schools and that Congress has not, if it could, pre-empted this particular phase of military obligation. The court distinguished *West Virginia Board of Education v. Barnette*⁵⁴⁶ on the ground that it involved mandatory attendance at school. It is submitted that the crucial compulsion in *Barnette* was not attendance at school but the required giving of the flag salute, and that the real significance of the case is that personal freedom prevailed over a state interest. Although the Maryland court proved that the interests of Maryland *could* be served by the compulsion involved here, it did not show why that interest *should prevail* after the United States had altered its own demands in deference to religious views.

Similarly, in *People v. Peck*,⁵⁴⁷ a conviction for refusing to take part in an air raid drill was upheld in a *per curiam* opinion, the court stating that the public good demanded such provisions for safety. Unsuccessfully, the contention had been made that this active preparation for war violated religious principles.

The granting of exemptions by the Selective Service System⁵⁴⁸ has generally

⁵⁴¹ *Id.* at 691.

⁵⁴² 56 N.J. Super. 245, 152 A.2d 394 (1959) *aff'd per curiam*. Board of Education of Mountain Lakes v. Maas, 31 N.J. 537, 158 A.2d 330 (1960), *cert. denied*, 360 U.S. 843 (1960).

⁵⁴³ N.J. STAT. ANN. § 18:14 64.2 (Supp. 1961).

⁵⁴⁴ 206 Ore. 221, 292 P.2d 134 (1956).

⁵⁴⁵ 217 Md. 213, 141 A.2d 903 (1958), *appeal dismissed*, 358 U.S. 643 (1959).

⁵⁴⁶ 319 U.S. 624 (1943).

⁵⁴⁷ 7 N.Y.2d 76, 163 N.E.2d 866, 195 N.Y.S.2d 637 (1959), *cert. denied*, 364 U.S. 622 (1961).

⁵⁴⁸ Universal Military Training and Service Act, 62 Stat. 604 (1948), as amended, 50 U.S.C. § 456(g),(j) (1958).

quieted constitutional controversy in draft cases. In its stead are issues arising from administration of the exemptions. One recurring issue is raised in the exemption of ministers, especially as applied to Jehovah's Witnesses. In *United States v. Stepler*,⁵⁴⁹ the defendant was convicted for failing to report for civilian work in lieu of induction, even though he claimed the ministerial exemption. It appears that the defendant's ministerial labors were confined to forty hours per month, while he also held a full-time paying job as a bricklayer. The Third Circuit reversed the board's decision, because the latter had made its determination on the ground that "a member of Jehovah's Witnesses does not qualify" for the exemption because "he does not have the training and qualifications of an ordained minister."⁵⁵⁰ Such a basis of decision obviously wanders into the periphery of the first amendment since it involves an adjudication of internal church disciplines.

The case of *United States v. Mohammed*⁵⁵¹ involved a Negro who sought ministerial exemption by claiming student status in the Muslim ministry. On appeal from conviction for failing to report for work in lieu of induction, the denial of the ministerial classification was upheld on the narrow grounds that the defendant's applications were untimely, and that his letters to the Board raised only the naked claim, without supporting evidence, of his ministerial status — defendant's letters, raising his "naked claims" indicate a considerable lack of education, little if any legal counsel, and certainly a lack of essential information about the operation of the Selective Service System. In this setting, the affirmation of the conviction on technical grounds has a certain insensitive connotation.

Special classification solely on the grounds of conscientious objection turns largely on the power of local boards to question the sincerity of a claimant's religious views.⁵⁵² Such an inquiry was used in *United States v. Corliss*⁵⁵³ to dispose of three appeals from convictions for refusing induction. As to one petitioner, the court relied in part on the fact that he couldn't cite a Bible passage to sustain his beliefs, and that he constantly referred to typewritten notes while testifying. It also appeared that the petitioner's belief had ripened into a conviction immediately after he received the induction notice. In evaluating the record of defendant Corliss, the court took pains to be fair — to the point of inquiring into the theological significance of baptism according to defendant's tenets. The court reluctantly concluded that the board's conclusions were legally defensible, because well-established personal opposition is required as well as training and belief. The third petitioner asserted that the questioning by the local board was infected with prejudice. The court cited an impressive list of authority to the effect that this was of no concern unless the appeal board appeared to have been misled by it.

The case demonstrates the difficult position in which a sympathetic judge is put. Open inquiry into another's sincerity and training can easily involve the examiner in matters of dogma. This borders on the establishment of orthodox religious tenets. On the other hand, the need for equitable and efficient administration requires that the fact-finding body be given a wide range of discretion in these matters. The difficulty is not the law as Congress structures it but the inescapable opportunity for the subtle play of emotion in its administration and the possible effect of that emotion on free exercise. If one doubts that legislative courtesy may become tyrannical in its dispensation, read the story below of one Donald Koch.⁵⁵⁴

549 258 F.2d 310 (3rd Cir. 1958).

550 *Id.* at 313. It is interesting to note that the board also relied on the fact that defendant's testimony had been mostly biblical in origin, and that he had admitted there are Bible passages favorable to war. The relevance of such inquiry is questionable.

551 288 F.2d 236 (7th Cir. 1961), *cert. denied*, 368 U.S. 820 (1961).

552 *United States v. Ballard*, 322 U.S. 78 (1944).

553 280 F.2d 808 (2d Cir. 1960), *cert. denied*, 364 U.S. 884 (1960).

554 *Koch v. Zuieback*, 194 F. Supp. 651 (S.D. Cal. 1961). Petitioner applied to a local board for exemption as an objector; because his application was untimely, it was denied. When he refused induction into the Armed Forces, he was convicted and sentenced to four years in

5. Religious Peculiarities

The cases here involve restriction on the free exercise of certain religious practices. In *Native American Church of North America v. Navajo Tribal Council*,⁵⁵⁵ an Indian church group that used peyote beans in its worship sought relief from a tribal ordinance that outlawed their introduction into Navajo territory. Since by treaty Indians are recognized as separate nations, the constitutional guarantees of the first amendment were held not applicable to them.⁵⁵⁶

The principle that corporations are not within the ambit of the free exercise clause was applied in *State v. Spink Hutterian Brethren*,⁵⁵⁷ where under state law a religious commune was secure in its right to exist, but restricted in its freedom to expand. This was an action to have the corporate charter annulled for alleged violation of a state statute. The original enabling act had been repealed but existing communal corporations saved under the condition that "expansion of any activity or power" was prohibited. The alleged violation of this section — by the leasing of a different 80 acres of land than that leased at the time the proviso was enacted — gave rise to the action. The lower court had found the repealing statute void because this particular proviso was uncertain in meaning. It therefore granted judgment for the corporation. On appeal, the case was modified and affirmed, as modified. The proviso was not uncertain but it had not been violated.⁵⁵⁸

The leading case on the right to advocate religious beliefs publicly in recent years is *State v. Corbisiero*,⁵⁵⁹ in which an ordinance requiring permits for the privilege of public speaking was held invalid as applied here. Defendant was a preacher using a loudspeaker to express his religious views. The court said that the free exercise of religion was unreasonably curtailed because the ordinance set no standards.⁵⁶⁰

prison. The board, aware of the forced change of address but notified only by the prison warden, classified him 4-F. That classification extended his draft eligibility period to age 35. When he was released on parole, the board reclassified him 1-A, sending the notice to an obsolete address; the notice did not reach Koch. After waiting out the 10-day appeal time, the board obtained his current address from the parole officer and mailed a change of address form. While in prison, petitioner reached the age of 26. Not knowing of the reclassification, or the fact that it extended his eligibility period to age 35, he thought his troubles were over. When he received the address form, he personally went to the board's office to inquire why they claimed jurisdiction of him. He learned, for the first time, of the preceding classifications. In three days, he protested in writing, asking for a V-A (overage) classification or, failing that, a conscientious objector status.

A hearing was held at which he was denied the right to counsel and the use of two witnesses; he was classified 1-0. Unsuccessfully, he appealed. Eighteen months later, the Board reopened the classification on its own initiative and reclassified him 1-0. Upon timely request, an unavailing hearing was held; timely appeal was unsuccessful. A marriage and divorce resulted in further reclassifications; the last he protested and at the hearing the board denied him the opportunity even to discuss the desired V-A classification. The appeal was unsuccessful. Koch filed a civil action against local board personnel for damages and a declaratory judgment of his status. In short, he contended that the official acts were done with intent to hound and harass him, to entrap him and cause his imprisonment again and with knowledge that their actions endangered his business affairs. The court said he failed to state a claim upon which relief could be granted.

555 272 F.2d 131 (10th Cir. 1959).

556 *Id.* at 134, citing *Talton v. Mayes*, 163 U.S. 376 (1896), excluding such nations from the controls or protections of the fifth amendment and *Barta Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (8th Cir. 1958) declaring in addition their exclusion from coverage of the fourteenth amendment.

557 77 S.D. 215, 90 N.W.2d 365 (1958).

558 While the opinion recounts a rather hectic relationship between the state and these communal Christians, it is submitted that the deprivation of their right to expand their corporate holdings denies them no right guaranteed by provisions for freedom of worship. The method by which legal title to property is held in this instance can be supplemented relatively easily by the use of trusts or by specific covenants in instruments utilizing joint tenancies or some other multiple-party device.

559 67 N.J. Super. 170, 170 A.2d 74 (1961).

560 *Id.* at 78.

6. Prisoners' Freedom to Practice Religion

Cases involving prisoners in both New York and California institutions question the degree to which constitutional guarantees of religious freedom can be restricted by conviction and by the requirements of prison discipline.

Perhaps the least restraint on such freedom is seen in *People ex parte Wright v. Wilkins*,⁵⁶¹ where a prisoner claimed that his Muslim beliefs were being restrained. He was not allowed to study an Arabic grammar in the recreation yard, and it was claimed that the knowledge of Arabic was essential to the study of Muslim beliefs. That claim was rejected by the court because the prisoner could read in his cell and was allowed access to English translations of Islamic texts from the prison library. Curiously enough, there was no explanation as to what threat to the safety and good order of the prison was posed by this particular religious or recreational practice.⁵⁶²

More serious problems are presented by *In re Ferguson*⁵⁶³ and *Pierce v. La Vallee*⁵⁶⁴ where the freedom to practice Black Muslimism was allegedly restricted in undue fashion. Muslimism maintains black supremacy and total segregation of the races, and they claim to be an Islamic sect.⁵⁶⁵ In the California case, the protection of prisoners' religious freedoms is left solely to federal guarantees.⁵⁶⁶ The court then has no trouble reaching the somewhat dubious conclusion⁵⁶⁷ that federal protections, whatever they may be, do not invalidate the prison rules in question. Since the one activity sought to be protected is the right of these inmates — who disdain "white" authority — to congregate for worship or discussion, the result is somewhat defensible. Peace and safety of the prison is clearly a legitimate interest. On the other hand, the conclusion is very broad. There is no evidence that permitting assembly for worship would have resulted in a threat to safety.⁵⁶⁸ Moreover, there is evidence of intolerance by prison officials. The Muslims were officially denied the classification as a religious group.⁵⁶⁹ Indeed, there was evidence of heavily prejudicial treatment of the Muslim sect.⁵⁷⁰

In the *Pierce*⁵⁷¹ case, an injunction was sought, under the Civil Rights Act of 1871,⁵⁷² restraining prison officials from denying Muslims access to religious literature and advice. The court held that the prisoners had stated a cause of action in complaining that prison officials had denied them access to literature and advice, and that an injunction should be granted. The commendable reasons were that the freedom of religion is a "preferred" right, guaranteed by the fourteenth amendment

561 26 Misc. 2d 1090, 210 N.Y.S.2d 309 (Sup. Ct. 1961).

562 See also *McBride v. McCorkle*, 47 N.J. Super. 468, 130 A.2d 881 (1957). The demands of prison discipline permitted the officials to prevent a prisoner in the segregation section to attend Mass in another part of the prison.

563 55 Cal. 2d 663, 12 Cal. Rept. 753, 361 P.2d 417 (1961).

564 293 F.2d 233 (2d Cir. 1961).

565 LINCOLN, *THE BLACK MUSLIMS IN AMERICA* 67-75 (1961).

566 Felons are specifically exempted from state protections, *In re Ferguson*, 55 Cal. 2d 663, 12 Cal. Rept. 753, 361 P.2d 417, 420 (1961), CAL. CONST., art. 10, § 7, CAL. PEN. CODE § 5058.

567 See *Pierce v. Vallee*, 293 F.2d 233 (2d Cir. 1961); *Sewell v. Pegelow*, 291 F.2d 196 (4th Cir. 1961); and *Fulwood v. Clemma*, 295 F.2d 171 (D.C. Cir. 1961), all of which reverse lower courts that dismissed claims of denial of religious rights to the petitioners. Of course, none dealt with proved facts.

568 The only physical resistance to authority noted was by a single prisoner; other resistance was markedly passive. The prisoners "looked down their noses at those present as if he were a very small piece of refuse." 361 P.2d at 420.

569 The court terms this reasonable without discussing whether this was a form of establishment or whether it was within the limits of proper inquiry laid down in *Ballard v. United States*, 322 U.S. 78 (1944).

570 See correctional officers' characterization of one petitioner's scrapbook as "Muslim trash," 361 P.2d at 419. As to the high moral standards of Muslimism, see also LINCOLN, *THE BLACK MUSLIMS IN AMERICA* 75-82 (1961).

571 293 F.2d 233 (2d Cir. 1961).

572 17 Stat. 13 (1871), 28 U.S.C. § 1343 (1958), 42 U.S.C. § 1983 (1958).

even to state prisoners who are indeed within the ambit of the Civil Rights Act.⁵⁷³ As has been noted elsewhere,⁵⁷⁴ this case may be reconciled with *Ferguson* because it is more abstract and seeks protection principally of belief rather than practice. Still *Pierce* and similar cases may require that more cogent reasons be adduced for restricting prisoners' exercise of religion than sufficed in *Ferguson* and *Wilkins*.

7. Summary

If these cases prove nothing else, they show a sometimes quick and alarming tendency to utilize the accepted principles of limitation without a sensitive and tolerant evaluation of the comparative necessity of the restriction with the preservation of the "preferred" constitutional guarantees. Even in the more sympathetic analysis,⁵⁷⁵ the preservation of lower echelon discretion prevails.⁵⁷⁶ While one feels that the principles of limitations are sound, and often feels that their particular application is legally defensible, he is frequently left with the nagging impression that the giving of wider range to the free exercise of religion in the particular context would neither injure the prevailing interest said to be safeguarded by the limiting principle nor defeat the object of the particular law or regulation, the observance of which is allegedly threatened or violated.

V. CONCLUSION

In the two-year interval since the last Church-State Survey, there have been no decisions or legislative enactments relating to gambling that constitute "developments" in the law.⁵⁷⁷ For that reason, it was deemed prudent to consider the matter only by brief reference in this conclusion section. It is a matter of conjecture whether or not gambling sponsored by religious groups for the purpose of raising funds is on the wane, but any change would almost certainly move in that direction. It is a fact that gambling for any purpose is looked upon with disfavor by most religions, and any liberality in that respect can be regarded as maintaining only a precarious position.⁵⁷⁸

To be sure, no general conclusions as to the current status of the law of church-state relations can be deduced from the materials presented herein. Nevertheless, a few specific comments can be presented, not in the hope of solving the problem, but

573 See comments in *In re Ferguson*, 55 Cal. 2d 663, 12 Cal. Rep. 753, 361 P.2d 417 (1961) on the scope of the Civil Rights Act's protections and *Koch v. Zuieback*, 194 F. Supp. 651 (S.D. Cal. 1961).

574 Comment, 75 HARV. L. REV. 837 (1962).

575 See, e.g., *United States v. Corliss*, 280 F.2d 808 (2d Cir. 1960), cert. denied, 364 U.S. 885 (1960).

576 The necessity for this discretion is not questioned; the comparative worth of its particular exercise, it is submitted, should be subjected to greater scrutiny.

577 1958-59 *Church-State Survey*, *supra* note 2, at 424-427.

578 See WILLIAMS, LOTTERIES, LAWS AND MORALS 85-94 (1958). The author sets out the positions of the three leading creeds in the United States:

- (1) Jewish: Central Conferences of American Rabbis, 1949. "The Central Conference of American Rabbis deplores the use of gambling devices to raise funds for Jewish religious and communal institutions as being contrary to our faith and tradition. The Central Conference . . . calls upon its members to discourage such practices." (p. 85)
- (2) Protestant: Legislative Committee of the New York State Council of Churches, 1953-54. "We oppose gambling in any form under any auspices. Gambling is like a creeping paralysis in our society. The alleged good which comes from money-raising activities based on petty gambling cannot possibly counteract the evil done to society as a whole." (p. 91)
- (3) Catholic: ROSS, CHRISTIAN ETHICS 373-74. Although a person may be able to resist the passion of gambling, "yet his action in indulging in, or giving countenance to, any form of gambling is giving a certain sanction to the practice and may entrap weaker persons into what may become a ruinous habit. This is especially true of church fairs employing gambling devices. . . . Prohibition of betting by the state is amply justified." (p. 90)

of focusing attention on some of the considerations that shed more light on the solutions which surely must come.

The refusal of the Supreme Court to review the *Swart* case at a time when the nation was looking for a settlement of the debate raging on the education problem is indicative of one view of the meaning of the first amendment. This view would denominate the amendment as a policy of studied inaction, a stern admonition to the government — legislature, executive and even judiciary — to keep hands off the problem of religions in a pluralistic society even to the extent of intentionally not formulating a rule of law to be applied when cases arise. The education cases are lessons in themselves of a lack of dominant purpose. The state courts, though not all possessing the same procedural devices the Supreme Court has used to avoid questions of church-state, have found ways around deciding the combat area.

As noted in the introduction, the courts are wont to speak of religious institutions in terms of charities, buildings, etc. — in short, anything but religions. The state courts, even more than their federal counterparts, are thus bypassing the relationship morass, to answer cases on the point in terms of the established concepts of secular law. There are signs that the courts may no longer be able to dodge the issue. The practices involved in the test oath case and *Bayside* were recognized for what they were — special privileges awarded to religion. The courts have decided cases arising in the education area on the religious issue since the *Everson* case refused to dodge the issue fifteen years ago. It seems reasonable to conclude that the next few years will find the realistic approach coming into many of these subjects of the Survey.

By evading the issue, the courts have obfuscated certain underlying principles. The church is thus considered as one thing for purposes of taxation, another for education, and still another for zoning. The one simple reality of the good of religion has been overlooked. It is not clear that the results would be different if the church were considered in one and the same way in all of these problems. Nevertheless, both from the analytical point of view and that demanding clarity in the law, the present treatment of the church as varying things for varying purposes is objectionable. The *Swart* and *De La Salle Institute* contradiction as to whether the educational function of a church is integral to the religion is a prime example. While this discretionary classification has of yet been little used to hinder religion, the dangers from a vague state of the law are apparent.

The Amish cases portray another danger to religion. While the facts are peculiar to one religion, the essence of the decisions abrogating this right of religious belief where the state has a "paramount" interest could be applied to any religion in the country. By deciding that the practice of the Amish Brethren was not really religious in the sense protected by the first amendment, the courts established themselves as the arbiters of dogma. The schism cases are another example of the courts' insistence on determining the religious beliefs of the churches themselves. These problems are small, to be sure, but the potential is large. While the Mormon cases may in the opinion of most commentators have been decided correctly, the limits of this power must be clearly defined to prevent a tyranny of the majority when the occasion presents itself.

Conflicts will arise where one man is simultaneously subject to two masters — one spiritual and one temporal. The conflicts may be resolved only by the tribunals entrusted with the responsibility — the courts; yet, as *Shelley v. Kraemer*⁵⁷⁹ established in another context, the courts must be considered as an arm of one of the combatants — the state. The courts have, thus far at least, preferred the state's interests in that they insist on considering the problem as one divorced from religion. So we have the different approaches in the test oath case and the Sunday closing cases as to where the true interest of the state must lie. In both examples, the Su-

preme Court imposed a secularizing rationale on religiously-motivated practices.

The question thus still to be resolved in regard to the whole area of church-state is how far the nation will go in determining the secular worth of any religious creed or belief. The end of such action may be a state imposed unity *within* our pluralistic framework, but then again future surveys may find this unity *in place of* our much-heralded diversity of belief.

Joseph P. Albright
Philip B. Byrne
N. Patrick Crooks
Charles J. Griffin, Jr.
Thomas Richard Joyce, Jr.