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Church-State -- Religious Institutions and Values: A Legal Survey 1955-57

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NOTES

CHURCH — STATE

RELIGIOUS INSTITUTIONS AND VALUES: A LEGAL SURVEY

1955-57

Contents

I INTRODUCTION	417
II RELIGIOUS INSTITUTIONS:	
A. ZONING — <i>A Favorable Treatment</i>	418
B. SCHOOLS — <i>The Wall of Separation Re-examined</i>	420
C. TAXATION — <i>Unresolved Issues</i>	423
D. TORT LIABILITY — <i>Toward Social Responsibility</i>	427
III RELIGIOUS VALUES:	
A. RELIGION IN THE COURTS — <i>Judicial Attitudes</i>	429
B. SUNDAY CLOSING LEGISLATION — <i>A Suggested Solution</i> ..	432
C. OBSCENITY — <i>The Emergence of a Legal Value</i>	436
1) LITERATURE — <i>A Problem of Definition Resolved</i>	436
2) THE MOTION PICTURE — <i>A New Analysis</i>	446
D. DOMESTIC RELATIONS — <i>A Reconciliation</i>	453
1) SEPARATION AND DIVORCE — <i>A Value Denied</i>	453
2) AGREEMENTS — <i>Continued Resistance</i>	454
3) THE CHILD'S PREFERENCE — <i>A Retrogression</i>	456
4) CUSTODY AND ADOPTION OF CHILDREN — <i>Imposition of a Standard</i>	457

I. Introduction

The Church-State relation in the United States today encompasses a wide variety of legal and social problems. Determining the place of religion and its attendant spiritual values in a pluralistic society is a perplexing problem requiring a broad basis of thought and analysis. This Note is an attempt to examine critically and exhaustively the judicial recognition of this relation over the past three years.

With the appearance of this Note, the *Notre Dame Lawyer* is inaugurating a new feature which will be perpetuated on a biennial basis. Every two years the *Lawyer* will present an analysis such as is found here, bringing its readers up to date on new developments in the field of Church-State. As this tradition gradually develops, it is expected that the form and content of these studies will become more crystallized, providing a better and more thorough presentation of the problem.

Some areas of the problem have been purposely excluded from the present study because of their marginal connection with the central issue. Chief among these perhaps is the area of intra-church disputes, involving such matters as conflicting claims to church property or disagreement as to the official ruling authority of a church. The issues presented by these problems require treatment of a different sort than that found here.

It is hoped that the originality of this study lies in presenting at one glance the over-all topography of the Church-State issue. The approach here is not confined solely to the institutional balance struck in the first amendment with its subsequent judicial interpretations. To restrict the problem in this manner is to ignore the broader social and political contexts of the problem. Although recent case law and legislation serve as the springboard of the analysis, it has become necessary to look beyond these official agencies of government to discern the general contours of the problem. Because many of the crucial dimensions of the relationship have not appeared before the courts and probably never will, the writers have taken into account the important discussion taking place in the larger form of public opinion and criticism.

The first part of the Note, *Religious Institutions*, deals with the issues traditionally considered within the idea of Church-State. It is here that the direct conflicts arise between Church and State considered as juridical entities, each seeking to justify its rights against the asserted authority of the other. Section Two considers the broader problem of religious values seeking vindication before the legal tribunals of our country. The chief emphasis here is not upon a church considered as a juridical entity, but upon the person as a moral agent, acting simultaneously as a member of the political community and a religious society. With Church and State exercising concurrent jurisdiction with respect to these values, it is the position of the person as a member of both institutions that becomes of primary importance. Employing these two lines of analysis,

it is hoped that the widest possible perspective on the question of Church and State can be achieved.

II. RELIGIOUS INSTITUTIONS

A. ZONING—*A Favorable Treatment*

Churches and religious institutions have fared well under zoning laws during the past three years. The cases exhibit little appreciable change from previous decisions in this area. That churches and sectarian schools cannot be excluded from residentially zoned districts is firmly established in the majority of jurisdictions.¹ In some instances the legislatures have interceded, declaring invalid ordinances or by-laws which prohibit or limit the use of land for church purposes.² Broad policy considerations have been enunciated in this field, with courts reasoning that even though churches in residential areas may increase traffic hazards or decrease property value, the high purposes and moral values of these institutions outweigh any such drawbacks.³ The same policy considerations have also prevailed in the successful efforts of denominational schools to locate in residential areas.⁴

In an important case before the California Supreme Court, an ordinance was declared unconstitutional that excluded private schools from a district covering 98.7% of the city.⁵ Petitioner sought to build a Roman Catholic elementary school within this area, and was denied a permit. The court said a private institution cannot be arbitrarily excluded, while public schools are allowed in the same district. Parents have the right to send their children to private rather than to public schools, and to have such schools located in the immediate vicinity or general neighborhood. The Wisconsin Supreme Court reached a contrary result previously, holding that private high schools may be excluded from certain districts, since they discriminate in their admission policies and thus do not serve the general welfare to the same extent as does a public school.⁶ The Supreme Court dismissed this case for want of a substantial federal question.⁷

1 YOKLEY, ZONING LAW AND PRACTICE §§ 222, 247 (2d ed. 1953).

2 MASS. ANN. LAWS c. 40A, § 2 (Sup. 1956).

3 *Diocese of Rochester v. Planning Bd.*, 1 N.Y.2d 508, 136 N.E.2d 827 (1956); *Application of Gardan City Jewish Center*, 2 Misc. 1009, 155 N.Y.S.2d 523 (Sup. Ct. 1956). *Contra*, *West Hartford Methodist Church v. Zoning Bd. of Appeals*, 143 Conn. 263, 121 A.2d 640 (1956).

4 *In re O'Hara's Appeal*, 389 Pa. 35, 131 A.2d 587 (1957). *But see* *Ranney v. Istituto Pontificio Delle Maestre Filippini*, 20 N.J. 189, 119 A.2d 142 (1955).

5 *Roman Catholic Welfare Corp. v. City of Piedmont*, 45 Cal. 2d 325, 289 P.2d 438 (1955). The court did not specify in what respect the ordinance was unconstitutional, saying only it was an arbitrary and unreasonable discrimination against private schools.

6 *State ex rel. Wisconsin Lutheran High School Conference v. Sinar*, 267 Wis. 91, 65 N.W.2d 43 (1954). See Brindel, *Zoning Out Religious Institutions*, 32 NOTRE DAME LAW. 627 (1957).

7 349 U.S. 913 (1955). See Seitz, *Constitutional and General Welfare Considerations in Efforts to Zone Out Private Schools*, 11 MIAMI L. Q. 68 (1956). The writer criticises the Court for overlooking what he considers to be a very substantial federal question under the due process and equal protection clauses of the fourteenth amendment.

As with all zoning ordinances, the justification for those that affect religious institutions is that they are a valid exercise of the police power, bearing a reasonable relation to public morals, health, safety, and general welfare. But courts demand that these justifications be rigorously substantiated in the case of churches, less the paradoxical situation arise that they are being excluded on the basis of public morals or welfare, the very things churches themselves are attempting to promote.⁸ But occasionally the courts have treated the application of a church in the same manner as any other institution, granting the ordinance the traditional presumption of validity, and requiring strong reasons for its overthrow.⁹ Certain decisions have properly excluded or limited churches, where it is clear that the benefit to the church would be slight in relation to the overriding social utility of enforcing the ordinance.¹⁰

Successful objections to zoning ordinances have been made on the grounds of due process, equal protection of the laws, and the free exercise of religion;¹¹ or on the grounds that the ordinance, though constitutional in itself, has been applied unreasonably, amounting to an abuse of discretion on the part of the zoning board.¹² Rigid enforcement of ordinances has been refused where the church was able to show it would be subjected to unreasonable hardship, or would be placed in a position of great disadvantage in carrying on its work.¹³ All these pleas have met with sympathy in the great majority of courts, and there is every reason to believe that this view will persist, with the courts displaying even more leniency in this area. Behind this attitude appears to be the unspoken commitment that churches should be given every opportunity to prosper, even at the expense of some possible hardship to other interests. Churches play too important a role in fostering desirable social and moral values to be zoned out of existence or to be relegated to industrial or commercial districts. Courts have displayed this favorable disposition toward churches in situations both where the ordinance makes a provision for their location, but restricts them to certain districts¹⁴ and where the ordinance requires that certain conditions be met before a building permit will be granted.¹⁵

The issue of what constitutes a use accessory to the church and its property has been considered in a few cases, dealing chiefly with applications for parking lots. Generally, ordinances are framed so as to allow all uses reasonably accessory to the premises. What constitutes such a use must be determined on the particular facts of each case. One court has held that a parking lot is a use accessory to the church premises,

⁸ *Congregation Comm., Jehovah's Witnesses v. City Council*, 287 S.W.2d 700 (Tex. Civ. App. 1956).

⁹ *Miami Beach United Lutheran Church v. Miami Beach*, 82 So. 2d 880 (Fla. 1955).

¹⁰ *Cf. Congregation Beth Israel v. Board of Estimate*, 285 App. Div. 629, 139 N.Y.S.2d 645 (1st Dep't 1955).

¹¹ For an extended discussion of this aspect of the zoning question, see 70 HARV. L. REV. 1428 (1957).

¹² *Diocese of Rochester v. Planning Bd.*, 1 N.Y.2d 508, 136 N.E.2d 827 (1956).

¹³ *Stevenson v. Board of Adjustment*, 96 S.E.2d 456 (S.C. 1957); *cf. State ex rel. Jehovah's Witnesses v. City of Wenatchee*, 312 P.2d 195 (Wash. 1957).

¹⁴ *Young Israel Organization v. Dworkin*, 133 N.E.2d 174 (Ohio App. 1956).

¹⁵ *Community Synagogue v. Bates*, 1 N.Y.2d 445, 136 N.E.2d 488 (1956).

since it relieves traffic congestion and aids the church in carrying out its work.¹⁶ But if the church may be built in another district, with no great hardship involved, then the variance for a parking lot will not be granted, especially where there are additional factors such as highway safety or undue traffic congestion.¹⁷

In short, churches and church-related institutions have had smooth sailing in this field. And if prediction is warranted by the precedents, the conclusion seems inescapable that their petitions for building permits, variances, exceptions, and the like, will continue to be greeted favorably. This is an area of Church-State relations where moral and religious issues are not present, where constitutional scruples about separation do not lurk forebodingly in the background. And for this reason, it will probably never bear the marks of bitter disagreement and dispute characteristic of other aspects of Church-State relations.

B. SCHOOLS—*The Wall of Separation Re-examined*

On the general question of religion in publicly supported schools, no cases of any great import have appeared in the past three years. The United States Supreme Court has not spoken on the question since 1952 when it decided the landmark case of *Zorach v. Clauson*.¹⁸ A 1953 New Jersey decision¹⁹ declared unconstitutional the practice by the Gideons Society of distributing the King James version of the Bible to school children whose parents so requested. On petition for certiorari, the Supreme Court declined to hear the case.²⁰ Many issues in this area remain unresolved, and will no doubt continue to be so for some time to come.²¹

The Kentucky Court of Appeals in 1956 held that the practice of conducting public school classes in Roman Catholic school buildings, with nuns as teachers, was constitutionally permissible.²² The arrangement was an economy measure by the local school board, stemming from a lack of facilities and teachers. The nuns wore the religious garb of their order, and upon this fact rested the main protest which brought the case to the highest court of the state. The objecting party claimed that the practice of nuns wearing their religious garb was a violation of the first and fourteenth amendment guarantees of freedom of religion. In holding the practice constitutional, the court pointed out that if these nuns were denied the right to teach in a state supported school because of their religious beliefs, they would be denied equal protection of the laws. The decision is squarely in opposition to a statute passed by North Dakota in 1948, providing that no person while teaching in the public schools of the state shall wear any dress or garb indicating that the person is a member of any religious denomination.²³

¹⁶ *Mahrt v. First Church of Christ, Scientist*, 142 N.E.2d 567 (Ohio C.P. 1955), *aff'd*, 142 N.E.2d 678 (Ohio App. 1956).

¹⁷ *Appeal of Jehovah's Witnesses*, 183 Pa. Super. 219, 130 A.2d 240 (1957).

¹⁸ 343 U.S. 306 (1952).

¹⁹ *Tudor v. Board of Education*, 14 N.J. 31, 100 A.2d 857 (1953).

²⁰ *Sub nom. Gideons Int'l. v. Tudor*, 348 U.S. 816 (1954).

²¹ During its 167 years of existence, the Supreme Court has listened to only ten cases on the question of religion in public schools. See Sutherland, *Public Authority and Religious Education*, 52 RELIGIOUS EDUCATION 256, 260 (1957).

²² *Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956).

²³ N.D. REV. CODE c. 15-47, § 15-4729 (Supp. 1953).

Within six weeks, however, the Kentucky Court of Appeals decided the case of *Wooley v. Spalding*.²⁴ Here the court was presented with the problem of two public schools being staffed largely by Roman Catholic nuns, with the following additional facts: the school libraries featured virtually nothing but Catholic periodicals, sectarian religious training was conducted during time set aside by statute for "moral instruction"; and the schools were closed on all Roman Catholic holydays. This last fact prevented Protestant children from attending yet another school on these days because the school buses did not run. The court directed that an injunction be granted against keeping sectarian periodicals in the libraries and suspending school bus operations on holydays. This is a sound decision, as the excesses found were unreasonable and apparently unnecessary.

While the Kentucky Court of Appeals appears to have struck a reasonable and operative position on the question of religion in public schools, judicial thinking in other states continues to manifest the extremism of *Illinois ex rel. McCollum v. Board of Education*.²⁵ The now unfortunate and twisted phrase of Jefferson's that the American people, by adopting the first amendment, wished to build "a wall of separation between Church and State" has given rise to numerous artificial distinctions and limitations, most sharply illustrated by the Supreme Court's *McCollum* decision.²⁶ The most recent manifestations of this type of thinking have come out of New York and New Jersey.²⁷ The New York Commissioner of Education has declared that the Ten Commandments may not be displayed in public school rooms. The reasoning seems to be that since they cannot be commented upon by the teacher, their unexplained presence in the schoolroom will cause needless disharmony and conflict among the students. In New Jersey, an Attorney General's opinion has banned the public recitation of grace before meals in public schools as a violation of freedom of religion.

These views represent an over-cautious mentality on the problem of Church-State, resulting in the paradoxical situation that free and legitimate expressions of religion are snuffed out under the guise of protecting constitutional guarantees of freedom of religion. The *intent* of such measures is to give the maximum protection to rights guaranteed by the first amendment; and yet, oddly enough, their *effect* is to limit and even suffocate these very rights. Current discussion of the matter seems to focus almost exclusively upon the establishment clause of the first amendment. What, indeed, has become of the second clause? — "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The implications of this clause deserve closer scrutiny and analysis.

²⁴ 293 S.W.2d 563 (Ky. 1956).

²⁵ 333 U.S. 203 (1948).

²⁶ Not to mention the Court's dictum in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947): "The 'establishment of religion' clause of the First Amendment means at least this: 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."

²⁷ See 60 *Nation's Schools* 45 (Dec. 1957).

A position at once more realistic and consistent with the intent of constitutional safeguards is found in the case of *Carden v. Bland*.²⁸ The Supreme Court of Tennessee held that the reading without comment of passages from the Bible in public schools does not violate freedom of religion. Speaking of the doctrine of separation of Church and State, the court said:

[I]t could not be tortured into a meaning that was never intended by the Founders of this Republic, with the result that the public school system of the several states is to be made a Godless institution as a matter of law.²⁹

A similar attitude is reflected in the decision of a New York court holding that there is no violation of first amendment rights when the phrase "under God" is included in the recitation of the pledge of allegiance to the flag.³⁰ These two decisions, along with others in the same spirit, represent a sound and balanced perspective of the problem of religion in public schools. They avoid the excesses found in the thinking of those who by guarding religious freedom too vigilantly, strangle legitimate expressions of religious duty and devotion. It would seem that the struggle will continue between those who read the establishment clause of the first amendment as demanding an absolute wall of separation and non-recognition and those who read it more flexibly as allowing impartial non-preferential assistance toward all sectarian groups.³¹

Although the present state of the law seems to impede any religious manifestations in the public schools, the *de facto* conditions existing locally throughout the country may well be in the opposite direction. While court decisions and official rulings reflect a certain climate of opinion, a wide latitude with respect to them can be found in concrete plans and programs across the nation. Professor Sutherland has made the following interesting observation on this point:

The practical impossibility of consistent and doctrinaire constitutional literalism in matters of Church and State throughout our federal nation maybe one of the curious benefits of the system. It seems to be one of those benign paradoxes which permit an adjustment of localism to national policy, and so make life reasonably tolerable in our widespread and diverse nation.³²

In short, a good deal of the Church-State dispute is perhaps being thrashed out at the level of abstract comment and discussion, not at the level of local schools boards and classrooms.

The Pennsylvania Supreme Court in a five-one decision refused to take up the precise question of whether, in the absence of statutory authorization, a county school board has discretionary power to transport parochial school children in its buses.³³ While disposing of the case on technical grounds, the court hinted that they would find this practice unconstitu-

²⁸ 199 Tenn. 665, 288 S.W.2d 718 (1956).

²⁹ *Id.* at 724; *accord*, *Commonwealth v. Renfrew*, 332 Mass. 492, 126 N.E.2d 109 (1955).

³⁰ *Lewis v. Allen*, 5 Misc.2d 68, 159 N.Y.S.2d 807 (Sup. Ct. 1957).

³¹ For a stimulating presentation of these two positions, see Pfeffer & O'Neill, *The Meaning of the Establishment Clause*, 2 BUFFALO L. REV. 225 (1953); see also Drinker, *Some Observations on the Four Freedoms of the First Amendment*, 37 B. U. L. REV. 1, 49-69 (1957).

³² Sutherland, *supra* note 21, at 264.

³³ *School Dist. v. Houghton*, 387 Pa. 236, 128 A.2d 58 (1956).

tional if they were someday to decide the question on its merits. The strong rhetorical dissent protested that the constitutional question should have been determined; and further, that it should have been decided in favor of allowing parochial school children the use of the school district's transportation facilities, since it would not increase the cost to taxpayers and cause a deflection of public funds for sectarian purposes.

Non-legal skirmishes continue to take place occasionally as to whether federal funds should be made available to privately owned sectarian schools. Little new has been said on this question, as it seems resolved in the direction of denying such funds. However, it has been recently advocated by the Catholic Jesuit Education Association that in light of the pressing needs for increased technical and scientific education, and the Administration's consequent plan for a four-year, billion dollar outlay, the sectarian schools should be included under this subsidy. Otherwise, as the Association pointed out, ". . . the program could not achieve its purpose, because it would by-pass a very large pool of individual talent and educational facilities."³⁴ The suggestion bears attention and discussion, and it cannot be summarily written off as parochial grasping. Perhaps the time is not ripe for such aid. Jurists and political theorists may think the issue is dead, the question foreclosed. But with constant expansion of sectarian educational institutions, and their role in the American schooling picture, the prediction seems safe that the question has not yet seen its final resolution.³⁵

C. TAXATION—*Unresolved Issues*

The broad area of property tax exemptions for religious institutions is governed wholly by statute. Various state statutes, while roughly similar in their over-all contours, exhibit a sufficient amount of difference to result in a multi-sided body of case law on the problem. A substantial number of important cases have come before the courts since 1955.

In a most significant decision, the Supreme Court of California held constitutional a statute requiring a church to sign a non-subversive declaration as a condition for tax exemption.³⁶ The church had refused to sign the oath, but still demanded its exemption. The court restated the traditional view that an exemption is a privilege granted by the sovereign, and can be withdrawn if stipulated conditions are not met. The United States Supreme Court has granted certiorari.³⁷

Another issue of basic importance was before the same court in the case of *Lundberg v. County of Alameda*³⁸ where a local taxpayer chal-

³⁴ Chicago Sun-Times, Jan. 5, 1958, p. 7, col. 1. As could be expected, the Protestants and Other Americans United for Separation of Church and State lodged an immediate protest.

³⁵ For a general discussion of the problem, pointing out that private and church-related schools exist by right and not by sufferance, see the American Bishops' Annual Statement, 1955, *The Place of Private and Church-Related Schools in American Education*, in 56 CATHOLIC SCHOOL JOURNAL 1 (1956).

³⁶ *First Unitarian Church v. County of Los Angeles*, 48 Cal. 2d 419, 311 P.2d 508 (1957). Companion cases, decided on the same day, were: *People's Church v. County of Los Angeles*, 48 Cal. 2d 899, 311 P.2d 540 (1957); *First Methodist Church v. Horstmann*, 48 Cal. 2d 901, 311 P.2d 542 (1957).

³⁷ 355 U.S. 853 (1957).

³⁸ 46 Cal. 2d 644, 298 P.2d 1 (1956).

lenged the legality of a statute exempting property used for schools of less than collegiate level, owned and operated by religious and charitable organizations. The taxpayer protested that this amounted to subsidizing the schools, thus contravening the establishment clause of the first amendment. A sharply divided court held against the taxpayer, pointing out that the measure was in the interests of public welfare, and even though the schools were benefiting by this, there was no violation of the first amendment.³⁹ The majority also pointed to its general policy of construing exemption statutes broadly in favor of the institution seeking to come within the privilege.⁴⁰ Upon appeal to the United States Supreme Court, the case was dismissed per curiam for want of a substantial federal question.⁴¹ The fact that the exemption was sustained by a narrow four-three margin indicates that courts are perhaps probing the whole rational of property tax exemptions for religious institutions and re-examining the foundations of the doctrine. And while the Supreme Court's dismissal has probably laid the issue to rest for the present, its future is not certain.⁴²

The traditional reason for granting property tax exemptions to charitable, educational, and religious institutions is that they are performing a service for the state by fulfilling certain needs. In return for this service, as a *quid pro quo*, the state excuses the institution from paying taxes. Some courts enforce this requirement rigidly by refusing to uphold the exemption if the citizens of the state do not benefit from the institution.⁴³ Other courts have said this reciprocity is not necessary if the service results in the "encouragement of certain endeavors that the body politic considers beneficial or desirable."⁴⁴ It is difficult to say at present whether the reciprocity requirement will continue as one of the strong currents in the law of tax exemptions.

The bulk of the cases in this area consider the problem of determining whether a given institution is charitable or religious. This issue frequently arises when the institution in question maintains marginal interests,

³⁹ Cf. *Schade v. Allegheny County Institution* Dist. 386 Pa. 507, 126 A.2d 911 (1956).

⁴⁰ But see *City of Ashland v. Calvary Protestant Episcopal Church*, 278 S.W.2d 708 (Ky. 1955) (exemption for religious societies construed strictly; exemption for educational and charitable groups construed broadly).

⁴¹ *Sub. nom. Heisey v. County of Alameda*, 352 U.S. 921 (1957) (Justices Black and Frankfurter dissented). See 9 STAN. L. REV. 366 (1957), criticising the Court for refusing to hear the case. The writer of the comment argues with some persuasion that the effect of the case is to permit subsidies to sectarian schools, thus violating the first amendment. The writer's dubious propositions appear to befo the basic issue in the case, however. The conclusions reached thus tend to be rhetorical and over-stated.

⁴² Efforts are being made to repeal the California exemption statute through an initiative petition which will be submitted to the voters in November. This is being met with strong objection by political leaders of both parties. See *The New World*, Feb. 21, 1958, p. 11, col. 1.

⁴³ *Young Life Campaign v. Board of County Commissioners*, 134 Colo. 15, 300 P.2d 535 (1956).

⁴⁴ *In re Assessment for the Year 1952*, 387 Pa. 534, 128 A.2d 773, 779 (1957), reversing 180 Pa. Super. 216, 119 A.2d 550 (1956) (missionary society owned property within the state, but worked exclusively among the poor in the West Indies); cf. *City of Asbury Park v. New Jersey*, 41 N.J. Super. 504, 125 A.2d 411 (1956), *certification denied*, 22 N.J. 574, 126 A.2d 910 (1956).

fringing on an economic enterprise, but yet ultimately related to its religious or charitable purposes. The courts are split on the question of whether the use of property or its ultimate purpose is the controlling factor. For example, where a church rented out a downstairs portion of its building to a retail merchant, collected rent and used the proceeds for church purposes, the exemption was denied, since it extends to the religious *use* of property only.⁴⁵ And where a church maintained a book store for profit, the exemption was likewise denied, even though profits on sales were turned over to the church.⁴⁶ The court made it clear that it is the present *use* of the property, and not the ultimate disposition of proceeds therefrom that furnishes the criterion. Where the facts clearly indicate that the petitioning taxpayer is operating a mercantile establishment for profit, the exemption will be denied with little hesitation even though a religious organization may be an incidental beneficiary of the enterprise.⁴⁷ In such a case, courts will generally use the test of primary *source* of income (as distinguished from *use* of property). But the Supreme Court of Georgia used the test of primary *purpose*, and concluded on this basis that property is exempt if all realized revenue is turned over to furthering the religious aims of the institution.⁴⁸

If a religious institution can demonstrate that a particular piece of property is incidental to and reasonably necessary for the accomplishment of its purposes, an exemption will be granted. Falling within this class are parking areas and residences for the convenience of a divinity school's faculty and students,⁴⁹ and a rest home to house foreign missionaries temporarily on furlough.⁵⁰

In *Assessors of Dover v. Dominican Fathers*,⁵¹ the Supreme Judicial Court of Massachusetts was faced with construing a statute exempting property owned by "literary, benevolent, charitable, and scientific institutions. . . ."⁵² The property in question was owned by a religious order of the Catholic Church, used as a priory and seminary for the training and education of candidates for the priesthood. The local tax board contended that the property fell into none of the four categories of

⁴⁵ *City of Ashland v. Calvary Protestant Episcopal Church*, 278 S.W.2d 708 (Ky. 1955); *St. Louis Gospel Center v. Prose*, 280 S.W.2d 827 (Mo. 1955). See also *Township of Teaneck v. Lutheran Bible Institute*, 20 N.J. 86, 118 A.2d 809 (1955) (exemption based on use of property, not on the status of the user).

⁴⁶ *Lutheran Book Shop v. Bowers*, 164 Ohio St. 359, 131 N.E.2d 219 (1955). *Contra*, *Solheim Lutheran Home v. County of Los Angeles*, 313 P.2d 185 (Cal. App.2d 1957).

⁴⁷ *Sunday School Bd. of Southern Baptist Convention v. McCue*, 179 Kan. 1, 293 P.2d 234 (1956).

⁴⁸ *Church of God of the Union Assembly v. City of Dalton*, 213 Ga. 76, 97 S.E.2d 132 (1957); *cf. In re YMCA of Pittsburgh*, 383 Pa. 175, 117 A.2d 743 (1955).

⁴⁹ *Church Divinity School v. County of Alameda*, 314 P.2d 209 (Cal. App.2d 1957). *But cf.*, *Township of Teaneck v. Lutheran Bible Institute*, 20 N.J. 86, 118 A.2d 809 (1955).

⁵⁰ *House of Rest v. County of Los Angeles*, 313 P.2d 392 (Cal. App.2d 1957); *cf. Congregation B'nai Yisroel v. Township of Milburn*, 35 N.J. Super. 67, 113 A.2d 182 (1955) (any use incident to the fair enjoyment of property is entitled to exemption).

⁵¹ 334 Mass. 530, 137 N.E.2d 225 (1956).

⁵² MASS. ANN. LAWS c. 59, § 5 (Supp. 1957).

exemption. The court would not hear this argument, holding instead it is unnecessary that the exact criteria of a "literary" or "scientific" education be met. The decisive matter is that the public benefits from this institution; and although the public at large may not benefit, at least "an indefinite class of persons" does, which is sufficient to satisfy the statute.

Two cases arose during the three year period under survey that were addressed to the problem of whether a religious society must profess belief in a Supreme Being to qualify for an exemption. In one, an appellate court of California decided it did not, and that a group dedicated to "studying human relationships from the viewpoint of religion, education and sociology" was entitled to the exemption.⁵³ There was evidence tending to show that the group professed no belief in a Supreme Being, but the court said that since the concept of religion has been greatly expanded in our times, a humanistic group would be considered within the exempt class. A federal appellate court reached the same conclusion,⁵⁴ reversing a tax court decision that had refused exemption on the grounds that the petitioning group professed no belief in a Supreme Deity.

These two cases represent a new and interesting approach to the exemption question, and a discernible movement may be under way in the direction of allowing exemptions to groups with little or no positive religious content, within the traditional meaning of the word. The effects of this approach would seem to be more in the direction of increasing the number of societies entitled to exemptions, rather than any noticeable deleterious effects on religion itself. If the scope of exemption is to be enlarged, the only people who might be adversely affected are county tax assessors, since more applications for exemptions will be made. The traditional concept of religion may have been diluted as a result of these two decisions, but the practical consequences seem to be negligible.

A comparison of these two decisions with the cases mentioned above⁵⁵ concerning the denial of exemptions to religious societies maintaining peripheral economic interests exhibits an incongruous state of affairs. These latter cases deny the exemption to an otherwise valid religious group because of some marginal mercantile enterprise, while on the other hand, groups with no discernible religious form or purpose are granted the exemption. While this relationship borders on the inconsistent, it is doubtful any courts will be too concerned with it in the future.

In conclusion, it is clear that courts disagree over specific issues, by reason of the divergent statutes controlling the matter in the various jurisdictions. On the issue of whether a church is excused despite its economic enterprises, the weight of authority is that the exemption is lost in such a situation, regardless of where the money may ultimately go.

⁵³ Fellowship of Humanity v. County of Alameda, 315 P.2d 394 (Cal. App. 2d 1957).

⁵⁴ Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957). The court avoided the issue of whether the Society was entitled to the exemption as a religious group: "The question before us now is not broadly whether petitioner is in an ecclesiastical sense a religious society or a church, but narrowly whether under this particular statute it is qualified for tax exemption." 249 F.2d at 129.

⁵⁵ See notes 44-50, *supra*.

On the two questions of non-subversive oaths as a condition to exemption and the necessity of professing belief in a Supreme Being, more can be expected. Speculation on these two issues is necessarily circumscribed by the small number of decisions thus far handed down. Suffice to say that the great bulk of case law on these questions is yet to be developed.

D. TORT LIABILITY—*Toward Social Responsibility*

The freedom from tort liability previously enjoyed by religious bodies is slowly dissolving in the general thaw which has gripped the field of charitable immunity. It is beyond the scope of the survey to review the whole immunity problem, but during the period of the survey the courts have expressed certain ideas on the position of religious institutions in the development of this area of law worth examining.

In Nevada, a direct attack was made on the immunity doctrine through arguments which the court admittedly found persuasive.⁵⁶ But the protection of religious bodies was not abandoned; the court reasoned that the change was a task for the legislature. The reason for the reluctance to change was the reliance which many protected institutions had placed on the immunity in planning their affairs. But not everyone was so hesitant. A New Jersey judge in dissent has commented that the rule was created without the aid of the legislature when the judges found that such a policy would serve the public welfare. Now that the grounds for the policy no longer exist the same courts have a duty to remove the immunity.⁵⁷

In modifying the immunity theory, the Supreme Court of Kentucky used similar reasoning, noting that during the years subsequent to the adoption of the immunity doctrine there has been an increase in both social consciousness and the hazards of living. Justice required a limitation of immunity of religious institutions in a situation where there was corporate negligence in the operation of income-producing property, resulting in injury to a non-beneficiary of the institution.⁵⁸

Two states have recently dispensed with the immunity of charitable hospitals. Ohio removed it altogether,⁵⁹ while Washington did so only in the case of a paying patient.⁶⁰ Shortly afterwards, negligence suits were brought against religious institutions in both states. The Washington Supreme Court held that it had not intended to abandon the immunity of religious bodies where they were rendering a gratuitous service to

⁵⁶ The court did not state the arguments. *Springer v. Federated Church*, 71 Nev. 177, 283 P.2d 1071 (1955). A legislative enactment which covers this problem is the "safe place" statute of Wisconsin, Wis. STAT. § 101.06 (1955), which requires that the owner of a public building maintain it in a safe condition. The statute is applicable to buildings owned by religious groups. *Watry v. Carmelite Sisters*, 274 Wis. 415; 80 N.W.2d 397 (1957); *Harnett v. St. Mary's Congregation*, 271 Wis. 603, 74 N.W.2d 382 (1956).

⁵⁷ *Jacobs, J., dissenting, Lokar v. Church of the Sacred Heart*, 24 N.J. 549, 133 A.2d 12, 15-23 (1957). This is a confusing case: The majority admitted that there was no immunity, yet the dissent was taken up with favoring its abolishment.

⁵⁸ *Roland v. Catholic Archdiocese*, 301 S.W.2d 574 (Ky. 1957).

⁵⁹ *Avellone v. St. John's Hospital*, 165 Ohio St. 467, 135 N.E.2d 410 (1956).

⁶⁰ *Pierce v. Yakima Valley Memorial Hospital Ass'n*, 43 Wash. 2d 162, 260 P.2d 765 (1953).

children in transporting them to Sunday School.⁶¹ This distinction between hospitals and religious groups was utilized by an Ohio trial court in preserving the latter's immunity.⁶² In attempting to explain the distinction the court pointed out that the situation in hospital administration had changed, and that because of increased hospitalization insurance the number of charity cases had declined. Since no change had occurred in the status of churches, the policy considerations supporting the immunity were still valid.⁶³ Yet where another state had confirmed the immunity of hospitals, a mere citation of that case was sufficient to settle the problem for religious societies.⁶⁴

Several interesting cases have involved a claim by the injured party that he was an invitee while on church premises. In the case of a paying hospital patient, where the claim was accepted, recovery was prevented by an extension of immunity.⁶⁵ Another court handled the problem by first inquiring whether the party had been invited on the premises, and then asking if his presence resulted in mutual benefit to himself and the landowner. Even though these questions were answered in the affirmative, the court proceeded to treat the party as a licensee.⁶⁶ Most refusals to recognize a person as an invitee were on the same ground, that the participant alone was the beneficiary of his religious activity whether he was going to light a candle,⁶⁷ do church work,⁶⁸ or making a contribution.⁶⁹

The distinction drawn between a charitable hospital and a religious society as a proper subject for immunity from tort liability may be a valid one. The method of the Ohio court of examining the real situation of religious societies should be expanded to consider positively the position of these groups in the modern social structure. There are activities of religious bodies for which society has a right to expect the same legal responsibility that the law imposes on other parties. The Kentucky court has found a justification for this expectation in what it called an increase in social consciousness and the hazards of modern living. In the difficult determination of what ought to be expected from religious societies, certain factors other than the nature of the activity itself suggest themselves as being relevant to the propriety of continued immunization of the conduct in question. They are the degree to which the activity is essential to the religious function of the society, the ease in obtaining

⁶¹ *Lyon v. Tumwater Evangelical Free Church*, 47 Wash. 2d 202, 287 P.2d 128 (1955). For criticism of the result see Comment, *Questionable Status of the Charitable Immunity*, 31 WASH. L. REV. 287 (1956).

⁶² *Hunsche v. Alter*, 145 N.E.2d 368 (C.P. Ohio 1957).

⁶³ The strength of the policy in one jurisdiction was shown recently in a diversity action. It involved the application of a Pennsylvania conflict of laws rule that no action may be maintained which is contrary to the strong policy of the forum. The accident in question occurred in New Jersey where there was no immunity. But the trial judge found in *Bond v. Pittsburgh*, 368 Pa. 404, 84 A.2d 328 (1951) a sufficiently strong expression of public policy in favor of the immunity to satisfy the requirements of the rule. *Menardi v. Thea. Jones Evangelistic Ass'n*, 154 F. Supp. 622 (E.D. Pa. 1957).

⁶⁴ *Parks v. Holy Angels Church*, 160 Neb. 299, 70 N.W.2d 97 (1955); applying *Muller v. Nebraska Methodist Hospital*, 160 Neb. 279, 70 N.W.2d 86 (1955).

⁶⁵ *Parks v. Holy Angels Church*, *supra* note 64.

⁶⁶ *Lokar v. Church of the Sacred Heart*, 24 N.J. 549, 133 A.2d 12 (1957).

insurance to cover it,⁷⁰ and the frequency with which such activities are insured by other parties conducting them. In applying such tests, each problem must be considered individually.

III. RELIGIOUS VALUES

A. RELIGION IN THE COURTS—*Judicial Attitudes*

The treatment of religious matters in litigation is highly influenced by the judge's knowledge of the nature of the faith involved, and his ideas on the nature of religion itself. This section will explore some of the more definite judicial pronouncements on religion. It is intended to be expository, more an attempt to point out the attitudes of a court than analyze them. The latter is precluded by the limited amount of case material available.

While considering the application of an ethical culture group for a religious institution tax exemption, a California court was faced with the issue of whether the group could qualify without recognizing the existence of a Supreme Being.⁷¹ The court refused to follow the answer given by the United States Supreme Court⁷² and many other courts that such recognition is an essential part of a religion. The court followed another rule which is in line with the ideas of certain modern thinkers, that the notion of a Divine Being is not in any way necessary to a religion.⁷³ Furthermore, any distinction drawn by a state between theistic and nontheistic cults would violate our traditions of tolerance and the fourteenth amendment. The court asserts that any test used must be an objective one, and proposes a formula that it claims is sufficiently non-subjective: does the belief in question fill a void in the person's life and thereby occupy the same place in that life as an orthodox religion. According to the decision, a religion quantitatively includes a belief in something, some kind of organized expression and observation of the belief, and a system of morals.⁷⁴

The Iowa Supreme Court recently examined the nature of the Christian religion in a similar vein.⁷⁵ The case involved a contempt proceeding for failure to follow a divorce decree instructing a mother to rear the

⁶⁷ Coalbaugh v. St. Peter's Roman Catholic Church, 142 Conn. 536, 115 A.2d 662 (1955).

⁶⁸ Springer v. Federated Church, 71 Nev. 177, 283 P.2d 1071 (1955).

⁶⁹ McNutly v. Hurley, 97 So. 2d 185 (Fla. 1957). For a fuller discussion of this case see p. 430-31 *infra*....

⁷⁰ "Nor may we regard with complete detachment the availability of indemnifying and liability insurance." Roland v. Catholic Archdiocese, 301 S.W.2d 574, 578 (Ky. 1957).

⁷¹ Fellowship of Humanity v. County of Alameda, 315 P.2d 394 Cal. App. 2d 1957). For discussion of the tax aspect of this case see p. 426 *supra*.

⁷² Davis v. Beason, 133 U.S. 333 (1890); accord, Berman v. United States, 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946).

⁷³ In Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957), the court reached the same conclusion using very similar reasoning. For discussion of the tax aspect of this case see p. 426 *supra*.

⁷⁴ For a similar notion that religion embraces more than a code of moral conduct, see Angel v. Angel, 140 N.E.2d 86 (C.P. Ohio 1956).

⁷⁵ Lynch v. Uhlenhopp, 78 N.W.2d 491 (Iowa 1956). See 42 IOWA L. REV. 617 (1957); 34 N.C. L. REV. 509 (1956).

child placed in her custody in the Roman Catholic religion. The court held that the decree had been too vague; expert testimony would have been required to answer many questions involved in it, and even then the possibility of dogmatic differences might make an answer unattainable. Then, to explain the trial court's error, the opinion embarked on a discussion of the meaning of Christian religion. Ultimately, it contains a belief in and a worship of a Divine Being, the Father of mankind, who forgives repentants and cares for the souls of believers. This belief brings comfort in this life to those holding it and induces right living in them. All Christian religions are the same in this essential respect. The nature of the mistake below was found to be confusion of the term religion with the "cultus" or form of worship in the various denominations.⁷⁶ The appellate court thought that where the decree read "Roman Catholic religion" the trial court intended to refer to the "cultus" of that Church. The decision suggested that the trial court might have intended that the child be reared in the Christian religion under the discipline and dogma of the Roman Catholic Church. It is difficult to grasp the distinction the court attempted to make. Even if the decree had spelled out that the child was to be reared in compliance with the discipline and dogmas of the Roman Catholic Church, it is plain from what the court had said that the decree still would have failed for lack of clarity.⁷⁷

The approach employed by the Iowa and California courts, one of technical dissection, combined with a seeming uneasiness in dealing with problems of faith, prevented religion from appearing in their opinions as a solemn and deeply meaningful part of an individual's life. Where the factual situation permits a court to deal with the nature of religion more freely an opinion may well accord a dignity to religious experience that was absent in the prior cases. An example is found in a recent Florida case⁷⁸ determining the status of an attendant at mass. The court found the worshipper not an invitee but rather a licensee, one present for his own benefit only, who confers no benefit on the landowner. The decision rested on the notion that a universal part of religious belief is the concept that participation in religious services is for the benefit of the mortals who take part, and indeed it is impossible to explain the activity in any other way. Places of worship exist as reminders of the existence of a Higher Being, set apart from the material aspect of life,

⁷⁶ This distinction was drawn almost seventy years ago by the Supreme Court in *Davis v. Beason*, 133 U.S. 333 (1890). The distinction seems to have meant there and to some extent here that religious practices which will always be protected, such as belief in a God, are identified as "religion"; and those which are tolerated as long as they do not interfere with the rights of others, such as the active implementation of a belief in polygamy, are called "cultus." The Court has stated that the first amendment "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

⁷⁷ The dissent denies that the decree is so abstruse as not to be understandable. In support of his position the judge discusses the widespread adherence to the Catholic faith in America, and the many activities in which its members are involved. *Lynch v. Uhlenhopp*, 78 N.W.2d 491, 504 (Iowa 1956).

⁷⁸ *McNutly v. Hurley*, 97 So. 2d 185 (Fla. 1957).

where persons can exercise their beliefs in common with others. An individual attending a service cannot contend, "...that she went to mass for the benefit of Jesus Christ . . ." or the Church.⁷⁹

Not all factual situations demand an involved discussion of the nature of religion. At times courts find it possible to solve the problems that the presence of religion causes by merely stating that all religions stand in the same place before the law.⁸⁰

Some judges, especially in the trial courts, display detailed knowledge of religious practices and do not hesitate to use it in deciding cases.⁸¹ Where a wife had refused for several years to baptise a child which she had promised to rear as a Catholic, the court held that she could not be in compliance with her agreement because the precepts of that faith require almost immediate baptism.⁸² In an annulment action, a woman claimed that because of her devotion to the Catholic Church, a false statement made by her husband at the time of their marriage that he was a good practitioner was a material inducement for marriage. The court rejected her claim because she had been married in a civil ceremony and thereby had flouted the precepts of her faith.⁸³ On the same issue, where another court found that the plaintiff husband was "a practical and devout Catholic" who "is a member of its Holy Name Society and receives the sacraments regularly and frequently," a promise to rear children in the Catholic faith was a material inducement to him in marriage.⁸⁴ As part of the marriage agreement a spouse had promised to take instructions in the faith of his bride. He attempted to prove his compliance by showing a single instance in which he had gone to the place of instruction, but having been offended by something said there, never returned. The court concluded that only after taking a full course could his efforts be classified as having been made in good faith.⁸⁵

⁷⁹ *Id.* at 188.

⁸⁰ *McLaughlin v. McLaughlin*, 20 Conn. Supp. 278, 132 A.2d 420 (1957); *Angel v. Angel*, 140 N.E.2d 86 (C.P. Ohio 1956).

⁸¹ Mere generality of idea does not prevent use of a court's knowledge in judging conduct. Where a convert embarked on a cruel campaign to convert his wife, a court observed, "it is inescapable not to conclude that the defendant did not absorb the teaching of Christianity and Catholicism." *Golden v. Arons*, 30 N.J. Super. 371, 115 A.2d 639, 640 (1955).

⁸² *Ross v. Ross*, 4 Misc. 2d 399, 149 N.Y.S.2d 585 (Sup. Ct. 1956).

⁸³ *Musso v. Musso*, 143 N.Y.S.2d 331 (Sup. Ct. Kings Co. 1955). See note 81 *supra* for a similar condemnation of a poor practitioner.

⁸⁴ *Ross v. Ross*, *supra* note 82; see also *Villani v. Villani*, 207 Misc. 629, 139 N.Y.S.2d 724 (Sup. Ct. 1955) on the materiality of such a promise to a Catholic. Acknowledgment of the meaning of religion to a believer has been made in a case where it could not be legally recognized. In *Hackett v. Hackett*, 146 N.E.2d 477 (C.P. Ohio 1957), an antenuptial agreement on the religious training of children was declared void, but the court said of the father who had asserted it, "Because of his unusual closeness to his church, the words of 'The Pilot' (Mar. 6, 1954) official organ of the Boston Archdiocese seem appropriate: '... for Catholics their faith is their most treasured possession.'" *Hackett v. Hackett*, *supra* at 482.

⁸⁵ *Howardell v. Howardell*, 151 N.Y.S.2d 265 (Sup. Ct. N.Y. Co. 1956).

One visit did not indicate an abiding intent to embrace the faith and provided evidence that the promise was made fraudulently.⁸⁶

In connection with their treatment of religious problems courts sometimes have to consider the importance of tolerance or the lack thereof. A New Jersey court has observed that persons are sensitive about their religious beliefs, and insults which could be directed at the irreligious without effect could grievously hurt a devout adherent of a religion. Relief from mental cruelty is designed to protect the sensitive and the apathetic alike.⁸⁷ But relief from intolerance is not always available in the courts. As one decision has pointed out judges in this country must often be tolerant of intolerance.⁸⁸ In enforcing the provisions of a will, for example, strong public policies of freedom of speech and the distribution of property give support to a clause cutting off a child who marries a person belonging to a certain faith.⁸⁹ But courts are not prevented from making strong statements in favor of tolerance where the situation demands it:

It is a sad commentary, in this day, when tolerance and cooperation between faiths are fostered and advocated for the parent of one faith to seek to deprive her child of the companionship and affection of the other parent merely because the other parent's spouse is of a different faith. Such attitude should not be encouraged.⁹⁰

As was said in the beginning, no real conclusions can be drawn from a discussion such as this one. What can be said is that the ideas of religion expressed in the decisions are as varied as the situations involved in the cases and the backgrounds of the judges writing them, which in turn partially explain the varying treatment of religion in judicial opinions.

B. SUNDAY CLOSING LEGISLATION—*A Suggested Solution*

The historic legal deference to religious observance of the Sabbath in the United States has caused extensive comment in recent years. At their inception, Sunday laws were essentially a legal recognition of the religious convictions of the community,⁹¹ but recent interpretations of the first amendment religious freedoms in *McCullum v. Board of Education*⁹² and *Everson v. Board of Education*⁹³ have seriously altered the approach of courts and legislatures in this area. The mutually exclusive positions of Church and State in the first amendment established by these decisions have shifted the emphasis of these laws from a religious to a public health and welfare theme.⁹⁴ There are, however, several inconsistencies in this latter approach which have tended to perpetuate, rather than obviate, the religious aspects of the problem.

⁸⁶ At times the courts of New York seem unaware of the contents of the Jewish faith, and in two cases noted the lack of evidence establishing the requirements of that faith where questions concerning it were raised. *Koeppel v. Koeppel*, 3 A.D.2d 853, 161 N.Y.S.2d 694 2d Dep't 1957); *Gluckstern v. Gluckstern*, 148 N.Y.S.2d 391 (Sup. Ct. N.Y. Co. 1955).

⁸⁷ *Golden v. Arons*, 36 N.J. Super, 371, 115 A.2d 639 (1955).

⁸⁸ *United States Nat. Bank v. Snodgrass*, 202 Ore. 530, 275 P.2d 860 (1954).

⁸⁹ *Ibid.*

⁹⁰ *Housman v. Housman*, 285 App. Div. 1012, 139 N.Y.S.2d 24, 26 (4th Dep't 1955).

⁹¹ PFEFFER, CHURCH, STATE AND FREEDOM 227-30 (1953).

⁹² 333 U.S. 203 (1948).

⁹³ 330 U.S. 1 (1947).

⁹⁴ See *State v. Ullner*, 143 N.E.2d 849 (Ohio App. 1957).

Sunday closing statutes and ordinances⁹⁵ have been drafted along two distinct lines. One type is directed toward specific classes of commodities,⁹⁶ the other toward certain types of businesses.⁹⁷ (These classifications may overlap when the retailer, such as an automobile dealer, sells only a single product). The possibilities of discriminatory application are greater with this latter type where, for example, a grocer must close his doors and stand idly by while a local drug store absorbs a portion of his trade. But it has been held that this does not violate the equal protection clause of the fourteenth amendment.⁹⁸ Whereas if the statute prohibits the sale of a particular commodity, all engaged in the business of selling that commodity must close, resulting in a uniform application of the law to an entire class of merchants.⁹⁹ And while the typical statute contains broad prohibitions against all work and labor on Sunday,¹⁰⁰ most contain exceptions for works of charity or necessity.¹⁰¹ Even the necessity exception has submitted to flexible interpretation. The Supreme Court of Appeals of Virginia reversed the conviction of a grocer who remained open on Sunday because the state failed to prove that a grocery store was not a necessity.¹⁰² The court regarded the necessity provision as varying from community to community and time to time.

The patchwork character of much of the law presently governing Sunday closing is revealed in the sometimes baffling inconsistencies of decision within the same jurisdiction. In New York,¹⁰³ for example, it has been held that selling a book on Sunday does not violate the statute, even though this is not within the named exceptions.¹⁰⁴ A firm of accountants was held not to be engaged in "labor" within the meaning of the statute by conducting an audit of corporate records on Sunday,¹⁰⁵ but the gratuitous painting of a relative's house was sufficient to sustain a conviction.¹⁰⁶ And in a sharply criticised case a few years ago, it was held

⁹⁵ The three classes of Sunday legislation are: (a) State-wide statute (most common), LA. REV. STAT. ANN. § 51:191 (1952); OKLA. STAT. ANN. tit. 21, § 908 (Supp. 1958); (b) City ordinance, Detroit Ordinance No. 781-E; (c) State statute with local home rule option, N.J. REV. STAT. 2A 171-6 (1955); MASS. ANN. LAWS c. 136, §§ 4A-B (1957).

⁹⁶ N.J. REV. STAT. 2A: 171-1.1 (1955) (automobiles).

⁹⁷ MO. REV. STAT. § 563.720 (1949).

⁹⁸ Taylor v. City of Pine Bluff, 294 S.W.2d 341 (Ark. 1956); Taylor v. City of Pine Bluff, 289 S.W.2d 679 (Ark. 1955).

⁹⁹ Gundaker Central Motors v. Gassert, 23 N.J. 71, 127 A.2d 566 (1956), *appeal dismissed*, 354 U.S. 933 (1957); Humphrey Chevrolet v. City of Evanston, 7 Ill. 2d 402, 131 N.E.2d 70 (1956); Mosko v. Dunbar, 309 P.2d 581 (Colo. 1957) (statute does not violate the equal protection clause of the fourteenth amendment, since it is class, rather than special legislation).

¹⁰⁰ "No worldly employment or business . . . shall be practiced by any person within this state on the Christian Sabbath. . . ." N.J. REV. STAT. 2A: 171-1 (1955).

¹⁰¹ In works of necessity or charity is included whatever is needful during the day for the good order, health or comfort of the community. N.Y. PEN. LAW § 2143; CONN. GEN. STAT. § 8603 (Rev. 1949).

¹⁰² Rich v. Commonwealth, 198 Va. 445, 94 S.E. 2d 549 (1956). Apparently in Virginia a presumption of necessity is with the merchant who remains open on Sunday.

¹⁰³ PFEFFER, *op. cit. supra* at 230-35.

¹⁰⁴ People v. Law, 142 N.Y.S.2d 440 (Munic. Ct. 1955).

¹⁰⁵ People v. Sacks, 150 N.Y.S.2d 22 (Magis. Ct. 1956).

¹⁰⁶ People v. Deen, 3 A.D.2d 836, 160 N.Y.S.2d 962 (2d Dep't 1957).

that two Orthodox Jews were guilty of violating the law by keeping a grocery store open on Sunday, since the exception for those who conscientiously observe a Saturday Sabbath applied only to "work or labor" and not to selling.¹⁰⁷ The New York legislative scheme has been criticized as an "illogical and inconsistent pattern," requiring major revisions before there will be any definite meaning to the statutory proscriptions.¹⁰⁸ In order to sustain a conviction under an 1866 statute, the Court of Appeals of Maryland was forced to interpret the phrase "opera house" to include a drive-in motion-picture theater.¹⁰⁹ Such examples, not at all uncommon, point up the need for a drastic modernization of much of the existing Sunday legislation.

New Jersey has experienced extensive difficulty in attempting to reform its Sunday laws. Although the 1951 amendments were intended to bring the laws up to date and omit obsolete provisions, the completed revision contained no penalties for violations of the law. In *State v. Fair Lawn Ser. Center*,¹¹⁰ the court held the statute unenforceable, so that New Jersey presently has no effective law prohibiting the carrying on of general business on Sunday. Despite this fact, the statute remains a declaration of general state policy, so that even though unenforceable, local ordinances may not be enacted that are inconsistent with its provisions.¹¹¹ It now appears that the legislature intends to remedy this situation piecemeal, since an amendment containing an appropriate penalty was recently upheld by the Supreme Court of New Jersey, requiring all auto dealers to close on Sunday.¹¹²

Some statutes provide an exception for the person who conscientiously observes the Sabbath on a day other than Sunday.¹¹³ Such religious practices excuse the person from the general sweep of the statute and allow him to remain open on Sunday, provided he closes on some other designated religious holiday. However, there must be a conscientious observance of this alternate day before the person is entitled to the exception.¹¹⁴ The absence of such provisions in many of the statutes and ordinances has brought forth protest from some that these laws are

¹⁰⁷ *People v. Freidman*, 302 N.Y. 75, 96 N.E.2d 184 (1950), *appeal dismissed*, 341 U.S. 907 (1951); See also *State v. Keich*, 145 N.E.2d 532 (Ohio 1956), OHIO REV. CODE ANN. § 3773.24 (Page Supp. 1957); cf. *In re Berman*, 344 Mich. 598, 75 N.W.2d 8 (1956).

¹⁰⁸ *People v. Law*, 142 N.Y.S.2d 440, 442 (Munic. Ct. 1955); see also *People v. Glasser*, 2 A.D.2d 352, 155 N.Y.S.2d 700 (1st Dep't 1956).

¹⁰⁹ *Carrier v. Lynch*, 121 A.2d 246 (Md. 1956).

¹¹⁰ 20 N.J. 468, 120 A.2d 233 (1956), *reversing* 35 N.J. Super. 549, 114 A.2d 487 (1955).

¹¹¹ *Auto-Rite Supply Co. v. Woodbridge Township*, 25 N.J. 188, 135 A.2d 515 (1957), *affirming* 41 N.J. Super. 303, 124 A.2d 612 (1956); *Hertz Washmobile System v. Village of South Orange*, 25 N.J. 207, 135 A.2d 524 (1957), *affirming* 41 N.J. Super. 110, 124 A.2d 68 (1956). These cases seem to indicate that a local ordinance would have to prohibit *all* business on Sunday in order to be consistent with the policy of the statute.

¹¹² *Gundaker Central Motors v. Gassert*, 23 N.J. 71, 127 A.2d 566 (1956), *appeal dismissed*, 354 U.S. 933 (1957).

¹¹³ CONN. GEN. STAT. § 8609 (1947). See also *Commonwealth v. Chernak*, 145 N.E.2d 920 (Mass. 1957).

¹¹⁴ *State v. Keich*, 145 N.E.2d 532 (Ohio 1956); *In re Berman*, 344 Mich. 598, 75 N.W.2d 8 (1956).

coercive and violate the first amendment privilege of freedom of religion.¹¹⁵ And to the extent that courts continue to view these laws as measures for the preservation of religious duty and devotion, this objection is well taken.

Courts have consistently equivocated in their decisions with respect to the purposes and constitutional justification of these statutes. The main objections, other than denial of equal protection under the equal protection clause of the fourteenth amendment, center on the religious freedom provision of the first amendment. Admittedly the historical purpose of the statutes was to insure the fitting observance of Sunday worship.¹¹⁶ But the protests of those who observe the Sabbath on a day other than Sunday have forced courts in recent times to find alternate justifications for these laws. To satisfy these objections, the basis of decision has been shifted from recognition of religious custom to state police power,¹¹⁷ a day of rest being considered essential to a person's health. As the Ohio Court of Appeals has said:¹¹⁸

It is difficult—we think impossible—to make even a convincing argument that such a law has any relation whatsoever to religion, that is, anything to do with man's relation to his God.

While holding that the statutes are constitutionally grounded upon the police power of the state, many courts admit that the purpose of these laws is to preserve the religious tone of the day.¹¹⁹ This has resulted in a confusion of the real basis of decision.

In order to avoid the latent inconsistencies of these cases it would be better for the courts to consider the selection of the day of rest as a pragmatic declaration of public policy by the legislature, rather than any formal acknowledgment of religious observance of the Sabbath. With this clear constitutional justification adjustments could be provided in order to accomodate various religious convictions and local custom. Such a scheme would successfully avoid the *McCullum* objection,¹²⁰ as the selection of the particular day of rest would not be controlled by religious beliefs, but by the demands of public health.

Under this formulation of the problem, the primary emphasis—indeed the *sole* emphasis—becomes the police power of the state. The exclusive justification for Sunday closing legislation is the public health and welfare of the community. As a matter of convenience and workability, Sunday would be the day set aside simply because this is the day the vast majority of people refrain from work. Appropriate provisions for alternate days of rest, to fit the religious practices of the minority, would remove any elements of coercion or abridgement of religious freedom. In summary, the selection of the day of rest should be an arbitrary choice, having no

¹¹⁵ PFEFFER, *op. cit. supra* at 231.

¹¹⁶ See note 91 *supra*.

¹¹⁷ *Commonwealth v. Grochowiak*, 136 A.2d 145 (Pa. 1957); *State v. Ullner*, 143 N.E.2d 849 (Ohio App. 1957).

¹¹⁸ *State v. Ullner, supra*, note 117.

¹¹⁹ *State v. Hurliman*, 143 Conn. 502, 123 A.2d 767 (1956); *Commonwealth v. Grochowiak*, 136 A.2d 145 (Pa. 1957).

¹²⁰ "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.' *Everson v. Board of Education*, 330 U.S. at 59. If nowhere else, in the relation between Church and State, 'good fences make good neighbors'." 333 U.S. at 232 (concurring opinion).

relation to the community's religious practices. Sunday is chosen as a matter of convenience and accommodation only, and the congruence of the statutorily authorized day of rest and the majority's day of religious worship becomes accidental only. By thus eliminating the religious justification of these laws, the entire area could be liberated from the confusion and disagreement presently characterizing it.

C. OBSCENITY—*The Emergence of a Legal Value*

Obscenity has always occupied a penumbral region of the law. It is an area in which religious institutions and organizations have been unusually active¹²¹ because of its impact upon the moral disposition of the individual and his consequent social values.¹²² The historical difficulties courts experienced in their attempts to achieve a socially satisfactory and constitutionally acceptable definition of the term persist today in a multi-patterned context. It was conceded early that obscenity was not guaranteed the constitutional protections of the first amendment,¹²³ but it was not until recently that the Supreme Court passed down its own constitutionally refined definition of the nebulous concept.¹²⁴ This survey has found, however, that the definitional difficulties in this area do not spring from the semantic differences inherent in a pluralistic society, but rather, from the inability of these various definitions to satisfy the constitutional protections surrounding the vehicle of expression. With the arrival of some moral agreement concerning the abstract definition of obscenity has come a serious disagreement in its constitutional application. Because of the great importance attached to the values of moral welfare and freedom of expression in our society law and morals have failed to coincide on the obscenity issue. Instead, a compromise, which has not seriously altered either position, has effected the emergence of a legal value to guide the state and the individual in this delicate situation.

1) LITERATURE—*A Problem of Definition Resolved*

Although all states¹²⁵ and the federal government¹²⁶ have recognized a legitimate governmental interest in the moral welfare of their combined

¹²¹ For a detailed discussion of pressure group activity in this area, see Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954).

¹²² The American Bishops Annual Statement, in National Catholic Welfare Conference News Service, Nov. 18, 1957.

¹²³ *Ex parte Jackson*, 96 U.S. 727 (1877) (dictum).

¹²⁴ *Roth v. United States*, 354 U.S. 476 (1957).

¹²⁵ New Mexico has no general obscenity statute but does give municipalities power to prohibit sale or exhibition of obscene literature and pictures. N.M. STAT. ANN. § 14-21-12 (1953). Representative state obscenity statutes are: CAL. PEN. CODE § 311 (Supp. 1957); FLA. STAT. ANN. § 847.01 (1957); ILL. ANN. STAT. c. 38, § 468 (Smith-Hurd Supp. 1957); 4 IND. ANN. STAT. § 10-2803-4 (Supp. 1957); IOWA CODE ANN. § 725.4 (Supp. 1956); MASS. ANN. LAWS c. 272 § 28(a) (Supp. 1957); MINN. STAT. ANN. § 617.24 (Supp. 1956); N.J. STAT. ANN. § 2A:115-2 (Supp. 1956); N.Y. PEN. LAW § 1141; OHIO REV. CODE ANN. § 2905.34 (Page Supp. 1957); PA. STAT. ANN. tit. 18, § 4527 (Supp. 1957); TENN. CODE ANN. § 39-3001 (Supp. 1957); 1 TEX. PEN. CODE art. 526-7 (Supp. 1957); WIS. STAT. § 351.38 (1951).

¹²⁶ For a history of federal obscenity legislation, see *Roth v. United States*, 354 U.S. 485 n.17 (1957).

citizenry, it has taken time for the constitutional import of obscenity to emerge in the case law. The original concern of the courts in this area was post-publication punishment in accordance with an adequate standard of criminal behavior. As the litigation was focused upon the varied formulae used in defining the obscene, a judicial assumption regarding obscenity as beyond the constitutional protections of the first amendment gradually developed.¹²⁷ Consequently, the tests for defining the obscene developed as standards sufficient to define the nature of a criminal offense, necessitating the exclusion of any first amendment implications. The classical definition of the obscene as announced in *Hicklin v. Regina*¹²⁸ considered the effect of an isolated excerpt of the material upon those whose minds were open to such influences. This formula was rejected by the American courts in *United States v. One Book Entitled Ulysses*¹²⁹ and replaced with the "dominant theme" standard which arrived at the dominant purpose of the author by applying the contemporary standards of decency from the average person's perspective. Complementing this standard with a plethora of epithets,¹³⁰ courts and administrative agencies have attempted to protect the community from the harmful moral effects of the printed word, pictures, films and other devices which have embodied the obscene. A growing social awareness of the free speech guarantees of the first amendment, however, has prompted a new and more vital opposition to government control in this area.¹³¹

Obscenity cannot be regarded as a legal problem alone, for the realistic dimensions of artistic expression sometimes include situations which, when standing apart from the art form, would be considered as offensive to the community standards of decency. Recognizing this dual aspect of the problem courts were forced to arrive at a statutory definition of obscenity which would adequately proscribe the limits of community decency to the offender without violating the integrity of the artist's work product. A failure to observe the distinction between so abstractly defining the obscene and applying that same definition to restrict what is alleged to be constitutionally protected speech and press has created a constitutional question which has not received a satisfactory answer. The contemporary

127 *Ex parte Jackson*, 96 U.S. 727 (1877); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *People v. Doubleday & Co.*, 297 N.Y. 687, 77 N.E.2d 6 (1947), *aff'd per curiam by an equally divided Court*, 335 U.S. 848 (1948); *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

128 L.R. 3 Q.B. 360 (1868).

129 72 F.2d 705 (2d Cir. 1934); *United States v. Levine*, 83 F.2d 156 (2d Cir. 1936); *Parmelee v. United States*, 113 F.2d 729 (D.C. Cir. 1940); *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N.E.2d 840 (1945); *Bantam Books v. Melko*, 25 N.J. Super. 292, 96 A.2d 47 (1953). The *Hicklin* test is still valid, however, where the statute is designed for the protection of youth only. See *Commonwealth v. Donaducy*, 167 Pa. Super. 611, 76 A.2d 440 (1950), *cert. denied*, 341 U.S. 949 (1951).

130 Courts and legislatures have employed a wide variety of adjective standards in these determinations. Among the most popular are: "immoral," "indecent," "inhuman," "lewd," "lascivious," "salacious," "filthy," "tending to corrupt, deprave, induce, incite," etc.

131 McKEON, MERTON, GELLHORN, *THE FREEDOM TO READ* (1957); BERNS, *FREEDOM, VIRTUE AND THE FIRST AMENDMENT* (1957); GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* (1956); THAYER, *LEGAL CONTROL OF THE PRESS* (1956); CHAFFEE, *THE BLESSINGS OF LIBERTY* (1956); CHENERY, *FREEDOM OF THE PRESS* (1955); CHAFFEE, *FREE SPEECH IN THE UNITED STATES* (1948); Note, 71 HARV. L. REV. 326 (1957).

problem of obscenity legislation is an attempt, through a process of definition, to control a constitutionally protected form of expression because of its obscene content, which has been historically exempted from such protections. The distinction drawn here between form and content is a procedural one proposed by the opponents of these laws in the prior restraint phase of control.¹³² When the legal action is preventive (censorship) the distinction is a valid one, for the obscenity determination must await publication.¹³³ It is of dubious validity when carried over to the post-publication prosecution, however, as the form of expression becomes incidental to the criminal matter contained therein. Nevertheless, the modern controversy does not concern the historical exemption of obscenity from the free speech guarantees, but rather, the summary dismissal of these protections which are accorded the vehicle of expression on the basis of this exemption.¹³⁴ Although a host of cases denied obscenity a first amendment position, *Schenck v. United States*¹³⁵ made it imperative that a "clear and present danger" of substantive evil exist before governmental interference with speech and press would be justified. As the press is involved in every obscenity determination the opponents of obscenity legislation have insisted upon the *Schenck* interpretation of the first amendment being satisfied before this type of press be restrained, or its publisher prosecuted. The doctrine has submitted to a flexible interpretation through the years¹³⁶ and since the decision in *Dennis v. United States*¹³⁷ there is some doubt that it will remain a valid interpretive guide to the first amendment.¹³⁸ Rejecting the rigidity of the clear and present danger doctrine, rather than its principles, the Court said in *Dennis*:

In each case courts must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.¹³⁹

132 "Our constitutional protection against preventive censorship is soundly grounded: it is freedom from previous restraints placed on publication; it does not involve freedom from censure for matter reasonably found to be of criminal character." McKEON, MERTON, GELLHORN, *THE FREEDOM TO READ* 35 (1957); *United States v. Roth*, 237 F.2d 801 (2d Cir. 1956) (concurring opinion).

133 *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). In *Winters v. New York*, 333 U.S. 507 (1948), the Supreme Court gave some indication of this basic conflict saying: "Acts of gross and open indecency or obscenity, injurious to public morals, are indictable at common law. . . . When a legislative body concludes that the mores of the community call for an extension of the impermissible limits, an enactment aimed at the evil is plainly within its power, if it does not transgress the boundaries fixed by the Constitution for freedom of expression." *Id.* at 515.

134 See note 132 *supra*.

135 249 U.S. 47 (1919).

136 MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* 28 (1948); CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 196 (1954); Antieau, 'clear and present danger' — *Its Meaning and significance*, 25 NOTRE DAME LAW. 603 (1950); Corwin, *Bowing Out Clear and Present Danger*, 27 NOTRE DAME LAW. 325 (1952).

137 341 U.S. 494 (1951).

138 "It can probably be safely said, on the basis of the *Dennis* holding, that the 'clear and present danger' formula will never be successfully invoked in behalf of persons shown to have conspired to incite to a breach of federal law." CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 200 (1954). See also *Yates v. United States*, 354 U.S. 298 (1957).

139 *Id.* at 510. "In short, if the evil legislated against is serious enough, advocacy of it in order to be punishable does not have to be attended by a clear and present danger of success." CORWIN, *CONSTITUTION OF THE UNITED STATES: ANN.* 797 (1952).

It would be imprudent at this time to project the *Dennis* variation of *Schenck*, but it should be obvious that immediacy of action, whether it be "probable" or "present" will remain an essential ingredient of the first amendment cases. In this respect the clear and present danger objection must be considered.

The essential conflict takes position in the various definitions of obscenity which have purported to remove the objectionable expression from the first amendment guarantees. Included in every definition of obscenity has been some reference to the effect the material must have upon the viewer or reader.¹⁴⁰ This effect has been generally satisfied under the *Ulysses* rule if the tendency of the material is to arouse lustful thoughts,¹⁴¹ or prove offensive to the community standards of decency.¹⁴² There has been no necessity to relate the salacious thoughts of the reader to overt conduct, as once it has been determined that these thoughts are aroused the definition has been successfully applied and the constitutional question presumably answered. It is at this point that the opponents of obscenity legislation have injected the clear and present danger safeguard of the first amendment, as the lustful thoughts of the reader or aroused sense of community decency do not constitute a substantive evil which would justify curtailment of the expression. The *Hicklin* test - though deficient in other respects - could have satisfied a *Schenck* or *Dennis* interpretation of the first amendment, as it was concerned with the effect the material would have upon those of a sadistic or masochistic temperament. The *Ulysses* formula, however, has removed any direct or probable nexus between the sexual stimulation and overt conduct by imposition of the "average person," as this hypothetical individual is less likely to respond in action after contact with the objectionable material. Consequently, the question of obscenity has been rephrased today as how far governmental interference in the moral disposition of the individual will extend. Both the proponents and opponents of these laws have attempted to solve this dilemma by confused considerations of the socially disruptive influences of the obscene.¹⁴³ The unrealized source of the confusion is a standard which cannot accommodate the dual aspects of the problem.

The history and recent disposition of *Roth v. United States*¹⁴⁴ give a new but divided direction to the law of obscenity. The postal regulations, which declare unmailable "every obscene, lewd, lascivious, indecent . . .

140 This aspect of the obscenity definition has included a) effect on thought, b) effect on conduct, c) effect on community moral standards, d) offensiveness, and even e) the probable audience of the particular material. For an excellent development of these variations, see Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 329 (1954).

141 *Besig v. United States*, 208 F.2d 142 (9th Cir. 1953); *Burstein v. United States*, 178 F.2d 665 (9th Cir. 1949); *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930).

142 *People v. Dial Press*, 182 Misc. 416, 48 N.Y.S.2d 480 (1944); *Parmelee v. United States*, 113 F.2d 729 (D.C. Cir. 1940).

143 See Schmidt, *A Justification of Statutes Barring Pornography From the Mails*, 26 FORDHAM L. REV. 70 (1957); McKEON, MERTON, GELLHORN, *THE FREEDOM TO READ* 35 (1957); CHAFFEE, *THE BLESSINGS OF LIBERTY* 70 (1956). See also JAHODA, *THE IMPACT OF LITERATURE* (1954); WERTHAM, *SEDUCTION OF THE INNOCENT* (1954).

144 354 U.S. 476 (1957).

article, thing, matter, device, or substance,"¹⁴⁵ occupied the center of the controversy. After conviction under these regulations for mailing an obscene circular advertising the sale of objectionable material, the dealer-publisher appealed to the Court of Appeals for the Second Circuit, which affirmed the conviction because of the tendency of the material to arouse lustful and impure thoughts.¹⁴⁶ In his concurring opinion,¹⁴⁷ which was tantamount to a dissent, the late Judge Frank questioned the constitutional validity of the postal prohibitions and penalties. Claiming that government is concerned only with lawless, anti-social conduct and not thought, Frank contended that more than a remote connection between the objectionable material and socially undesirable conduct is necessary to justify curtailment of the expression. Since no one has shown with reasonable probability that obscene publications tend to have any effect upon the behavioral patterns of normal, average adults,¹⁴⁸ Frank asserted that government could not restrict the expression simply because it tended to arouse lustful or impure thoughts. Projecting the ultimate effects of such a practice he said:

If the government possesses the power to censor publications which arouse sexual thoughts, regardless of whether those thoughts tend probably to transform themselves into anti-social behavior, why may not the government censor political and religious publications regardless of any causal relation to probable dangerous deeds.¹⁴⁹

In formulating his contention that a desirable purpose does not render a statute constitutional, Frank relied upon cases which the majority used to bolster its contention that the obscene is to be considered exclusive of the first amendment protections. Although the dicta in these cases does support the historical position adopted by the majority, the factual situations clearly demonstrate that the court has always required something more than mere tendency of thought to sanction suppression.¹⁵⁰

Restraint of expression by any form of censorship or prosecution has received renewed attention in this age of colliding individual freedoms and national security. It has been asserted recently that the conflicting views in this area do not arise out of opposed conceptions of freedom, but from vague definitions and assumptions concerning the social and behavioral influences of obscenity.¹⁵¹ While serving as an accurate identification of the conflict between existing obscenity definitions and the

¹⁴⁵ 69 STAT. 183, 18 U.S.C. § 1461 (1955). In 1955 the Post Office Department reported a 75% increase in pornographic mail traffic. N.Y. Times, March 6, 1955, p. 70, col. 3. For the Senate report on the general language of the amended postal regulations, see 2 U.S. CODE CONG. AND AD. NEWS 2210 (1955). Implementation has been successful. *Schindler v. United States*, 221 F.2d 743 (9th Cir. 1955) (post card); *United States v. Hornick*, 229 F.2d 120 (3d Cir. 1956) (material advertised need not be obscene; the gist of the offense is giving the information by mail).

¹⁴⁶ *Roth v. United States*, 237 F.2d 796 (2d Cir. 1956).

¹⁴⁷ *Id.* at 801.

¹⁴⁸ See note 143 *supra*.

¹⁴⁹ 237 F.2d at 805.

¹⁵⁰ *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (imminent danger of riot due to racial tensions); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (words tending to provoke action on the part of the one addressed). For additional support Judge Frank adds *Dennis v. United States*, 341 U.S. 494 (1951) and *Winters v. New York*, 333 U.S. 507 (1948).

¹⁵¹ MCKEON, MERTON, GELLHORN, *THE FREEDOM TO READ* 96 (1957).

present interpretation of the first amendment protections,¹⁵² these same assertions cannot sustain a valid objection to obscenity legislation. A constitutional basis for these laws can be found in a more fundamental and positive interpretation of these constitutional guarantees.¹⁵³ In this respect it is unfortunate that criticism of Frank's thesis¹⁵⁴ has been confined to the cause of effect elements of the obscenity definition, for contemporary sociological and psychological data does not confirm any measurable relation between the objectionable material and the viewer's social conduct.¹⁵⁵ The absence of this causal relationship reduces the criticism to the singular moral position of the individual which cannot satisfy the first amendment objections to the definition.

Granting certiorari in *Roth v. United States*,¹⁵⁶ the Supreme Court definitively settled one phase of the constitutional argument. For the first time the Court was faced with the dispositive question as to whether the postal regulations, and a California statute combined for hearing,¹⁵⁷ violated the constitutional provisions of the first amendment by imposing criminal sanctions upon the purveyors of obscene literature. Disassociating obscenity and the first amendment, the Court declared:

In the light of . . . history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. . . .

[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without any redeeming social importance.¹⁵⁸

It is significant that the Court avoided consideration of an exact standard in this area, thereby making it unnecessary to establish any direct relation between the material and the reader's conduct. Relying upon *Ulysses* and associated cases the Court found the safeguards of the "average person" standard adequate to withstand the charge of constitutional infirmity. The standard announced was ". . . whether to the average person, applying contemporary community standards, the dominant theme

¹⁵² See note 143 *supra*.

¹⁵³ Because freedom of the press is a basic right to be respected and safeguarded, it must be understood and defended not as license but as true rational freedom. . . . To speak of limits is to indicate that freedom of expression is not an absolute freedom. The traditional and sounder understanding of freedom, and specifically freedom of the press, is more temperate. It recognizes that liberty has a moral dimension. Man is true to himself as a free being when he acts in accord with the laws of right reason. As a member of society his liberty is exercised within bounds fixed by the multiple demands of social living.

The American Bishops Annual Statement, in National Catholic Welfare Conference News Service, Nov. 18, 1957. Compare this language with that of the Supreme Court in *Dennis v. United States*, 341 U.S. 494, 503: "Analysis of the leading cases in this Court which have involved direct limitations on speech . . . will demonstrate . . . that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations." For the legal development of the constitutional concept of morality, see Whelan, *Censorship and the Constitutional Concept of Morality*, 43 GEO. L.J. 547 (1955).

¹⁵⁴ Schmidt, *A Justification of Statutes Barring Pornography From the Mails*, 26 *FORDHAM L. REV.* 70 (1957).

¹⁵⁵ There is no psychiatric consensus as to the effects of obscene literature upon human conduct. See WERTHAM, *SEDUCTION OF THE INNOCENT* (1953); JAHODA, *THE IMPACT OF LITERATURE* (1954); Abse, *Psychodynamic Aspects of the Problem of the Definition of Obscenity*, 20 *LAW & CONTEMP. PROB.* 572 (1955).

¹⁵⁶ 354 U.S. 476 (1957).

¹⁵⁷ CAL. PEN. CODE § 311 (1955).

¹⁵⁸ 354 U.S. at 483-84.

of the material taken as a whole appeals to prurient interest."¹⁵⁹ In its more detailed definition of the term "obscenity", the Court relied upon a recent draft of the American Law Institute's Model Penal Code¹⁶⁰ as a reflection of existing case law:¹⁶¹

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.¹⁶²

Answering the objection that a conviction was being obtained without proof either that the obscene material will perceptibly create a clear and present danger of anti-social conduct or will probably induce its recipients to such conduct, the Court relied upon *Beauharnais v. Illinois*¹⁶³ saying, ". . . no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances."¹⁶⁴ Concluding that the words of the statute give adequate warning sufficient to satisfy the due process requirements, the Court affirmed the convictions.

The *Roth* decision has clarified rather than concluded the legal problem of obscenity. The adopted standard does not meet the clear and present danger requirement of the first amendment, for the Court's language has not filled the gap between objectionable material and actionable response. In substance, the *Roth* standard has only redressed the *Ulysses* formula. But the constitutional question has been answered by an interpretation of the first amendment more fundamental than the technical construction of *Schenck v. United States*, for in basing its decision upon an historical analysis of freedom in the first amendment the Court has recognized that the moral dimensions of this freedom have a social and constitutional importance which cannot be denied.¹⁶⁵ The "action" which is prohibited is the publication or distribution of obscene literature and not the "action" which might result on behalf of those who read this material. With *Roth*, obscenity enters the same classification as defamation—the danger being the present rather than future consequences of the action. The evil need not be discounted by the improbability of its happening, as suggested in *Dennis*, for the evil has been accurately defined to happen upon publication. In all probability the courts will discard any future contentions which insist that overt anti-social conduct must result from contact with the obscene material before the publications be suppressed. Because the prurient interest standard represents a philosophical solution to an extremely practical problem, however, its application will require exacting discretion to preserve its constitutional validity.

The problems of implementation have become apparent in cases following *Roth*. In *Sunshine Book Co. v. Summerfield*¹⁶⁶ a publisher sought injunctive relief against the postal authorities for impounding a nudist

¹⁵⁹ *Id.* at 489.

¹⁶⁰ MODEL PENAL CODE TENTATIVE DRAFT NO. 6, § 207.10 (1957).

¹⁶¹ The Court's alignment of the current case law definition of the obscene with that of the model code has been criticized. See Schwartz, *Criminal Obscenity Law: Portents From Recent Supreme Court Decisions and Proposals of the American Law Institute in the Model Penal Code*, 29 PA. BAR ASS'N Q. 8 (1957).

¹⁶² 354 U.S. 487 n.20.

¹⁶³ 343 U.S. 250 (1952).

¹⁶⁴ 354 U.S. at 486-87.

¹⁶⁵ See note 153 *supra*.

health magazine. The Post Office Department had found the magazine to be "... obscene and indecent when judged by the ordinary community standards. . . ." ¹⁶⁷ The district court, after a page-by-page analysis of the material, found that the pictorial presentations, principally of women, which clearly revealed the genitals, breasts and other portions of the body normally covered, did offend the community sense of decency and upheld the Department's mail ban. The decision was affirmed five to three on appeal¹⁶⁸ but was reversed by the Supreme Court per curiam¹⁶⁹ on the basis of *Roth v. United States*. In a similar action for judgment declaring a serious magazine for homosexuals to be mailable the Supreme Court reversed the postal prohibition per curiam following the *Roth* decision.¹⁷⁰

The Supreme Court's disposition of these two cases has been subjected to unwarranted criticism.¹⁷¹ Opposition to the decisions seems to be based upon the sexual nature of the material presented in the periodicals and the "average person" standard used to determine the obscenity of such material.¹⁷² In *Roth* the court was careful to distinguish between sex and obscenity because of the legitimate public concern and corresponding need for communication in matters of sex.¹⁷³ In its application the obscenity standard should not be expected to exclude from public consumption all material which has a potential immoral use.¹⁷⁴ The average person and community decency elements of the *Roth* definition are admittedly vague moral standards but constitutional necessities. This was well illustrated in *Bulter v. Michigan*¹⁷⁵ where the Supreme Court struck down a Michigan penal statute¹⁷⁶ making it a misdemeanor to sell to the general reading public any book "tending to the corruption of the morals of youth," because it would reduce the adult population of Michigan to reading only what is fit for children. The Court of Appeals for the Sixth Circuit recently followed suit reversing the conviction of a dealer who had received allegedly obscene pictures from an express company because a psychiatrist was permitted to testify as to the effects such pictures could have upon the sexual deviate.¹⁷⁷ The sexual deviate classification of the

¹⁶⁶ 128 F. Supp. 564 (D.D.C. 1955).

¹⁶⁷ *Id.* at 566.

¹⁶⁸ 249 F.2d 114 (D.C. Cir. 1957).

¹⁶⁹ 78 Sup. Ct. 365 (1958).

¹⁷⁰ *One, Inc. v. Oleson*, 78 Sup. Ct. 364 (1958), reversing 241 F.2d 772 (9th Cir. 1957).

¹⁷¹ *The New World*, Jan. 24, 1958, p. 4, col. 1.

¹⁷² "[T]here should be little reason to question the prurience of illustrated or non-illustrated magazines devoted to homosexuality or nudism. . . . [T]he Supreme Court must regard these themes as in accord with 'contemporary community standards' . . ." *Ibid.*

¹⁷³ 354 U.S. at 487.

¹⁷⁴ Pictorial nudity has always posed interpretive problems which legal standards cannot be expected to solve. For a recent account of this problem, see Paul and Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship*, 106 U. Pa. L. Rev. 225 (1957). The problem has continued. *United States v. 31 Photographs*, 156 F. Supp. 350 (S.D.N.Y. 1957) (photographs imported for research in sexual behavior).

¹⁷⁵ 352 U.S. 380 (1957). A similar statute in Florida, FLA. STAT. ANN. § 847.01 (1957), will probably meet the same fate. See *State v. Clein*, 93 So.2d 876 (Fla. 1957).

¹⁷⁶ MICH. COMP. LAWS § 750.343 (1948).

¹⁷⁷ *Volanski v. United States*, 246 F.2d 842 (6th Cir. 1957).

Hicklin and *Volanski* cases and the youth objective of the Michigan statute are classes particularly susceptible to an actionable response after contact with the objectionable material, but they cannot serve as adequate standards for adult reading material. In the *Roth* definition the Court was forced to balance the clear and present danger requirements of the first amendment with the due process mandate of statutory precision. Although the "average person" is not always the suitable hypothetical individual for testing the effects of the material,¹⁷⁸ there must be some equitable or common standard for determining the obscene if this type of publication is to be excluded from the first amendment protection. The confined moral codes of various groups in society cannot fulfill such a delicate function, for there is no doubt that a wide gap will often exist between what is morally bad to a particular group and what should be legally prohibited.¹⁷⁹ If the standard were restricted to the psychiatric and moral positions of particular segments in society, *Bulter v. Michigan* would obviate all obscenity legislation.

The dissent of Mr. Justice Harlan in *Roth v. United States*¹⁸⁰ emphasizes the magnitude of this obscenity determination. In his statement of the issue Justice Harlan appears to have adopted the position of Judge Frank below:

In final analysis, the problem presented by these cases is how far, and on what terms, the state and federal governments have power to punish individuals for disseminating books considered to be undesirable because of their nature or *supposed deleterious effect upon human conduct*.

(Emphasis added.)¹⁸¹

Justice Harlan denies the validity of the majority's approach to the problem which centers upon an abstract definition of the obscene apart from the first amendment protections as interpreted in the free speech cases. By such a method he feels the decision is one insulated from the independent constitutional judgment demanded by the safeguards attending the form of expression.

I do not think that reviewing courts can escape this responsibility by saying that the trier of facts, be it a jury or a judge, has labeled the questioned matter as obscene, for if obscenity is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind.¹⁸²

Harlan chooses not to confine the determination of obscenity to a definition which includes no probable relation between mental stimulation and overt conduct, for such a solution tends to smother the constitutional question latent in each obscenity situation. The real thrust of this argument is the constitutional difficulty inherent in a control of the press because of its interlaced objectionable content. If the majority in

¹⁷⁸ The average person is less likely to purchase or circulate such material. See Lockhart and McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 340 (1954).

¹⁷⁹ "If we are content to accept as morally inoffensive all that is legally unpunishable, we have lowered greatly our moral standards. It must be recognized that civil legislation by itself does not constitute an adequate standard of morality." The American Bishops Annual Statement, in National Catholic Welfare Conference News Service, Nov. 18, 1957.

¹⁸⁰ 354 U.S. at 496.

¹⁸¹ *Id.* at 496-97.

¹⁸² *Id.* at 497-98.

Roth was to avoid the clear and present danger complications in definition, it had to decide the issue apart from this technical interpretation of the first amendment. This was properly accomplished by an historical analysis of the obscene which demonstrated that obscenity is without any redeeming social importance and, therefore, not within these first amendment protections. Harlan recognizes this dual concern of the court saying, "[obscene] books [are] considered to be undesirable because of their nature or supposed deleterious effect upon human conduct."¹⁸³ (Emphasis added.) He denies, however, any solution which considers only the nature of the material because of the first amendment protections which should attend the form of expression. Harlan's primary concern seems to be the particular judgment which will disassociate the particular material from the first amendment. In this respect each decision becomes an independent constitutional judgment which will not admit a separation of form from content. By focusing his attack upon the particularized judgment in the obscenity determination, Justice Harlan may have established an equipoise between the obscenity definition and its implementation. Somewhat paradoxically he concurs in *Alberts v. California*¹⁸⁴ because in this instance the state legislature has made the judgment that the printed word can deprave or corrupt the reader, and that words or pictures of this nature can incite the reader to anti-social conduct. Although his reasons for this concurrence could equally be applied to a similar Congressional judgment, they seem to be based upon recognition of a direct state interest in the general moral welfare, an interest he denies to the federal government.

In *Kingsly Books, Inc. v. Brown*,¹⁸⁵ a decision rendered the same week as the *Roth* case, the Supreme Court affirmed the use of a significant procedural device affecting the newstand control of objectionable literature. Pursuant to section 22-a of the New York Code of Criminal Procedure¹⁸⁶ local police officials received an injunction *pendente lite* to suppress the sale and distribution of an allegedly obscene magazine, *Nights of Horror*. In accordance with statutory provisions a hearing was granted immediately to determine the obscenity of the material in question and the injunction became permanent. On appeal to the Supreme Court the distributor contended that the injunctive process constituted an unconstitutional prior restraint of the press on the basis of *Near v. Minnesota ex rel. Olson*. Recognizing the power of the state to protect its citizens against the dissemination of pornography, the Court sustained the procedure as adequate notice and a hearing were provided before the order became permanent. It should be noted that the suppression in the instant case did not involve future issues of the same magazine; it merely restricted future sale of the particular issue considered. By directing the statute against the material after publication, but before mass distribution, the legislature has successfully avoided the objections of *Near v. Minnesota ex rel. Olson* and has presented a most effective means of control.

¹⁸³ *Id.* at 497.

¹⁸⁴ 354 U.S. 476 (1957).

¹⁸⁵ 354 U.S. 436 (1957).

¹⁸⁶ N.Y. CODE CRIM. PROC. § 22-a.

These recent decisions aptly illustrate the serious issues involved in the legal control of obscene literature. With its tenuous separation of obscenity and the first amendment, the *Roth* decision has properly denied that two fundamental values of society—freedom of expression and the general moral welfare—are competing for recognition upon the same constitutional grounds. The obscenity problem remains a constitutional issue, however, as the particular determinations in this area do involve constitutional judgment. The locus of the problem has been shifted from the definition of the obscene to the particular judgment which will disassociate obscenity from the closely related protections of the press, and, as Justice Harlan has indicated, the decision is one which cannot be isolated from constitutional considerations. In this respect the *Roth* standard is a significant statement of policy, but its implementation necessitates caution.

2) THE MOTION PICTURE—*A New Analysis*

The motion picture industry and its attendant legal problems have grown in great complexity over the forty years prior to this survey. The progress of legal development has failed to match the growth of the industry, however, due mainly to the modern reluctance of the courts and legislatures to deal with the delicate constitutional issues presented by contemporary censorship of the film medium. The censorship process has remained fairly uniform in procedure and substance with major differences existing only as to the censoring authority. Originally ten states¹⁸⁷ had established state examination and licensing which pre-empted consideration of the film throughout the state. Due to recent constitutional doubts concerning the validity of motion picture censorship this number has been reduced to four active censoring agencies on the state level.¹⁸⁸ Other states have preferred direct municipal control of entertainment and exhibitions pursuant to state statute.¹⁸⁹ The effect of recent decisions on these forms of control is difficult to measure,¹⁹⁰ but the general absence of cases arising from municipal censorship would seem to indicate that few formal attempts at censorship have been made on this level.

¹⁸⁷ KAN. GEN. STAT. ANN. § 51-103 (1949); MD. ANN. CODE art. 66A (Supp. 1957); MASS. ANN. LAWS c. 136 § 4 (Supp. 1957); N.Y. EDUC. LAW §§ 122, 122(a) (Supp. 1957); OHIO REV. CODE ANN. § 3305.04 (Page Supp. 1957); PA. STAT. ANN. § 43 (Supp. 1956); VA. CODE ANN. §§ 2-98 — 2-116 (1950). States having similar statutes but not enforcing them: FLA. STAT. § 521.01 (1955); LA. REV. STAT. § 4:304 (1950).

¹⁸⁸ Kansas, Maryland, New York, and Virginia.

¹⁸⁹ ARK. STAT. ANN. § 19-2329 (Supp. 1956); COLO. REV. STAT. ANN. § 139-32-1 (72) (1953); IDAHO CODE ANN. § 50-126 (1957); 24 ILL. ANN. STAT. c. 24, § 23-57 (Smith-Hurd 1956) ("prohibit sale or exhibition of obscene or immoral picture"); IND. ANN. STAT. § 48-1407(39) (1950); IOWA CODE ANN. § 368.8(3) (Supp. 1956); KY. REV. STAT. ANN. § 85.150, 86.120, 98.010 (Baldwin 1955); MICH. COMP. LAWS § 91.1(8) (1948); MO. ANN. STAT. § 74.143(5) (1957) ("Cities of the first class . . . to censor moving picture films and shows and to prevent or suppress those of vicious or harmful influence"); N.J. STAT. ANN. § 40:52-1 (Supp. 1956); TEX. REV. CIV. STAT. ANN. art. 1175(22) (1953); VT. STAT. § 7650 (1947) ("when public good requires"). California has no censorship statute, but the obscenity law refers to "pictures and exhibitions." CAL. PEN. CODE ANN. § 311 (West Supp. 1957).

¹⁹⁰ For a detailed report of local control in this area, see NOTE, 71 HARV. L. REV. 326 (1957).

Disregarding its earlier denial of free-speech guarantees to the motion picture,¹⁹¹ the Supreme Court in 1952 originated a series of decisions which has consistently deferred definition and clarity in this area. In *Jos. Burstyn, Inc. v. Wilson*,¹⁹² the Court struck down a New York prohibition banning a film for its "sacrilegious" content. The Court found the term to be vague and indefinite which, when applied to the motion picture in the form of prior restraint, offends the constitutional protections of the first amendment as incorporated in the due process requirements of the fourteenth.¹⁹³ Considered apart from its successors the *Burstyn* decision poses no problem. Further, the Court simply could not justify any legitimate interest of the state in the religious offensiveness found to exist in the film. As a foundation for later decisions, however, the case is an unfortunate choice due to the lower court's apparent neglect of its true content. In *Burstyn* the Court recognized the validity of prior restraint in exceptional situations,¹⁹⁴ but found the interest there not legitimate, nor the term sufficiently defined to satisfy the due process requirement of the fourteenth amendment. The Court did not decide whether a state may exercise this form of prior restraint under a clearly drawn statute designed to prevent the showing of obscene films.¹⁹⁵

The delicate interrelation of these two constitutional issues — prior restraint and statutory clarity — remained undecided in per curiam decisions of three later cases at a time when the problems raised in *Burstyn* could have been solved.¹⁹⁶ The Ohio, New York, and Texas courts believed the terms "immoral," "tending to corrupt morals," and "in the public interest" sufficiently clear to justify the application of prior restraint and denied the contentions of the industry that prior censorship was unconstitutional *per se*. Instead of clarifying the position of the state statutes in relation to the censors' determinations, the Court reversed the state decisions on the basis of *Jos. Burstyn, Inc. v. Wilson*. The concurring opinion of Justices Black and Douglas¹⁹⁷ is a concentrated attack on the doctrine of prior restraint alone as contrary to the constitutional protections guaranteed the film medium in the *Burstyn* case. It is reasonable to estimate, however, that here, as in *Burstyn*, the constitutional objection was grounded on vague statutory language.

The confusion of these currently unrelated issues¹⁹⁸ posed difficult

191 *Mutual Film Corp. v. Industrial Comm. of Ohio*, 236 U.S. 244 (1915).

192 343 U.S. 495 (1952).

193 The *Burstyn* case was the first motion picture legislation tested after *Gitlow v. New York*, 268 U.S. 666 (1925), which incorporated the provisions of the first amendment in the due process requirements of the fourteenth.

194 343 U.S. at 506. In *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), the court limited the application of prior restraint to "exceptional cases." However, "on similar grounds, the primary requirements of decency may be enforced against obscene publication." *Id.* at 716.

195 343 U.S. at 506.

196 *Superior Films, Inc. v. Department of Educ. of Ohio* (Commercial Pictures Corp. v. Regents of the University of the State of New York), 346 U.S. 587 (1954), reversing 159 Ohio St. 315, 112 N.E.2d 319 (1953); 305 N.Y. 336, 113 N.E.2d 502 (1953); *Gelling v. Texas*, 343 U.S. 960 (1952), reversing 157 Tex. Crim. 516, 247 S.W.2d 95 (1952).

197 346 U.S. at 588.

198 With the decision in *Burstyn* counsel for the producer saw an end to prior restraint in the motion picture medium. The industry, however, was still confused. N.Y. Times, June 3, 1952, p. 34, col. 2.

problems for the state courts testing the constitutionality of their censorship statutes on the basis of the *Burstyn* and *Superior Films* cases.¹⁹⁹ The Ohio Supreme Court attempted to declare the Ohio law unconstitutional following *Superior Films*, but due to the division of opinion on the validity of prior restraint under a clearly drawn statute the necessary majority could not be achieved to void the statute.²⁰⁰ The dissent in this case properly argued that the Supreme Court in the *Superior Films* case, by relying upon the *Burstyn* decision, was considering the clarity of the statute as applied to the film under consideration and not the constitutionality of the entire Ohio statute.²⁰¹ The same pattern was repeated in Kansas when the Kansas Supreme Court was asked to decide the constitutional validity of the state censor's ban of *The Moon is Blue* on the grounds that it was "obscene, indecent, immoral and [such] as would tend to debase or corrupt morals." Basing its decision upon language not considered in the *Burstyn* and *Superior Films* cases and the expertise of the censoring agency, the Kansas court upheld the prohibition of the film,²⁰² but was reversed by the Supreme Court per curiam on the basis of the *Superior Films* case.²⁰³

The Pennsylvania Supreme Court, adopting the *Burstyn* progeny, ruled the state censorship act unconstitutional when confronted with a censor's determination that a film was "indecent and immoral," and such as would "tend to debase and corrupt morals."²⁰⁴ Despite a strong dissenting opinion urging the limited nature of the *Burstyn* decision, the majority found the statute vague in its vital area of definition. After the Pennsylvania Supreme Court had based this decision upon grounds of indefiniteness another Pennsylvania court sustained the conviction of a theatre operator for the exhibition of an "obscene" film previously banned by the censorship board.²⁰⁵ By such action the Pennsylvania courts have apparently gone one step beyond the United States Supreme Court, for in permitting the conviction under a similarly worded statute these courts have conceded that the words will admit of interpretation and definition. The only possible conclusion of these Pennsylvania

¹⁹⁹ The Supreme Court decisions produced ironical results. The state courts were now permitting films to pass which had been denied the Motion Picture Production Code seal of approval. N.Y. Times, Oct. 3, 1954, § 2, p. 1, col. 7.

²⁰⁰ RKO Radio Pictures v. Department of Educ., 162 Ohio St. 263, 122 N.E.2d 769 (1954). This decision effectively stopped film licensing in Ohio. The statute, OHIO REV. CODE ANN. § 3305.04 (Page Supp. 1957), empowers the board to approve only those films which are of "a moral, educational, or amusing and harmless character." One year later a revised bill to ban films "obscene . . . or provocative of immediate crime or [which] jeopardizes public safety," N.Y. Times, May 27, 1955, p. 15, col. 4, failed to pass the Ohio Senate. *Id.*, June 25, 1955, p. 9, col. 4. A new bill is presently under consideration in Ohio.

²⁰¹ 122 N.E.2d at 775.

²⁰² Holmby Productions v. Vaughn, 177 Kan. 728, 282 P.2d 412 (1955). Before the Kansas Supreme Court received this case the legislature had repealed the censorship legislation, KAN. GEN. STAT. ANN. § 51-103 (1949). N.Y. Times, April 8, 1955, p. 16, col. 4.

²⁰³ Holmby Productions v. Vaughn, 350 U.S. 870 (1955).

²⁰⁴ Hallmark Productions, Inc. v. Carroll, 384 Pa. 348, 121 A.2d 584 (1956); PA. STAT. ANN. tit. 4, § 43 (Supp. 1956).

²⁰⁵ Commonwealth v. Blumenstein, 184 Pa. Super. 83, 133 A.2d 865 (1957); PA. STAT. ANN. tit. 18, § 4528 (Supp. 1956).

decisions is that the fact of prior restraint forbids any attempt at censorship, even under a clearly drawn statute.

Early in 1955 the Massachusetts supreme court interpreted the *Burstyn* decision as a condemnation of prior restraint alone and accordingly ruled a Sunday censorship law invalid.²⁰⁶ Two years later the same court indicated that it would affirm the conviction of a theatre manager who exhibited an obscene picture contrary to the state obscenity statute if the film was judged obscene by a jury.²⁰⁷ In its decision rendering the Sunday law unconstitutional this court should not have reached the prior restraint issue, as the statute was vague enough to fail the due process requirements. In basing its decision on the censorship law upon the prior restraint issue alone, however, the Massachusetts court can avoid the Pennsylvania paradox when and if it is confronted with a future censorship law similarly worded to the obscenity statute.

The apparent readiness of the Pennsylvania and Massachusetts courts to dismiss censorship activity is in sharp contrast with the reluctance of the New York courts to tamper with their already-questioned statute,²⁰⁸ and the cautious judicial interpretation of a similar Maryland statute.²⁰⁹ The New York courts have failed to sustain the censorship of any film banned in that state since the *Superior Film* case, apparently reserving the final test of the New York statute for an "exceptional case." Nudity was not regarded as obscene per se in one case,²¹⁰ and a spurious educational film was permitted to pass in another.²¹¹ Maryland has elected to treat the motion picture as a true medium for the communication to ideas and has redesigned its film legislation along lines more acceptable to first amendment objections.²¹² Out of forty-three films which were altered or banned by the Maryland State Board of Motion Picture Censors during a recent two year period only two have ended in litigation.²¹³ The Maryland Courts in applying the statute have required that an objectionable passage have some measureable effect upon

²⁰⁶ *Brattle Films, Inc. v. Commissioner of Pub. Safety*, 333 Mass. 58, 127 N.E.2d 891 (1955); MASS. ANN. LAWS c. 136, § 4 (Supp. 1957).

²⁰⁷ MASS. ANN. LAWS c. 272, § 28(a) (Supp. 1957); *Commonwealth v. Moniz*, 143 N.E.2d 196 (Mass. 1957).

²⁰⁸ N.Y. EDUC. LAW § 122, 122(a) (Supp. 1957). The statute was questioned in *Jos. Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ("sacrilegious"); *Commercial Pictures Corp. v. Regents of the University of the State of New York*, 346 U.S. 587 (1954) ("immoral").

²⁰⁹ MD. ANN. CODE art. 66A (Supp. 1957). The same statute is now in force in New York and Kansas. See note 187 *supra*.

²¹⁰ *Excelsior Pictures Corp. v. Regents of the University of the State of New York*, 3 N.Y.2d 237, 144 N.E.2d 31 (1957). A theatre operator was convicted under an obscenity statute in Massachusetts recently for showing the same film, *Garden of Eden*. *Commonwealth v. Moniz*, 143 N.E.2d 196 (Mass. 1957).

²¹¹ *Capitol Enterprises, Inc. v. Regents of the University of the State of New York*, 1 A.D.2d 990, 149 N.Y.S.2d 920 (1956). The film in question was *Mom and Dad*. The review of the picture, "Sex and Violence Star in Central's Double Bill," was not in accord with the court's educational interpretation, even though material for "sexual enlightenment" was sold in the theatre after the showing. N.Y. Times, Jan. 31, 1957, p. 21, col. 1. The same picture was banned by the Ohio censors but reversed in *Capitol Enterprises, Inc. v. Department of Educ.*, 162 Ohio St. 263, 122 N.E.2d 769 (1954).

²¹² See note 209 *supra*.

²¹³ Note, 71 HARV. L. REV. 326, 339 n.93 (1957).

the viewer before alteration or prohibition of the film would be permitted. Nudity escaped the censor's ban in one case because it was contained in a documentary presentation.²¹⁴ Although it was unnecessary to decide any constitutional question in that case, the Maryland Court of Appeals indicated that it would uphold the statute. In the only other film to reach litigation the same court refused deletion of a scene from *The Man With a Golden Arm*, which the censors determined would "teach the use of narcotics," a specific prohibition of the statute.²¹⁵ Comparing the new statute with the first amendment provisions of the Smith Act²¹⁶ the court decided that the statute is not directed at the plain presentation of the harmful habit, but only against presenting the objectionable conduct, here, use of narcotics, in such a desirable fashion as to impliedly advocate its repetition.

The United States Supreme Court has indicated that the existing procedure for licensing motion picture films is a form of prior restraint²¹⁷ but has declined to enter any direct comparison of the process with that condemned in *Near v. Minnesota ex rel. Olson*.²¹⁸ As the courts have found no problem in post-exhibition prosecutions of obscene films,²¹⁹ the constitutional objection to censoring the film must be situated in the relationship of the statutory standard to the fact of prior restraint. In the *Burstyn* case the censor's ban failed, not because the state had access to the film before exhibition, but because the term "sacrilegious" did not provide an adequate standard to justify the screening before exhibition. In this respect it is significant that each subsequent per curiam reversal of state film prohibitions has been based upon either the *Burstyn* case or *Superior Films*, which followed *Burstyn*. The reserved question in *Burstyn* has been perpetuated rather than solved in the subsequent decisions.

The language in *Burstyn* seems to imply that the Court has recognized a substantial difference between the art form of the motion picture and those which employ the written word alone, as "each method tends to present its own peculiar problems."²²⁰ The most significant difference, implied from this language and the silent per curiam line, is that governmental interference before public exhibition of the film might be tolerated if done under a clearly drawn statute.

It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. . . . Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. (Emphasis added.)²²¹

²¹⁴ Maryland State Bd. of Motion Picture Censors v. Times Film Corp., 212 Md. 454, 129 A.2d 833 (Md. App. 1957). The film was *Naked Amazon*.

²¹⁵ United Artists Corp. v. Maryland State Bd. of Motion Picture Censors, 210 Md. 586, 124 A.2d 292 (Md. App. 1956); Md. ANN. CODE art. 66A (Supp. 1957). In 1956 the Motion Picture Production Code restrictions were eased to permit films dealing with narcotics, abortions, prostitution, and kidnaping. N.Y. Times, Dec. 16, 1956, § 2, p. 3, col. 8.

²¹⁶ 70 STAT. 623 (1956), 18 U.S.C.A. § 2385 (Supp. 1957).

²¹⁷ Jos. Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

²¹⁸ See note 194 *supra*.

²¹⁹ Commonwealth v. Moniz, 143 N.E.2d 196 (Mass. 1957); Commonwealth v. Blumenstein, 184 Pa. Super. 83, 133 A.2d 865 (1957).

²²⁰ 343 U.S. at 503.

²²¹ *Id.* at 502, 503.

If the Court were to permit the pre-exhibition testing of the picture this would clearly differentiate "exhibition" of a film from the "publication" of the printed word and perhaps draw the line of objectionable prior restraint at different places in each medium. Although "the first amendment draws no distinction between the various methods of communicating ideas,"²²² such a statement has reference to the forms of expression only as a constitutional conclusion and not as an analysis of the individual art forms. Chief Justice Warren, concurring in *Roth v. United States*,²²³ issued an obvious warning to those who would apply the *Roth* definition in the prior restraint phase of control, saying, "It is not the book that is on trial; it is a person. . . . A wholly different result might be reached in a different setting."²²⁴ The Chief Justice occupied a minority position in *Kingsley Books, Inc. v. Brown*,²²⁵ however, when he said: "it is the conduct of the individual that should be judged, not the quality of art or literature. To do otherwise is to impose a prior restraint and hence to violate the Constitution."²²⁶ It would seem, then, that the Court could justify a different application of the first amendment provisions to the various media of communication if the applications were based upon substantial differences in the forms of expression.²²⁷

It is precisely the active content of the motion picture which differentiates the medium from those dependent upon the written word, and which eventually will permit "trial" of the film. Literature, because of its reliance upon the phantasm of the reader for effective communication, is an art form which does not lend itself to screening before publication. Prior to publication the only standard for determination would be an estimation as to the effects such expression would have upon its readers. As this translation of subjective stimulation into action is the peculiar province of the individual which will not submit to measurement, governmental interference based upon such a standard at this point would amount to thought control as well as a forbidden prior restraint. The motion picture, however, is primarily an exhibition — a mechanical reproduction of conduct — which depends upon dramatic action for conveyance of its message. As the state may easily determine the social value of measureable conduct,²²⁸ it is entirely unnecessary to publicly exhibit the activity before governmental interference may be justified.

The standard employed should vary with the grounds for opposition to the film. As the film is an expression by means of dramatic action it will "affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping

²²² *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587, 589 (1954) (concurring opinion).

²²³ 354 U.S. 476 (1957).

²²⁴ *Id.* at 495.

²²⁵ 354 U.S. 436 (1957).

²²⁶ *Id.* at 446.

²²⁷ Justices Douglas and Black are more concerned with different treatment being accorded the motion picture because of its greater impact or force upon the viewer. *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587, 588 (1954) (concurring opinion). In this connection see, *THE PAYNE FOUNDATION, MOTION PICTURES AND STANDARDS OF MORALITY* (1933).

²²⁸ *Cf. Adams Newark Theatre Co. v. Newark*, 22 N.J. 472, 126 A.2d 340 (1956), *aff'd per curiam*, 354 U.S. 931 (1957).

of thought which characterizes all artistic expression."²²⁹ Where opposition to a film is based upon vulgar or brutal conduct and vivid presentations of human body areas not normally exhibited in public, there should be little difficulty in distinguishing the motion picture from a work of literature. In the literature situation the objection at this point would have to be directed at estimated behavioral effects of the material upon the reader, as the descriptive written word alone provides no measureable objective. In the motion picture, however, the objection would not be aimed at the viewer's conduct, but at the measureable activity which is to be exhibited publicly. Statutory prohibitions similar to those upheld recently in *Adams Newark Theatre Co. v. Newark*²³⁰ could define the permissible limits of such physical disclosures and activities on the screen. The general language formerly found unacceptable as a standard would be supplanted by a detailed description of body areas and activities which may not be exhibited in public. Where objection to a film is grounded upon a suggestive theme or direct spoken espousal of immoral practices the applicable test would be that employed in judging obscene literature,²³¹ for as the picture depends more upon artistic subtlety for conveyance of its message the standard will become more indefinite and incapable of measuring the objectionable activity. In its most recent ruling, *Times Film Corp. v. Chicago*,²³² the Supreme Court reversed the Chicago Police Commissioner's ban on the controversial film, *Game of Love*, on the basis of *Albert v. California*.²³³ In its acceptance of the *Alberts* decision as a gauge the Court has apparently chosen to apply the literature standard of obscenity to the film medium,²³⁴ and has thereby impliedly admitted that the "obscene" would be a sufficient standard to justify the exercise of prior restraint in this area.²³⁵

The preceding analysis is not an attempt to divest the motion picture of its constitutional guarantees but to justify a needed pre-exhibition

²²⁹ *Jos. Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

²³⁰ 22 N.J. 472, 126 A.2d 340 (1956), *aff'd per curiam*, 354 U.S. 931 (1957). The ordinance enumerates certain genital and other areas of the body which may not be disclosed in public, nor by costumes which give illusions of nudeness in these areas.

²³¹ See *Roth v. United States*, 354 U.S. 476 (1957). An example of the suggestive theme opposition is that offered by the Kansas censors' determination respecting *The Moon is Blue*: "Sex theme throughout, too frank bedroom dialogue: many sexy words; both dialogue and action have sex as their theme." *Holmby Productions v. Vaughn*, 177 Kan. 728, 282 P.2d 412, 413 (1955), *reversed*, 350 U.S. 870 (1955). Such a description would hardly satisfy the "prurient interest" standard and the film would most likely pass uncut.

²³² 26 U.S.L. WEEK 3147 (U.S. Nov. 12, 1958) (No. 372), *reversing per curiam*, 244 F.2d 432 (7th Cir. 1957).

²³³ 354 U.S. 476 (1957).

²³⁴ The *Times Film* case is the first motion picture decision to be reversed on a decision other than *Burstyn* or *Superior Films*. It is generally believed that the court viewed the film before rendering its decision. N.Y. Times, Nov. 14, 1957, p. 40, col. 1.

²³⁵ The open question in *Burstyn* has apparently been answered, i.e., the state may censor motion picture films under a clearly drawn ("obscene") statute.

appraisal of current films.²³⁶ Although the Supreme Court has not expressly defined the relation between statutory standards and prior restraint in this area, there are indications²³⁷ that censorship may be accomplished under an adequate standard for objective measurement of the film medium.

D. DOMESTIC RELATIONS—*A Reconciliation*

In family law there were few innovations during the survey period; but this should not be surprising, since the problems of domestic relations are dealt with in highly individualized situations. The trial courts have great importance in the ultimate determination of domestic relations law, first, because there are few appeals, and, secondly, because the trial judge is accorded a wide discretion which is usually respected by the appellate courts.

1) SEPARATION AND DIVORCE—*A Value Denied*

In several recent divorce and separation actions the litigants have unsuccessfully attempted to support their contentions or excuse their conduct on religious grounds. Mere refusal of intercourse on religious grounds was not a sufficient ground for divorce in Pennsylvania.²³⁸ And in New York a wife who had refused to participate in the marriage act for religious reasons was barred from obtaining a separation, since her refusal was without valid legal excuse²³⁹ under an application of the rule in *Mirzio v. Mirzio*²⁴⁰ that such refusal is a violation of the marriage agreement. In another case, a husband attempted to justify the abandonment of his wife because of her change of religious faith. He claimed that where two Jews are married before a rabbi there arises an agreement that the couple will lead their lives in accord with the Jewish faith, and that if a spouse abandons that faith the agreement is broken and the other spouse is entitled to abandon the breacher. The court could find no evidence that such was the Jewish precept, but commented that such a rule could not provide an excuse for abandonment under the secular law and that to make religious differences standing alone a ground for separation would violate the freedom of religion.²⁴¹

The question whether religious beliefs excuse certain conduct is irrelevant where a married person attempts to convert his spouse to his faith through a course of conduct which in itself constitutes cruelty and

²³⁶ Although some of its listings are questionable, for the first year of the survey period the National Legion of Decency found fewer objectionable movies than in the previous twelve months (10%), but at the same time expressed serious concern over the "intensity of objectionability" in the films it reviewed. N.Y. Times, Nov. 20, 1956, p. 46, col. 2. For an excellent account of the philosophical confusion in this area see Clancy, *The Catholic as a Censor*, 68 COMMONWEAL 142 (1958).

²³⁷ *Roth v. United States*, 354 U.S. 476 (1957); *Adams Newark Theatre Co. v. Newark*, 354 U.S. 931 (1957); *Times Film Corp. v. Chicago*, 26 U.S.L. WEEK 3147 (U.S. Nov. 12, 1957) (No. 372).

²³⁸ *E. F. v. G. H.*, 4 Cumberland L. J. 42 (Pa. 1956).

²³⁹ *Diemer v. Diemer*, 149 N.Y.S.2d 146 (Sup. Ct. Queens Co. 1956).

²⁴⁰ 242 N.Y. 74, 150 N.E. 605 (1926).

²⁴¹ *Gluckstern v. Gluckstern*, 148 N.Y.S.2d 391 (Sup. Ct. N.Y. Co. 1955), modified on appeal, 2 App. Div.2d 774, 153 N.Y.S.2d 184 (1st Dep't 1956). See also *Booke v. Booke*, 207 Misc. 999, 141 N.Y.S.2d 580 (Sup. Ct. 1955).

grounds for divorce.²⁴² In speaking of the right to freedom in choice of religion, a court recently took cognizance of violations of that right, including conduct between spouses which amounted to extreme cruelty.²⁴³ No theory of religious freedom will excuse cruelty motivated by religious zeal,²⁴⁴ and acts themselves rather than the irreligious cause, are determinative.²⁴⁵

The clash between the legal obligation and religious duty is not often won by the latter in the courts.²⁴⁶ Relief from the rule that a religious excuse is no excuse may probably be had only from the legislature. On the question of child placement, many legislatures have provided that a certain weight must be given to religious affiliation in the placing of children with adoptive parents.²⁴⁷ A statute which recognizes religious grounds in general might be difficult to administer since it is not always clear what a religion requires of its adherents, or indeed what is a religion.²⁴⁸ Any statutory relief would probably raise constitutional questions, although constitutional objections not yet proved fatal to the adoption statutes.²⁴⁹ Despite the difficulties, the real need of the persons who are affected by this problem indicates that the effort should be made to find a solution.

2) AGREEMENTS—*Continued Resistance*

One of the often recurring problems where domestic relations law and religion meet is that of the enforcement of agreements made by the parties to a marriage or a separation.²⁵⁰

A recent New York case involved an action for annulment based on fraud in making an agreement to participate in a religious ceremony after the civil ceremony. The marriage was never consummated, and the hus-

²⁴² On conflicts arising from religious differences, see Note, 3 ST. LOUIS U.L.J. 253 (1955).

²⁴³ *Golden v. Arons*, 36 N.J. Super. 371, 115 A.2d 639 (1955). See *Gluckstern v. Gluckstern*, *supra* note 241.

²⁴⁴ *Stanton v. Stanton*, 100 S.E.2d 289 (Ga. 1957).

²⁴⁵ *Gluckstern v. Gluckstern*, *supra* note 4.

²⁴⁶ Illustrative is this statement by an Ohio court:

The Catholic father would be well within his rights were he to place preservation of his faith above preservation of his family. Unfortunately for him, while the former may take precedence over the latter in an ecclesiastical tribunal, no faith or religious dogma may ever take precedence over a state constitution in a state court. *Hackett v. Hackett*, 146 N.E.2d 477 (C.P. Ohio 1957).

In Utah, a family which was the result of a polygamous marriage was deprived of its children on the ground that the home life was immoral. The defense offered without success was that the law of God commanded polygamy, and that the law of man was simply inferior. *In re State in Interest of Black*, 3 Utah 2d 315, 283 P.2d 887 (1955). See 28 ROCKY MT. L. REV. 138 (1955).

²⁴⁷ For a statute which is construed to require the court to award the child to a person of the same religion whenever practicable, see MASS. ANN. LAWS c. 210, § 5 B (1955), interpreted in *Petition of Gally*, 329 Mass. 143, 107 N.E.2d 21 (1952); for one which is construed to leave the matter more freely in the discretion of the court, see ILL. REV. STAT. c. 4 § 4-2 (1955), interpreted in *Cooper v. Hinrichs*, 10 Ill. 2d 269, 140 N.E.2d 678 (1955).

²⁴⁸ See *supra*, pp. 429-30.

²⁴⁹ See *infra*, pp. 460-61.

²⁵⁰ For a general discussion of the problem see Comment, 34 U. DET. L. J. 632 (1957).

band refused to go through with the church marriage. In denying the annulment the court reiterated what it considered to be the fixed policy of the state, that agreements such as the parties entered into cannot affect their legal obligations arising from the civil ceremony. The status of marriage is too important a matter of public concern to allow the parties to tamper with it.²⁵¹ Neither can a private agreement not to seek a divorce confer jurisdiction on a court of equity to prevent either party from obtaining a decree. Only the statutes confer jurisdiction over divorce.²⁵²

Courts have frequently considered the constitutional problem involved in the enforcement of these agreements.²⁵³ A Connecticut court found that judicial support of an agreement to rear a child in a certain faith would violate the state constitution which provides²⁵⁴ that no person shall be compelled to be classed with or join or be associated with any religious body.²⁵⁵ But three years previously the highest court of that state upheld a decree placing a child in a Catholic convent school as not violative of that same constitution and as a wise exercise of discretion under the circumstances. The appellate court stated that the decree did no more than provide that the child be trained in the faith into which she was born and baptized, and did not prevent her from making her own choice of religion when she reached the age of discretion.²⁵⁶ An agreement to send a child to a Catholic school was void in Ohio as violative of the state constitution²⁵⁷ which provides that no one shall be required to support a religion.²⁵⁸ The court reasoned that sending a child to a denominational school amounted to support of that denomination in the meaning of the constitution and the enforcement of the agreement would also violate the federal constitution as interpreted in the *McColum* case.²⁵⁹

On the other hand a recent New York case displayed a most sympathetic attitude toward these agreements. In speaking of the right to the promised performance the court stated that it "cannot be treated lightly and although it is but a spiritual right, it is nonetheless as real and as valuable as any property right."²⁶⁰ In apparent support of this attitude the court suggested that the custody agreement which it had ordered to be made contain "an unqualified stipulation" in accordance with the antenuptial agreement that the child be enrolled in a parochial school; or if enrolled in a public school, that the mother execute the permission necessary for released time instruction, and that she have the duty of educating and rearing the child in the Roman Catholic faith. The court's suggestion may

²⁵¹ *Lorifice v. Lorifice*, 148 N.Y.S.2d 578 (Sup. Ct. N.Y. Co. 1956). See also Vail, *Annulment in Church and State*, 5 DE PAUL L. REV. 216 (1956).

²⁵² *Dumais v. Dumais*, 152 Me. 24, 122 A.2d 322 (1956). See 37 B.U.L. REV. 146 (1957).

²⁵³ For a general discussion of the problem see Note, 64 YALE L.J. 772 (1955).

²⁵⁴ CONN. CONST. art. 7, § 1 (1818).

²⁵⁵ *McLaughlin v. McLaughlin*, 20 Conn. Supp. 278, 132 A.2d 420 (1957).

²⁵⁶ *Sullivan v. Sullivan*, 141 Conn. 235, 104 A.2d 898 (1954).

²⁵⁷ OHIO CONST. art. 1, § 7 (1851).

²⁵⁸ *Hackett v. Hackett*, 146 N.E.2d 477 (C.P. Ohio 1957).

²⁵⁹ *McColum v. Board of Educ.*, 333 U.S. 203 (1948).

²⁶⁰ *Ross v. Ross*, 4 Misc. 2d 399, 149 N.Y.S.2d 585, 589 (Sup. Ct. 1956).

have gone far in enforcing the original agreement, since in event of a failure to agree on the terms of custody, the child was to go to the Catholic father.

Where the training of children was not involved, one court gave direct support to an agreement with religious elements. A wife sought enforcement of the separation agreement in which her husband had promised to go before a rabbi and obtain a divorce under the Jewish law.²⁶¹ A constitutional objection was made to judicial enforcement of the agreement. The court held that being forced to go before a religious official and to give evidence was not equivalent to being forced to practice a religion. The husband would be merely required to do what he had promised.²⁶²

Two thoughts drawn from these decisions are worthy of consideration as leading toward fair and just results. The first is simply that these promises, regardless of constitutional ban, are solemn obligations of deep importance to the obligee.²⁶³ They are often material to his happiness and as such present a real claim to a society which has recognized the enforcement of obligations as conducive of the common good. The second, a corollary of the first, is that each situation is worthy of an independent examination such as was made in the last case, to determine if the conduct required by the premise is really of the kind immunized by the constitution from judicial enforcement. No quarrel is made here with all refusals to enforce an agreement. Even where the techniques suggested are followed the judge may still decide against enforcement. The purpose of these suggestion is to promote through an increased awareness of the importance of these agreements the reduction of any needless denials of relief on constitutional grounds.

3) THE CHILD'S PREFERENCE—*A Retrogression*

The courts of New York and New Jersey have recently considered the importance to be accorded to wishes of children on religious matters when settling their custody. Consultation is a step in the custody process, an aid in determining the best interest of the child. Where the expressions of children are given great weight it can present a major barrier to the enforcement of ante-nuptial agreements which seek to regulate the rearing of children.

The most important recent case, *Martin v. Martin*,²⁶⁴ arose under a custody order following a separation which provided that the child of the marriage be reared a Catholic in accord with a premarital agreement. Petition was made by the mother who had custody for a modification permitting the child to be instructed in another faith. A referee found

²⁶¹ On the problems caused by the divorce requirements of the Jewish faith and efforts to meet them through agreements, see Comment, 23 U. CHI. L. REV. 122 (1955).

²⁶² *Koeppel v. Koeppel*, 138 N.Y.S.2d 366 (Sup. Ct. Queens Co. 1954); dismissed after referral by the trial court to a referee for failure to show that the contract had become operative, 3 App. Div. 2d 853, 161 N.Y.S.2d 694 (2d Dep't 1957).

²⁶³ See *supra*, p. 000.

²⁶⁴ *Martin v. Martin*, 283 App. Div. 721, 127 N.Y.S.2d 851 (2d Dep't), *aff'd per curiam*, 308 N.Y. 136, 123 N.E.2d 812 (1954). See also Comment, 34 U. DET. L.J. 632 (1957).

that the change would be in the best interest of the child, but also noted that the child, then twelve-years old, on examination had shown a mind of his own and to continue the present arrangement would deprive him of his independent judgment in such matters. The modification was approved by the Court of Appeals of New York per curiam in a short opinion which relied on the referee's conclusion that the change was best for the child, who was deemed old enough to testify intelligently. In the appellate division two justices had dissented from the memorandum decision, insisting that during the formative years of a child's life he must be guided in the religious and secular aspects of his education by his parents, which period has not ended at the age of twelve. In the higher court Judges Desmond and Conway dissented on the grounds that it violated common sense and the laws of New York to make the choice of a twelve-year old binding on the court, as they thought the majority had. In addition such a rule was inconsistent with the *parens patriae* policy of the state. The dissenters held that the agreement between the parties was enforceable until it was shown to be harmful to the child.²⁶⁵

The principle that the minority had condemned was taken to be the ruling and applied in a later case. A mother who had custody of her fifteen-year old daughter was instructing her in a Christian religion in violation of her agreement to rear the child in the Jewish faith. The court stated that the instruction might well have been deferred until the child had arrived at an age of understanding, but the judge was bound by the *Martin* case to recognize the right of a child to change her religion.²⁶⁶

The cursory treatment which the *Martin* case received from the majority in both appellate courts gives little basis for the establishment of a rule. What a full treatment of the problem by the Court of Appeals of New York would reveal cannot be predicted. But if the dissenters were correct, a rule has been established which seems to ignore the maturing process to which all men are subject and the need during that transition for guidance. New Jersey permits its trial judges to examine the desires of children, but leaves the weight to be given to such wishes to the discretion of the trial court. A recent case ruled that the religious preferences of three children, aged seven, five, and three could not be determinative of which faith they were to be reared in, a result in which New York would probably concur.²⁶⁷ In an earlier New Jersey case a higher court rejected the proposition that a child of twelve has sufficient judgment to be permitted to conclusively determine his future, although it was quite proper to consult him as to his wishes.²⁶⁸ The practice of consultation in this form is realistic and obviously helpful to the trial court in making its decision.

4) CUSTODY AND ADOPTION OF CHILDREN—*Imposition of a Standard*

The approach to the problems which religion raises in the determination

²⁶⁵ For a discussion opposing the dissent, see 43 CAL. L. REV. 132 (1955).

²⁶⁶ *Booke v. Booke*, 207 Misc. 999, 141 N.Y.S.2d 580 (Sup. Ct. 1955). The wishes of the children as to custody were consulted in *Gluckstern v. Gluckstern*, 148 N.Y.S.2d 391 (Sup. Ct. N.Y. Co. 1955).

²⁶⁷ *Wojnarowicz v. Wojnarowicz*, 137 A.2d 618 (N.J. Super. 1958).

²⁶⁸ *Callen v. Gill*, 7 N.J. 312, 81 A.2d 495 (1951).

of custody and adoption is generally identical in the states examined.²⁶⁹ The trial judge is given discretion to determine what arrangement will be in the best interest of the child. The power and independence of the judge is indicated by a recent statement of the Supreme Court of Georgia when considering an ante-nuptial agreement:

[P]arents cannot by contract relating to the religious training of their children restrict the discretion of the court in awarding custody, and the court may disregard entirely any such contract.²⁷⁰

A party very interested in the manner in which this discretion is exercised is the devout father or mother, concerned with the spiritual well-being of his child. A recent Ohio decision speaking of such a person had this to say:

Because of his unusual closeness to his church, the words of "The Pilot" (Mar. 6, 1954), official organ of the Boston Archdiocese seems appropriate: ". . . for Catholics their faith is their most treasured possession." And: ". . . small wonder they wish to see it passed on to the coming generation as the road to their salvation as well."²⁷¹

These are the forces present. They will be seen sometimes to clash, more often adjust to one another.

Kansas recently considered the application of the best interest rule to a most difficult situation with a result indicating there may be real limitations to the effectiveness of the rule.²⁷² The case was on appeal from a judgment removing children from the custody of their mother, who claimed that the court's action was based on the fact that she was a Jehovah's Witness and that the finding of her emotional instability made by the trial court was a subterfuge. The trial court had examined the children extensively on their religious beliefs and the children had given answers in accord with the precepts of their mother's faith.²⁷³ But it was declared in the opinion below that membership in a religion no matter how obnoxious it might be to the judge, or the possibility that the child will be instructed in the religion cannot qualify or disqualify a believer from custody of the child. Since poor mental condition of the mother was having an adverse effect on the children, they were taken from her. This sensible ruling was upset as an abuse of discretion under the laws of Kansas. In that state, courts have no authority over the religious training of children because of the paramount right of parents to educate their children as they see fit. That right may not be violated by a consideration of religious matters in determining custody. Therefore the trial court erred when it permitted religion to permeate the whole proceeding, and if it had good reasons for changing the custody they could not be separated from religious considerations. On the effect of church-state separation the court cited the position of a Texas Court in considering a case somewhat similar to the present one:

²⁶⁹ In general see Huard, *The Law of Adoption, Ancient and Modern*, 9 VAND. L. REV. 743 (1956); Pfeffer, *Religion in the Upbringing of Children*, 35 B.U.L. REV. 333 (1955).

²⁷⁰ *Stanton v. Stanton*, 100 S.E.2d 289, 293 (Ga. 1957).

²⁷¹ *Hackett v. Hackett*, 146 N.E.2d 477, 482, (C.P. Ohio 1957).

²⁷² *Jackson v. Jackson*, 181 Kan. 1, 309 P.2d 705 (1957).

²⁷³ The questions had to do with the nature of war and their willingness to serve in the armed services. The oldest answered that he would determine for himself when called upon, the younger two advanced stronger pacifistic beliefs. *Jackson v. Jackson*, *supra* note 272 at 709-10.

[T]he secular power is so shackled and restrained by our fundamental law that it is beyond the power of a court, in awarding the custody of the child, to prefer, as tending to promote the interest of the child or surround it with a more normal atmosphere, the religious views or teachings of either parent.²⁷⁴

The remarks of the dissent seem well taken in declaring that the court has a right and a duty to consider religious matters in instances where parent's extreme religious views result in emotional instability in the parent.

The effect of the decision is a limitation of the trial court's ability to search out the best interest of the child through a broad investigation of all relevant materials; religion is not to be treated as any other pertinent factor. An examination of the following cases will often show religion being placed in a minor position, but never completely eliminated from the basis for decision. What is said and done suggests that reality requires more attention be paid to the question of religion in this area, and that the Constitution does not prohibit such attention.

The problem of polygamous marriage in Utah provided the background in another extreme situation.²⁷⁵ The case involved the children of a polygamous marriage whose parents had instructed them that polygamy was the proper way of life and refused to do otherwise. The children were removed from the custody of the parents, on the grounds that the teaching was immoral, and that they were therefore "neglected children" under a statute which defined such children as those whose parents had failed to give them proper guidance necessary for their moral well-being.²⁷⁶ It is difficult to criticise the decision due to the local aspects of the problem. Perhaps, as a concurring opinion suggests, the question could have been better resolved without labelling the practice of polygamy as immoral. The same effect could have been reached by classifying polygamy as a felony. The court has not found these people to be other than devout, honest, and Godfearing, even though engaging in what the majority labels immorality. To make martyrs of them would not only be "casting the first stone" but making more difficult the ultimate solution of the problem.²⁷⁷

Two rather unusual cases indicated the willingness of some courts to consider questions of religion in determining the best interest of a child. The first involved a writ of habeas corpus directed to a mother who had custody of the petitioner's children. The mother was living in adultery with another man, but the children were given good care, although they were not attending church. The petitioner was found to be a devout Catholic and good citizen concerned with their spiritual welfare. In granting the writ, the court noted that if the mother were otherwise fit, and if she had insisted on rearing the children in another faith there would be no basis for removing them from her care. But the children in the

²⁷⁴ *Salvagio v. Barnett*, 248 S.W.2d 244, (Tex. Civ. App. 1952). But a different result is reached. Here there was an actual finding that because of the religious beliefs of the party having custody, the best interest of the child was with someone who would give her more normal surroundings. The action of the trial court was not reversed because there was an independent ground on which to base it.

²⁷⁵ *In re State in Interest of Black*, 3 Utah 2d 315, 283 P.2d 887 (1955).

²⁷⁶ UTAH CODE ANN. § 55-10-30, 32 (1953).

²⁷⁷ *In re State in Interest of Black*, *supra* note 275 at 914. It appears that the judge himself traces his origin to a polygamous home.

case were not receiving religious training in any denomination, a factor which should be considered among other matters in awarding custody.²⁷⁸ A similar attitude was displayed in a California decision which declared that there were no religious qualifications for the office of guardian, and that in making a selection the best interest of the child is the primary determinant. But a court should consider the religious affiliations of the guardian and the wishes of the parents in placing a child.²⁷⁹

A recent Connecticut case illustrates the willingness which has been noted in trial judges to decide cases expressly in reference to religious matters. It involved a petition by an estranged husband for the custody of his children. The findings included the fact that the children were receiving no religious instruction in their present home, and that they would in the home where they were sought to be placed. The court concluded that it was in the best interest of the children to place them with people who would provide them with several advantages they were now lacking, including, "the opportunity to continue their religious education in a Catholic home."²⁸⁰ On appeal the Supreme Court in reviewing the decision simply held it to be clear that the trial judge had been guided by the best interest rule and affirmed his order.

The last three cases indicate that where the religious element is evenly balanced between two parties it will not be given extensive consideration. But a home that will provide a religious atmosphere will be preferred to one which lacks the same spiritual environment.

Several statutes have been enacted by the states which, to varying degrees, have attempted to limit the discretion of the trial court in the placement of children for adoption. The Massachusetts statute²⁸¹ is unusual because it requires the court to place the child with foster parents of the same faith when such placement is practicable.²⁸² Other states recognize a broader discretion in following the statutory provision that the religion of the child and the foster parent are to be considered in placement.²⁸³ The well-known case of *Ellis v. McCoy*²⁸⁴ concerned the application of the Massachusetts law to a situation in which a mother whose child had been adopted petitioned the court for leave to withdraw her permission. The reason given was that the child had been placed with persons who were not of her faith, and the trial court granted the withdrawal. On appeal the order was upheld as an exercise of discretion in which the court is bound by the statute to act in favor of identity of religion.

New York, as does Massachusetts, requires by statute²⁸⁵ that the trial judge must favor persons of the same religious faith as the parent. The question of constitutionality of these laws has been raised in a Massachusetts case,²⁸⁶ but the United States Supreme Court refused certiorari,²⁸⁷

²⁷⁸ *Schreifels v. Schreifels*, 47 Wash. 2d 409, 287 P.2d 1001 (1955).

²⁷⁹ *In re Minnicar's Estate*, 141 Cal. App. 2d 603, 297 P.2d 105 (1956).

²⁸⁰ *Murphy v. Murphy*, 143 Conn. 600, 124 A.2d 891, 893 (1956).

²⁸¹ MASS. ANN. LAWS c. 210, § 5 B (1955).

²⁸² *Petition of Gally*, 329 Mass. 143, 107 N.E.2d 21 (1952).

²⁸³ *Cooper v. Hinrichs*, 10 Ill. 2d 269, 140 N.E.2d 293 (1957) (in which the court reviews decisions from many states.)

²⁸⁴ 332 Mass. 647, 124 N.E.2d 266 (1955).

²⁸⁵ N.Y. DOM. REL. LAW § 113.

²⁸⁶ *Petitions of Goldman*, 331 Mass. 254, 121 N.E.2d 843 (1954).

²⁸⁷ *Goldman v. Fogarty*, 348 U.S. 942 (1955). See Note, 64 YALE L.J. 772 (1955).

and left standing the decision in favor of validity. While noting these constitutional developments, a New York court has applied the statute in denying an application of a Catholic couple for the adoption of a Protestant child.²⁸⁸

Though the statutes of other states have not been interpreted as placing an absolute mandate on the court, a Maryland statute²⁸⁹ did seem to have a definite effect on the outcome in a recent adoption case.²⁹⁰ A heavy factor in the final determination was the advanced age of the prospective foster parents, but the court in denying the adoption was compelled to recognize and give effect to the fact that the couple was of a different faith than the mother and that it was possible to place the child with Catholics.

A Georgia court considering a custody problem in a divorce case, held that under the Georgia statute,²⁹¹ similar to the one in Maryland, it could properly consider the religious atmosphere into which the children were being placed. But the court insisted that the statute did not indicate that the legislature had intended to restrict the discretion of the trial court in the placement of children.²⁹²

The Illinois courts have given extensive treatment to the meaning and effect of these statutes in the case of *Cooper v. Hinrichs*.²⁹³ The appellate court approved a decision by the trial court denying the application for adoption presented by a couple of different faith than the child, holding that the Illinois statute²⁹⁴ had the same effect as that of Massachusetts. The Supreme Court of Illinois reversed, holding that the Illinois law was to be classified in the group of statutes which are merely advisory. One of the reasons for this classification came from the wording of the statute where it said that the court "shall" rather than "must" act in favor of identity of religion as the Massachusetts act had required. The religious factor, however, as a result of the statute is now more significant, for the trial court is directed to give preference to those of the same religion wherever they are otherwise fit to be adoptive parents. But the trial court has the discretion to determine what will best serve the child, and in that determination the identity of religion is "a significant and desirable but not an exclusive factor to be considered by the court in the exercise of this discretion."²⁹⁵ Heed will be paid to religion, but not at the cost of "best interest." The instant case was remanded for further consideration of the petition, to determine whether the adoption would serve the best interests of the child in light of the differences in religion.

The decision's effect, contrary to its face value, is to eliminate the religious preference provision from the statute, and leave the law exactly where it was before the act. Any placement of a child with foster parents

²⁸⁸ Adoption of Anonymous, 207 Misc. 240, 137 N.Y.S.2d 720 (County Ct. 1955).

²⁸⁹ MD. ANN. CODE art. 16, § 67 (1957).

²⁹⁰ Frantum v. Dep't of Pub. Welfare, 214 Md. 100, 133 A.2d 408 (1957). See 17 MD. L. REV. 353 (1957).

²⁹¹ GA. CODE ANN. § 24-2423 (Supp. 1955).

²⁹² Stanton v. Stanton, 100 S.E.2d 289 (Ga. 1957).

²⁹³ 8 Ill. App. 2d 144, 130 N.E.2d 678 (1955); *rev'd*, 10 Ill. 2d 269, 140 N.E.2d 293 (1957). See Comment, 1957 ILL. L.F. 114.

²⁹⁴ ILL. REV. STAT. c. 4, § 4-2 (1955).

²⁹⁵ Cooper v. Hinrichs, 10 Ill. 2d 269, 140 N.E.2d 293, 297 (1957).

of a different faith may be justified simply as being in the best interest of the child. The legislature, as the court admits, intended a different result.²⁹⁶

The importance of an individual's religious life in domestic relations cases has been examined. The cases on adoption and custody have revealed that religious values are treated by judges in the placement of children in the same manner that any other factor is handled, that is, the weight given them is in direct proportion to the importance which the judge, in his experience, thinks that they have to a child. A justice who highly assays the value of a "Catholic home and instruction" can honestly define the best interest of a Catholic child to include such an environment and education. But one who feels that any Christian home will provide that environment which he feels is necessary for a child's well-being, can in all honesty place that same Catholic child in a non-Catholic home where, under his system of values, the child's best interest will be served. This is the nature of the discretion which, within the limitation that the law cannot favor one religion over another, is necessarily given to the trial judge.

If a particular group feels that within the intellectual makeup of the men from which judges in their community are drawn, there will not necessarily be found an appreciation of the value of religious training similar to that which they possess, they should have recourse to the legislature for the passage of a statute similar to that of Massachusetts. Despite the rather favorable attitude of the Maryland court, statutes such as that of Illinois in effect only reiterate the discretion of the court. The Supreme Court of Georgia has said this plainly, Illinois indirectly but just as effectively. In a given situation the statutory expression of the policy may be persuasive to a judge, but in all honesty he may reach the same conclusion as he would without the statute. Yet an Illinois-type statute is not without its place. It may be the best that is attainable. Furthermore, it might be extended to include the awarding of custody following divorce. There is not in that situation a number of fit persons from which a court may choose as parents, but the legislative suggestion might prove useful in having children placed with the parent of the faith in which the child has been reared whenever otherwise proper.

One point should be reemphasized in conclusion. If it is necessary to limit the discretion of the trial judge it is not because he has not honestly sought out the best interest of the child, but because his honest effort does not always produce a result which a certain group has reason to believe is correct. In a democratic society it is fitting that there be an opportunity to limit the judiciary in a matter such as this where men may differ on the solution of a practical problem. But any such action ought to be undertaken only after a careful consideration of the work presently being done by the judges, and with a conviction that the policy to be enforced is of higher value than courts which can act in accord with their own wisdom.

William D. Bailey, Jr.

Richard C. Clark

Patrick F. McCartan, Jr.

²⁹⁶ The dissent stated that the court cannot "depreciate the high priority that the legislature clearly intended [religious belief] to have." 140 N.E.2d at 298. Where there were qualified families of the same faith available, the trial court was clearly within its discretion in doing what it did. *Cooper v. Henrichs*, *supra* note 295.